IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-557

Filed: 7 May 2019

Forsyth County, No. 16CRS060350

STATE OF NORTH CAROLINA

v.

MICHAEL RAYVOND THOMPSON, Defendant.

Appeal by defendant from judgment entered 5 October 2017 by Judge Anderson D. Cromer in Forsyth County Superior Court. Heard in the Court of Appeals 14 February 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Erika N. Jones, for the State.

Guy J. Loranger for defendant-appellant.

BERGER, Judge.

On October 5, 2017, Michael Rayvond Thompson ("Defendant") was found guilty of misdemeanor stalking. Defendant appeals, arguing that his ability to prepare a defense at trial was affected because the arrest warn (*sic*) did not allege a "course of conduct" theory of stalking. He further contends that the trial court erred

when it instructed the jury on a "course of conduct" theory of stalking. We find no error.

Factual and Procedural Background

On November 8, 2016, an arrest warrant was issued against Defendant for misdemeanor stalking and misdemeanor communicating threats. The victim was J.F., the mother of their son. The arrest warrant stated in relevant part that Defendant had

> on more than one occasion harass[ed] [J.F.] by calling her and texting her repeatedly, sitting in a car outside of her apartment, taking pictures of her apartment and texting them to her, and ringing her doorbell and banging on her door at night. The [D]efendant knew or should have known that the harassment would cause a reasonable person to fear for the persons safety or the safety of the persons immediate family. . . .
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> [Defendant] . . . unlawfully and willfully did threaten to physically injure the person of [J.F.]. The threat was communicated to [J.F.] through a facebook account he had used to contact her immediately before this message by posting: "she just tried to police me knowing I gotta warrant she dead now." Shