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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1183

Filed: 18 June 2019

Cherokee County, No. 17 CRS 426

STATE OF NORTH CAROLINA

v.

JAN DAVID BARNETT

Appeal by defendant from judgment entered 19 April 2018 by Judge Bradley B. Letts in Cherokee County Superior Court. Heard in the Court of Appeals 9 April 2019.

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

James R. Parish for defendant-appellant.

TYSON, Judge.

Jan David Barnett ("Defendant"), age 57, appeals from the trial court's judgment entered after a jury found him guilty of two counts of felony cruelty to animals and reckless driving to endanger. We find no plain error in part, reverse and remand for a new trial on one charge of felony cruelty to animals, and dismiss in part.

I. Factual Background

Cherokee County Sheriff's Sergeant Mitchell Morgan responded to a dispatch call from a complaint that free-roaming dogs were attacking livestock at Defendant's address on 15 February 2017. Sergeant Morgan arrived on site within ten minutes of the call. He observed Defendant's pickup truck parked in the roadway facing oncoming traffic. Two Husky breed dogs were sitting in the road about 60 yards in front of Defendant's vehicle. One of the dogs was black and white. The other dog was red and white. Sergeant Morgan testified both of the dogs appeared healthy and non-aggressive, but neither dog wore any collars or any identification by any owner.

Sergeant Morgan told Defendant to move his truck off the roadway. Defendant did so and told the officer the dogs had killed his girlfriend's pet goat and some of his chickens. Defendant asked Sergeant Morgan if he would shoot the dogs. Sergeant Morgan explained he was only there to investigate the matter and that the dogs were not being aggressive at that time.

Defendant asked Sergeant Morgan to follow him to his property to observe the injuries to and carcasses of his livestock. As Defendant began to drive toward his residence, he "revved" his engine several times, blue smoke came out of his tailpipe, he spun his tires, crossed the centerline, and ran over both dogs. Sergeant Morgan placed Defendant under arrest. Sergeant Morgan testified Defendant stated that he did not care about getting arrested, because he "took care of the problem."

The black and white Husky died moments after the incident. The red and white Husky limped into a nearby wooded area. The dogs' owner, Gerson Torres, testified the dogs had "escaped" through the front door of his home two days prior to the incident. The red and white Husky returned to Torres's home several days later. The dog limped and refused to leave his kennel for two weeks, but had fully recovered from all injuries by the time of trial.

On 27 March 2017, Defendant was indicted for two counts of felony cruelty to animals and one count of reckless driving to endanger. Defendant was tried by a jury and convicted of all offenses. Defendant was sentenced to an active term of 8 to 19 months as a prior record level II offender. Defendant appeals.

II. Jurisdiction

Jurisdiction lies in this Court from final judgment of the superior court entered upon the jury's verdicts pursuant N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2017).

III. Issues

Defendant argues the trial court: (1) erred by denying his motion to dismiss the animal cruelty charge relating to the red and white dog; (2) erred by failing to instruct the jury on the lesser-included offense of misdemeanor cruelty to animals; and, (3) plainly erred by failing to instruct the jury on the defense of accident.

Defendant further argues he received ineffective assistance of counsel upon his trial counsel's failure to file advance notice of the defense of accident and to more fully request and object to the trial court's failure to give an instruction on accident.

IV. Motion to Dismiss

Defendant contends that the trial court erred by denying his motion to dismiss the second felony animal cruelty charge for insufficient evidence that Defendant had "maimed" the red and white Husky, as alleged in the indictment. He argues the State failed to offer any evidence of "lasting injury or disfigurement" to that dog, to elevate the crime from a misdemeanor to a felony.

At trial, Defendant moved to dismiss the animal cruelty charges and argued the State did not prove malice. Defendant did not assert the lack of evidence of the red and white dog having been maimed as the basis to support his motion to dismiss before the trial court.

In renewing this motion at the conclusion of Defendant's evidence, defense counsel stated:

> [DEFENSE COUNSEL]: I would agree (sic) with my motion from earlier that even after all the evidence we've had, I don't think the State has met its burden as far as the maliciousness and the wantonness would be required in the cruelty to animals charge, both charges against my client. It seems that we do have a significant question here about that. So I would move to motion to dismiss.

Defense counsel did not argue a lack of evidence showing the red and white dog had been maimed, only a lack of evidence of malice, the requisite mental state to support the felony animal cruelty charges. This Court has consistently held that "when a defendant presents one argument in support of her motion to dismiss at trial, she may not assert an entirely different ground as the basis of the motion to dismiss before this Court." *State v. Chapman*, 244 N.C. App. 699, 714, 781 S.E.2d 320, 330 (2016). When a party attempts to advance a theory he failed to present at the trial court, the assignment of error is considered waived. *State v. Shelly*, 181 N.C. App. 196, 207, 638 S.E.2d 516, 524 (2007).

In *Shelly*, the defendant moved to dismiss his charges of first-degree murder and conspiracy and argued the victim's death was accidental, "and therefore, that the charge of first-degree murder, which by statute requires a 'willful, deliberate, and premeditated killing, have been dismissed.'" *Id.* at 206, 638 S.E.2d at 524 (quoting N.C. Gen. Stat. § 14-17 (2003)). On appeal, the defendant argued the rule of *corpus delicti* required there be corroborative evidence beyond his confession to prove the crime of first-degree murder. This Court recognized our "Supreme Court has long held that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts." *Id.* at 206-7, 638 S.E.2d at 524 (citations omitted). This Court held the defendant had "impermissibly changed theories between the trial

court and appellate Court" and had waived appellate review of the unpreserved argument. *Id.; see Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) ("An examination of the record discloses that the cause was not tried upon that theory, and the law does not permit parties to swap horses between courts in order to get a better mount in the [appellate] Court.").

In *Chapman*, the defendant had moved to dismiss her charge of robbery with a dangerous weapon on the basis the State had failed to prove that her use of a BB gun in the commission of the robbery rose to the level of being a dangerous weapon. *Chapman*, 244 N.C. App. at 713, 781 S.E.2d at 330. On appeal, the defendant argued the trial court erred in denying her motion to dismiss on the different basis of "the State failed to prove that 'she knowingly committed the crime as an actor in concert or as an aider or abettor.'" *Id.* Following our precedent in *Shelly*, this Court held the defendant "failed to properly preserve the specific argument she now seeks to make on appeal regarding the basis upon which her motion to dismiss should have been granted" and declined to reach the merits of her argument. *Id.* at 714.

In *State v. Euceda-Valle*, this Court also refused to consider the defendant's argument that the trial court had erred in denying his motion to dismiss a charge of intentionally maintaining a vehicle for keeping a controlled substance. *State v. Euceda-Valle*, 182 N.C. App. 268, 271-72, 641 S.E.2d 858, 861-62 (2007). The defendant had moved to dismiss at trial on the basis that he lacked an " 'ownership

interest [in the vehicle] short of possession,' and because he had no actual knowledge that there was a controlled substance in the vehicle." *Id.* at 271, 641 S.E.2d at 862. On appeal, the defendant argued the entirely different basis of "the State failed to prove that he possessed the [vehicle] with the cocaine in the trunk for a substantial period of time." *Id.* at 271-72, 641 S.E.2d at 862. This Court held, "Accordingly, as defendant presents a different theory to support his motion to dismiss than that he presented at trial, this assignment of error is waived." *Id.* at 272, 641 S.E.2d at 862.

Defendant failed to properly preserve this specific argument that he now seeks to assert on appeal to challenge the trial court's denial of his motion to dismiss. He made no argument to separate the death of the black and white dog in count 1 and the lack of "maiming" to the red and white dog in count 2 of the indictment.

We do not reach the merits of Defendant's argument regarding the trial court's denial of his motion to dismiss based upon the severity of the injuries sustained by the red and white dog to support the felony conviction where the argument has not been properly preserved. *See Chapman*, 244 N.C. App. at 714, 781 S.E.2d at 330; *Shelly*, 181 N.C. App. at 207, 638 S.E.2d at 524; *Euceda-Valle*, 182 N.C. App. at 271-72, 641 S.E.2d at 861-62. Defendant's argument is dismissed.

V. Jury Instruction for Misdemeanor Animal Cruelty

Defendant argues the trial court erred by failing to instruct the jury on the lesser-included offense of misdemeanor animal cruelty in regards to the red and white

Husky because no evidence tends to show the dog was maimed, as was alleged in the indictment. We agree.

A. *Standard of Review*

"We review the trial court's denial of the request for an instruction on the lesser included offense *de novo*." *State v. Laurean*, 220 N.C. App. 342, 345, 724 S.E.2d 657, 660 (2012).

The trial court denied Defendant's request for a lesser-included misdemeanor instruction and stated "the State has put forth sufficient evidence to prove their case of malicious conduct." To the extent the trial court denied Defendant's request on this basis, the trial court incorrectly applied the standard for ruling upon a motion to dismiss for insufficient evidence as its basis to deny Defendant's request for an instruction on the lesser-included offense of misdemeanor cruelty to animals. *Compare State v. Brackett*, 306 N.C. 138, 142, 291 S.E.2d 660, 663 (1982) ("The evidence is sufficient to withstand a motion to dismiss if, when viewed in the light most favorable to the State, there is substantial evidence of all essential elements of the offense."), *with State v. Barlowe*, 337 N.C. 371, 378, 446 S.E.2d 352, 357 (1994) ("To determine whether [the] evidence is sufficient for submission of the lesser[-included] offense to the jury, we must view the evidence in the light most favorable to [the] defendant").

Based upon our *de novo* standard of review of the trial court's denial of Defendant's request for a jury instruction on the lesser-included offense of misdemeanor cruelty to animals, we now review the evidence presented at trial in the light most favorable to Defendant to determine whether a lesser-included offense jury instruction was warranted. *Barlowe*, 337 N.C. at 378, 446 S.E.2d at 357; *Laurean*, 220 N.C. App. at 345, 724 S.E.2d at 660.

B. *Maiming*

It is well-established: "[W]hen there is conflicting evidence of the essential elements of the greater crime and evidence of a lesser included offense, the trial judge *must instruct* on the lesser[-]included offense even where there is no *specific* request for such instruction." *State v. Reid*, 175 N.C. App. 613, 623, 625 S.E.2d 575, 584 (2006) (emphasis supplied) (modification in original) (quoting *State v. Rowland,* 54 N.C. App. 458, 461, 283 S.E.2d 543, 545 (1981)). Defendant's request and noted objection is preserved for appellate review, even though Defendant's lesser-included instruction request did not advance a specific argument of why the trial court should also instruct on misdemeanor cruelty to animals. *See id.*

Under our precedents, the trial court "must instruct the jury upon a lesser[-] included offense when there is evidence to support it." *State v. Brown*, 112 N.C. App. 390, 397, 436 S.E.2d 163, 168 (1993) (citing *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981)), *aff'd*, 339 N.C. 606, 453 S.E.2d 165 (1995). "To determine

whether the evidence supports the submission of a lesser-included offense, courts must consider the evidence in the light most favorable to [the] defendant." *State v. Matsoake*, 243 N.C. App. 651, 658, 777 S.E.2d 810, 815 (2015) (citation and internal quotation marks omitted) (modification in original), *review denied*, 368 N.C. 685, 781 S.E.2d 485 (2016).

"[M]isdemeanor cruelty to animals is a lesser[-]included offense of felony cruelty to animals." *State v. Gerberding*, 237 N.C. App. 502, 507, 767 S.E.2d 334, 337 (2014).

This Court explained the difference between felony cruelty to animals and misdemeanor cruelty to animals in *Gerberding*, stating:

> 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). . . . 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.

Gerberding, 237 N.C. App. at 506-07, 767 S.E.2d at 337-38 (emphasis supplied). The General Assembly did not define "maim" for purposes of felony cruelty to animals in N.C. Gen. Stat. § 14-360.

In *State v. Malpass*, a case in another factual context, the Supreme Court of North Carolina analyzed the meaning of "to maim" in an older version of N.C. Gen. Stat. § 14-29, under which the defendant was charged with the "maiming of the privy members of the prosecuting witness." 226 N.C. 403, 404, 38 S.E.2d 156, 157 (1946). The defendant argued the trial court erred by denying his motion to dismiss the charge of "maiming of the privy members" because there was no evidence the prosecuting witness was permanently injured. *Id.*

Our Supreme Court stated: "'to maim'. . . implies a *permanent* injury to a member of the body or renders a person lame or defective in bodily vigor." *Id.* (emphasis supplied). We follow our Supreme Court's definition of "maim" in *Malpass* and construe the use of "maim" in N.C. Gen. Stat. § 14-360 to require a permanent injury. *See id.* This definition of maim that "implies a *permanent* injury" is consistent with the plain language dictionary definition of maim: "To disable or disfigure, usually by depriving of the use of a limb or bodily member. 2. To make imperfect or defective; impair." *American Heritage Dictionary* 756 (2nd ed. 1982).

Here, defense counsel requested the court to instruct the jury on the lesser-included misdemeanor offense. In response to Defendant's request, the trial court indicated it had consulted the pattern jury instructions and found:

> THE COURT: . . . . the State has adduced and presented to this jury through evidence and testimony all of the elements which support a conviction of cruelty to animals under the felonious standard with the higher malicious intentional act.
> . . .
>
> [T]he request in the court's discretion to submit the lesser included offense of misdemeanor cruelty to animals shall not be allowed.
>
> [Defense counsel]: Thank you, Your Honor.
>
> THE COURT: I'll note your objection for the record.

Misdemeanor animal cruelty under N.C. Gen. Stat. § 14-360(a) does not include maiming as a possible harm to support the offense as does felony animal cruelty under N.C. Gen. Stat. § 14-360(b). N.C. Gen. Stat. § 14-360(a)-(b).

Torres, the dogs' owner, testified that the day the red and white Husky was hit by Defendant's truck, it returned home limping. Other than limping, the red and white dog was not otherwise injured. Torres did not present the dog to a veterinarian. Torres testified the dog stayed in his kennel for two weeks and fully recovered from his injuries. According to Torres, the dog was in "good condition" at the time of trial.

No evidence tended to show the red and white Husky suffered a permanent or lasting injury to support the allegation that it was maimed. *See Malpass*, 226 N.C. at

404, 38 S.E.2d at 157. Based upon the evidence that the red and white Husky was limping and of its two-week full recovery, there was evidence the dog was at least wounded or injured, but no evidence that it was maimed.

Viewed in the light most favorable to Defendant, evidence was presented from which a jury could find the red and white Husky was injured or wounded, but not maimed. This evidence entitled Defendant to an instruction under the lesser-included offense of misdemeanor cruelty to animals. *See Matsoake*, 243 N.C. App. at 658, 777 S.E.2d at 814-15; N.C. Gen. Stat. § 14-360(a). The trial court was obligated to instruct the jury on misdemeanor animal cruelty with respect to the red and white Husky, and erred by not doing so. *See Rowland*, 54 N.C. App. at 461, 283 S.E.2d at 545.

C. *Waiver*

The State contends Defendant has waived his argument because he acquiesced to the trial court ruling upon a different basis to deny his request for a jury instruction on misdemeanor animal cruelty than the basis he argues on appeal. The State argues in its brief:

> Defendant's trial counsel requested a jury instruction on misdemeanor animal cruelty absent any supporting argument. Given that defense counsel had moved to dismiss the felony charges on the basis that the State had put forward insufficient evidence of malice, the trial court appears to have assumed that defense counsel's basis for requesting the misdemeanor instruction was the lower intent standard in the misdemeanor offense.

The trial transcript indisputably shows Defendant requested a jury instruction on misdemeanor animal cruelty:

> [Defense counsel]: Well, Your Honor, I just wanted to bring a motion to the court to ask that the court would allow the jury to consider misdemeanor cruelty to animals on both counts, if that's a possibility.

The trial court denied Defendant's request and noted Defendant's objection for the record. The trial court initially denied Defendant's request for the misdemeanor animal cruelty instruction apparently because the trial court did not believe misdemeanor cruelty to animals was a lesser-included offense of felony cruelty to animals. Following the charge conference with counsel, the jury was brought back inside the courtroom for closing arguments.

Then, following closing arguments, the trial court excused the jury for the day. Before the trial court adjourned for the evening, it stated:

> THE COURT: All right. . . . For the record, in North Carolina misdemeanor cruelty of [sic] animals is a lesser included offense of felonious cruelty to animals. North Carolina versus Boozer, . . . 210 North Carolina App. 371.
>
> The difference between misdemeanor cruelty to animals and felony cruelty to animals is that in misdemeanor cruelty to animals the State must prove intent, whereas with the felonious charge the state must prove malicious conduct.
>
> The court would find that in this case, coupled with the evidence adduced at trial, that the statements attributed to the defendant that he took care of the problem and the

> fact that the dogs were laying in the road, the State has put forth sufficient evidence to prove their case of malicious conduct.
>
> Further, there's no evidence of justification in that these dogs were run over some two hours after the alleged dogs were at the residence of the Defendant, therefore not necessitating any action to protect livestock or property of the defendant, but at no time pursuant to 15A905 did the defendant by and through counsel give any notice of any defense of accident.
>
> The court will note for the record that [Defense counsel] was appointed to represent the defendant back on June 26, 2017, some ten months ago. Therefore, the defendant's request is, in the court's discretion, denied of the lesser included instruction on misdemeanor cruelty to animals.

The trial court may have denied Defendant's request for a lesser-included instruction on misdemeanor cruelty to animals because of Defendant's failure to provide the State with advance notice of defense of accident pursuant to N.C. Gen. Stat. § 15A-905. This statute provides, in relevant part:

> If the court grants any relief sought by the defendant under G.S. 15A-903, or if disclosure is voluntarily made by the State pursuant to G.S. 15A-902(a), the court must, upon motion of the State, order the defendant to:
>
> (1) Give notice to the State of the intent to offer at trial a defense of . . . accident[.] Notice of defense as described in this subdivision is inadmissible against the defendant. Notice of defense must be given within 20 working days after the date the case is set for trial pursuant to G.S. 7A-49.4[.]

N.C. Gen. Stat. § 15A-905(c)(1) (2017).

Defendant testified he did not intend to strike the dogs with his truck. After Defendant initially spoke with Sergeant Morgan, he returned to his truck to drive to his residence to show Sergeant Morgan the goat and chickens that had purportedly been killed by the dogs earlier that morning.

According to Defendant, when he returned to his truck, moved his truck from the shoulder, and began driving towards his residence, the two dogs were not lying in the road. Defendant drove around a sharp curve and testified the two dogs suddenly ran out from the side of the road. According to Defendant: "They just ran out one in front of one tire, one in front of the other. I hit my brakes, that was it." The dogs slid under his tires. Defendant testified he did not intentionally run over the dogs and the resulting injuries were an accident.

Defendant acknowledges he failed to provide advance notice of defense of accident to the State pursuant to N.C. Gen. Stat. § 15A-905 as ordered to by the trial court. When a defendant fails to provide the State notice of a defense when requested to do so, the trial court may impose any of the following sanctions on the defendant:

> (1) Order the party to permit the discovery or inspection, or
> (2) Grant a continuance or recess, or
> (3) Prohibit the party from introducing evidence not disclosed, or
> (3a) Declare a mistrial, or
> (3b) Dismiss the charge, with or without prejudice, or
> (4) Enter other appropriate orders.

N.C. Gen. Stat. § 15A-910(a) (2017).

However, "[p]rior to finding any sanctions appropriate, the court shall consider both the materiality of the subject matter and the totality of the circumstances surrounding an alleged failure to comply with this Article or an order issued pursuant to this Article." N.C. Gen. Stat. § 15A-910(b). "If the court imposes any sanction, it must make specific findings justifying the imposed sanction." N.C. Gen. Stat. § 15A-910(d).

"N.C. Gen. Stat. § 15A-910 leaves the determination of whether to impose sanctions solely within the discretion of the trial court[.]" *State v. Jones*, 151 N.C. App. 317, 325, 566 S.E.2d 112, 117 (2002). "[T]he trial court's decision will only 'be reversed for an abuse of discretion . . . upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision.'" *Id.* (quoting *State v. Gladden*, 315 N.C. 398, 412, 340 S.E.2d 673, 682, *cert. denied*, 479 U.S. 871, 93 L.E.2d 166 (1986)).

This Court has held:

> in considering the totality of the circumstances prior to imposing sanctions on a defendant, relevant factors for the trial court to consider include without limitation: (1) the defendant's explanation for the discovery violation including whether the discovery violation constituted willful misconduct on the part of the defendant or whether the defendant sought to gain a tactical advantage by committing the discovery violation, (2) the State's role, if any, in bringing about the violation, (3) the prejudice to the State resulting from the defendant's discovery violation, (4) the prejudice to the defendant resulting from the sanction, including whether the sanction could interfere with any

> fundamental rights of the defendant, and (5) the possibility of imposing a less severe sanction on the defendant.

State v. Foster, 235 N.C. App. 365, 380-81, 761 S.E.2d 208, 219 (2014).

The trial court noted "at no time pursuant to 15A905 [sic] did the defendant by and through counsel give any notice of any defense of accident." The trial court, if it intended to deny the lesser-included instruction on the basis of lack of notice of accident, made no specific findings "justifying the imposed sanction" to deny Defendant's requested instruction on misdemeanor animal cruelty in accordance with N.C. Gen. Stat. § 15A-910(d).

The lack of findings justifying the trial court's decision on Defendant's request for a jury instruction on the lesser-included offense was not the result of a reasoned decision, when the evidence is considered in the light most favorable to Defendant. *See Foster*, 235 N.C. App. at 381, 761 S.E.2d at 219 ("The procedure followed by the trial court, the failure to find prejudice, and the lack of findings are inconsistent with the court's ruling being a reasoned decision to further the purposes of the rules of discovery.").

Presuming *arguendo*, Defendant's failure to provide the State with prior notice of defense of accident could justify denying a jury instruction on the defense of accident. It does not follow that the trial court could deny Defendant's requested instruction on the lesser-included offense when the instruction is supported by the evidence viewed in the light most favorable to Defendant.

Defendant's testimony that he accidently ran over the dogs tends to show Defendant did not have the required mental state of malicious intent to establish felony cruelty to animals. *See Gerberding*, 237 N.C. App. at 507, 767 S.E.2d at 338; N.C. Gen. Stat. § 14-360. However, the evidence by the owner that the red and white Husky was not maimed provided a sufficient basis, independent of the evidence regarding accident, to require the trial court to instruct the jury on the lesser-included offense of misdemeanor cruelty to animals. *See* N.C. Gen. Stat. § 14-360(a).

Refusing Defendant's request for a jury instruction on misdemeanor cruelty to animals in light of unchallenged evidence by its owner the red and white Husky was not maimed contradicts the trial court's duty to "instruct the jury upon a lesser[-] included offense when there is evidence to support it." *Brown*, 112 N.C. App. at 397, 436 S.E.2d at 168 (citation omitted).

If the trial court purported to deny Defendant's request for an instruction on misdemeanor cruelty to animals as a sanction for Defendant's failure to provide the State with prior notice of defense of accident, without the Court making the required findings, the denial was "so arbitrary . . . it could not have been the result of a reasoned decision." *Jones*, 151 N.C. App. at 325, 566 S.E.2d at 117. The trial court's sanction to deny Defendant's request for a jury instruction on misdemeanor cruelty to animals was an error of law and constitutes an abuse of discretion. *See Gailey v. Triangle Billiards & Blues Club, Inc.*, 179 N.C. App. 848, 851, 635 S.E.2d 482, 484

(2006) ("When discretionary rulings are made under a misapprehension of the law, this may constitute an abuse of discretion.").

We reverse Defendant's conviction for felony animal cruelty to the red and white Husky and remand for a new trial. If the evidence presented at the new trial supports a jury instruction on the lesser-included offense of misdemeanor cruelty to animals, such an instruction must be provided. *See Brown*, 112 N.C. App. at 397, 436 S.E.2d at 168; N.C. Gen. Stat. § 14-360(a).

VI. Defense of Accident

Defendant next asserts the trial court plainly erred by not instructing the jury on the defense of accident. Defendant acknowledges he did not request an instruction on defense of accident and this issue is reviewed for plain error.

"In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4). To constitute plain error, the burden falls upon Defendant to show "not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted). Plain error should be "applied cautiously and only in the exceptional case" where the error "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) (citation omitted).

Our Supreme Court has repeatedly held that it is the duty of the trial court to instruct the jury on all of the substantive features of a case. *State v. Brock*, 305 N.C. 532, 540, 290 S.E.2d 566, 572 (1982); *State v. Ferrell*, 300 N.C. 157, 163, 265 S.E.2d 210, 214 (1980). "This is a duty which arises notwithstanding the absence of a request by one of the parties for a particular instruction." *State v. Loftin*, 322 N.C. 375, 381, 368 S.E.2d 613, 617 (1988) (citations omitted). "All defenses arising from the evidence presented during the trial constitute substantive features of a case and therefore warrant the trial court's instruction thereon." *Id*. (citations omitted).

"The defense of accident is triggered in factual situations where a defendant, without premeditation, intent, or culpable negligence, commits acts which bring about the death of another." *State v. Taylor*, 154 N.C. App. 366, 370, 572 S.E.2d 237, 240 (2002).

The defense of accident is only available where a defendant's actions were "unintentional and the perpetrator acted without wrongful purpose in the course of lawful conduct and without culpable negligence[.]" *State v. Thompson,* 118 N.C. App. 33, 36, 454 S.E.2d 271, 273 (1995). The pattern jury instruction for accident in non-homicide cases reads as follows:

> When evidence has been offered that tends to show that the [Defendant's actions were] accidental and you find that the

> injury was in fact accidental, the defendant would not be guilty of any crime even though his acts were responsible for the [ ] injury. An injury is accidental if it is unintentional, occurs during the course of lawful conduct, and does not involve culpable negligence. Culpable negligence is such gross negligence or carelessness as imparts a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others. When the defendant asserts that the [ ] injury was the result of an accident he is, in effect, denying the existence of those facts which the State must prove beyond a reasonable doubt in order to convict him. The burden is on the state to prove those essential facts and in so doing disprove the defendant's assertion of accidental injury. The State must satisfy you beyond a reasonable doubt that the [ ] injury was not accidental before you may return a verdict of guilty.
>
> Note Well. *Add to the final mandate at end:*
>
> Or if you fail to find beyond a reasonable doubt that the injury [ ] was not accidental, it would be your duty to return a verdict of not guilty.

N.C.P.I.-Crim. 307.11 (May 2003).

Defendant testified he did not intend to run over either of the two dogs and the injuries were accidental. According to Defendant, the dogs were not present in the road as he started to drive back to his residence to show Sergeant Morgan his killed livestock. As recounted by Defendant, the dogs suddenly ran into the road in front of Defendant's pickup truck as he was driving around a sharp curve. Defendant testified he activated his brakes, and the dogs slipped under his truck.

Despite Defendant's testimony, he was not entitled to an instruction on accident because his actions were not "in the course of lawful conduct and without culpable negligence." *Thompson*, 118 N.C. App. 36, 454 S.E.2d 273. In addition to the cruelty to animals charges, Defendant was tried and convicted of reckless driving to endanger for his conduct which led to striking the dogs. Although Defendant appealed each conviction, he has failed to argue any error in his conviction for reckless driving to endanger.

"Issues not presented and discussed in a party's brief are deemed abandoned." N.C. R. App. P. 28. Defendant's abandonment of any argument relating to his reckless driving to endanger conviction leaves the jury's verdict on this charge undisturbed. Based upon Defendant's abandonment of any argument on his reckless driving to endanger conviction, he cannot show that his actions in running over the dogs occurred in the course of lawful conduct. *See Thompson*, 118 N.C. App. at 36, 454 S.E.2d at 273.

Under the law of the case doctrine, he is precluded from asserting the defense of accident at a new trial on the charge of cruelty to animals for the red and white dog. *See State v. Dorton*, 182 N.C. App. 34, 39, 641 S.E.2d 357, 361 (2007) ("Under the law of the case doctrine, when an appellate court passes on a question and remands the cause for further proceedings, the questions there settled become the law of the case, both in subsequent proceedings in the trial court and on subsequent appeal,

provided the same facts and the same questions which were determined in the previous appeal are involved in the second appeal. Although more prevalent in civil matters, this doctrine applies with equal force in criminal proceedings.") (citations and quotation marks omitted).

Defendant cannot demonstrate that his actions in running over the two dogs occurred during the course of lawful conduct and without culpable negligence, as would entitle him to a defense of accident instruction. *See State v. Riddick*, 340 N.C. 338, 343, 457 S.E.2d 728, 731-32 (1995) ("Where, as here, the evidence is uncontroverted that the defendant was engaged in unlawful conduct and acted with a wrongful purpose when the [crime] occurred, the trial court does not err in refusing to submit the defense of accident.").

Presuming *arguendo*, Defendant was entitled to an instruction on defense of accident, Defendant has not satisfied the high burden of showing prejudice under plain error review. According to an affidavit from the trial transcriptionist within the record, the portion of the trial during which the trial court charged the jury was not transcribed or recorded. Defendant's trial counsel stated in an affidavit that "[t]he trial judge instructed the jury from the pattern jury instructions and the jury instruction was consistent with what the court indicated it would and would not instruct on during the charge conference."

The portion of the transcript documenting the charge conference with counsel indicates the trial court instructed the jury, in relevant part, in accordance with the pattern jury instructions for felony cruelty to animals, the definition of "intent," and the State having the burden to prove every element of the charged offenses beyond a reasonable doubt. N.C.P.I.-Crim. 247.10A (June 2017) (felonious cruelty to animals), N.C.P.I.-Crim. 120.10 (June 2012) (defining intent), N.C.P.I.-Crim. 101.10 (June 2008) (burden of proof and reasonable doubt).

The pattern instructions, viewed together, apprised the jury that it could only find Defendant guilty of felony cruelty to animals if it found Defendant had acted maliciously and intentionally when he ran over the dogs beyond a reasonable doubt. *See Gerberding*, 237 N.C. App. at 506-07, 767 S.E.2d at 337-38 ("[I]n order to be guilty of felonious cruelty to animals, a defendant must have acted both 'maliciously' and 'intentionally.'"); N.C.P.I.-Crim. 247.10A; N.C.P.I.-Crim. 101.10.

The jury heard Defendant's testimony that the dogs had surprised him by running in front of his truck, he activated his brakes, and he unintentionally and accidentally ran over the dogs. The jury also heard Sergeant Morgan's testimony, which contradicted Defendant's version of events. According to Sergeant Morgan, the dogs were lying in the road at the time Defendant drove down the road. Sergeant Morgan denied that the dogs ran in front of Defendant's truck. The jury found beyond

a reasonable doubt that Defendant's testimony was not credible in order to find he had acted maliciously and intentionally when he drove over the dogs.

In light of the instructions provided to the jury and the testimony offered at trial, Defendant has failed to meet the rigorous burden of showing that the jury not being instructed on defense of accident arose to the level of plain error on the felony conviction for the death of the black and white Husky. Defendant has not shown the trial court's error "seriously affect[ed] the fairness, integrity or public reputation of [the] judicial proceeding." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (citation omitted). Under the law of the case doctrine, Defendant is precluded from receiving a jury instruction on defense of accident at a new trial for his charge of felony animal cruelty to the red and white Husky. *See Dorton*, 182 N.C. App. at 39, 641 S.E.2d at 361. Defendant's argument is overruled.

VII. Ineffective Assistance of Counsel

Defendant contends he received ineffective assistance of counsel ("IAC") in violation of his rights under the Sixth Amendment to the United States Constitution and Article 1, Section 23 of the North Carolina Constitution by counsel's failure to provide notice of the defense of accident prior to trial and failure to request an instruction on accident at trial.

Generally, IAC claims are appropriately considered through motions for appropriate relief, rather than on direct appeal. *State v. Stroud*, 147 N.C. App. 549,

553, 557 S.E.2d 544, 547 (2001). Such claims can be decided on direct appeal only "when the cold record reveals that no further investigation is required." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524, *reconsideration denied*, 354 N.C. 576, 558 S.E.2d 862 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002).

The record before us is sufficient for this Court to resolve Defendant's IAC claim on the merits. *See id.*; *State v. Curry*, __ N.C. App. __, __, 805 S.E.2d 552, 558 ("No further investigation is necessary in this matter as there is ample evidence in the record to decide Defendant's two IAC claims."), *disc. review denied*, 370 N.C. 377, 807 S.E.2d 568 (2017).

Defendant testified the two dogs ran in front of his truck and he did not intend to hit the dogs. Defendant asserts his actions were accidental, and an instruction on the defense of accident would have probably led to a different result. It is well-established that to prevail on an ineffective assistance of counsel claim, defendant must show that counsel's conduct:

> fell below an objective standard of reasonableness . . . . To meet this burden, the defendant must satisfy a two part test:
>
> > First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the

> defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Curry, ___ N.C. App. at ___, 805 S.E.2d at 558-59 (citation and quotation marks omitted). "[B]oth deficient performance and prejudice are required for a successful ineffective assistance of counsel claim." *State v. Todd*, 369 N.C. 707, 711, 799 S.E.2d 834, 837 (2017). To show prejudice, there must be "a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings. This determination must be based on the totality of the evidence before the finder of fact." *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 248 (1985) (citations omitted).

Defendant's IAC claim is similar to the IAC claim recently considered by this Court in *State v. Harris*, ___ N.C. App. ___, 805 S.E.2d 729 (2017), *disc. review denied*, 370 N.C. 579, 809 S.E.2d 872 (2018). In *Harris*, the State filed motions requesting notice of defenses under N.C. Gen. Stat. § 15A-905 and disclosure of alibi witnesses. __ N.C. App. at __, 805 S.E.2d at 734. The defendant failed to provide advance notice of the defense of alibi. *Id.* At trial, the defendant testified, among other things, that he was in a different county when the crimes for which he was charged were committed. *Id.* at __, 805 S.E.2d at 731-32. The trial court declined to provide an alibi instruction where the evidence "just came up here in trial[.]" *Id.* at __, 805 S.E.2d at

732. The defendant was found guilty of all charges and sentenced as an habitual felon. *Id.*

On appeal, the defendant argued, among other things, that he received ineffective assistance of counsel because his attorney had failed to provide notice of his alibi defense, which caused the trial court to decline instructing the jury on the defense of alibi. *Id.* at __, 805 S.E.2d at 733. After resolving a number of procedural issues with the trial court's imposition of sanctions, this Court went on to state that

> Even if we were to find that trial counsel's performance was deficient, Defendant is unable to demonstrate that counsel's "deficient performance prejudiced the defense" in that his counsel made errors . . . so serious as to deprive [the defendant] of a fair trial, a trial whose result is reliable. Although the trial court declined to give a jury instruction on alibi, the alibi evidence—Defendant's testimony that he was in [another county] with his girlfriend at the time of the offense—was heard and considered by the jury.

Id. at ___, 805 S.E.2d at 735 (citations and quotation marks omitted).

This Court, relying on *State v. Hood*, 332 N.C. 611, 422 S.E.2d 679 (1992), held that the defendant was unable to demonstrate prejudice on his ineffective assistance of counsel claim because the defendant presented evidence of alibi; the jury was instructed on the presumption of innocence and subsequently instructed that the State was required to prove each element beyond a reasonable doubt; and "the trial court's charge afforded the defendant the same benefits a formal charge on alibi would have afforded." *Id.* at 618, 422 S.E.2d at 682 (citations and quotations omitted).

It is uncontroverted that defense counsel failed to provide advance notice of defense of accident as was found by the trial court. As discussed in Section VI above, Defendant's conviction for reckless driving to endanger constitutes the law of the case for his failure to advance an argument asserting error in the trial court's judgment on that conviction. Defendant was not entitled to an accident instruction, regardless of his counsel's failure to request the instruction. *See Riddick*, 340 N.C. at 343, 457 S.E.2d at 731-32 ("Where, as here, the evidence is uncontroverted that the defendant was engaged in unlawful conduct and acted with a wrongful purpose when the [crime] occurred, the trial court does not err in refusing to submit the defense of accident.").

Presuming*, arguendo*, defense counsel's representation was deficient for the failure to provide notice of defense of accident and to request instructions on the defense at trial, Defendant cannot demonstrate prejudice.

Defendant was indicted for felony cruelty to animals for maliciously killing the black and white dog by running the animal over with his truck in violation of N.C. Gen. Stat. § 14-360(b). This statute makes it a Class H felony to "maliciously torture, mutilate, maim, cruelly beat, disfigure, poison, or kill, . . . any animal[.]" N.C. Gen. Stat. § 14-360(b). Based upon the evidence presented at trial, the trial court instructed the jury in accordance with the pattern jury instruction on felony cruelty to animals, which includes, in relevant part, instructions on the required elements of intent and malice.

Similarly to *Harris*, Defendant presented evidence on the defense at issue, including his testimony that he did not intend to run over the dogs, the dogs ran in front of his truck, and the incident was an accident. *See Harris*, __ N.C. App. at __, 805 S.E.2d at 735. The jury was instructed that, in order to find Defendant guilty of felony cruelty to animals, the State had to prove the elements of intent and malice beyond a reasonable doubt. For the jury to find that Defendant's actions in running over the black and white dog were intentional, they necessarily found that Defendant's conduct was intentional, malicious, and not accidental. "[T]he trial court's charge afforded Defendant the same benefits a formal charge on [accident] would have afforded, [and the Defendant] was not prejudiced." *Id*. at __. 805 S.E.2d at 735 (citation omitted).

Defendant cannot, and has failed to, demonstrate prejudice. We deny and dismiss Defendant's IAC claim.

VIII. Justification

The trial court stated during the charge conference with counsel that it was not going to instruct the jury on justification with regard to the felony animal cruelty charges. The trial court based its determination upon the uncontroverted evidence that the dogs had allegedly attacked the goat and chickens two hours before the dogs were run over at an entirely different location.

The trial court gave defense counsel an opportunity to comment upon its proposed omission of justification from the jury instruction. The defense counsel responded: "Well, I think that's correct, Your Honor. I don't have a problem with that."

Based upon our holding to grant a new trial on Defendant's charge of felony animal cruelty relating to the red and white dog, Defendant may request an instruction on justification upon remand. In that event, we clarify the rules and highlight our precedents regarding when an instruction on the defense of justification should be given in an animal cruelty case.

N.C. Gen. Stat. § 14-360, the statute governing the offense of animal cruelty, expressly provides that its provisions do not apply to: "The lawful destruction of any animal for the purposes of protecting the public, other animals, property, or the public health." N.C. Gen. Stat. § 14-360(c)(4). "Animal" is defined by the statute to "include[] every living vertebrate in the classes Amphibia, Reptilia, Aves, and Mammalia except human beings." N.C. Gen. Stat. § 14-360(c).

This Court's opinion in *State v. Simmons*, 36 N.C. App. 354, 244 S.E.2d 168 (1978), provides instruction on when a defendant charged with animal cruelty was justified in killing an animal. In *Simmons*, the defendant was charged and convicted of willfully and wantonly killing a dog under the animal cruelty statute. *Id.* at 354, 244 S.E.2d at 168.

The defendant argued the trial court had erred by failing to submit self-defense to the jury. *Id.* This Court looked at precedents from our Supreme Court regarding justification and self-defense in the killing of roaming animals: dogs and pigs. Although these precedents addressed an older version of the animal cruelty statute, this Court noted both the older animal cruelty statute and current animal cruelty statute are "substantially the same." *Id.* at 355, 244 S.E.2d at 168. This Court quoted *State v. Smith*, 156 N.C. 628, 72 S.E. 321 (1911), in which our Supreme Court held:

> The right to slay [a dog] cannot be justified merely by the baseness of his nature, but it *is founded upon the natural right to protect person or property.* He has the good-will of mankind because of his friendship and loyalty, which are such marked traits of his character that they have been touchingly portrayed both in song and story. Why, then, should he be declared an outlaw and a nuisance, and forfeit his life without any sufficient cause? This was never the law. Neither at the common law nor since the passage of our present statute prohibiting cruelty to animals can a dog be killed for the commission of any slight or trival [*sic*] offense; *nor to redress past grievances*. As said by Chief Justice Pearson in the last cited case: *"It may be the killing will be justified by proving that the danger was imminent —making it necessary then and there to kill the hog in order to save the life of the chicken, or prevent great bodily harm*." [Emphasis supplied].

Id. (quoting *Smith*, 156 N.C. at 631, 72 S.E. at 322) (citations omitted).

In *Simmons*, this Court held the trial court did not err by failing to instruct the jury on self-defense. This Court also noted the evidence only indicated the dog

the defendant had shot was not attacking, nor threatening to attack, anyone or anything at the time the defendant shot it in his field. *Id.* at 357, 244 S.E.2d at 170.

Based upon the statute and our precedents, but subject to the express statutory exceptions, a defendant's use of deadly force against an animal is justified if the animal was in the process of attacking, or threatening to attack, the defendant, another person, another animal, or destroying livestock, crops, or other property. N.C. Gen. Stat. § 14-360(c)(1); *Smith*, 156 N.C. at 631, 72 S.E. at 322; *Simmons*, 36 N.C. App. at 354, 244 S.E.2d at 168.

We also note the animal cruelty statute exempts lawful sporting activities, including, for example, hunting, trapping, and fishing. N.C. Gen. Stat. § 14-360(c)(1) ("this section shall not apply to . . . [t]he lawful taking of animals under the jurisdiction and regulation of the Wildlife Resources Commission"). The statute also exempts the lawful slaughter and processing of animals for food or feed. N.C. Gen. Stat. § 14-360(c)(2a) ("this section shall not apply to . . . [l]awful activities conducted for the primary purpose of providing food for human or animal consumption"). Evidence tending to show Defendant had used deadly force against the dogs when they were in the process of attacking his girlfriend's goat and his chickens, or posing an imminent danger to the goat, chickens, people, or property would support an instruction on justification.

IX. Conclusion

We hold Defendant's arguments concerning the trial court's denial of his motion to dismiss are waived. Defendant failed to show plain error in the trial court's failure to instruct on the defense of accident. Defendant's ineffective assistance of counsel claim is denied and dismissed with prejudice.

We grant Defendant a new trial on Defendant's charge for felony cruelty to animals based upon maiming the red and white Husky dog. If supported by the evidence, the jury is to be instructed on the lesser-included offense of misdemeanor cruelty to animals. *It is so ordered.*

NO ERROR IN PART, NEW TRIAL IN PART, AND DISMISSED IN PART.

Chief Judge McGEE and Judge BERGER concur.

Report per Rule 30(e).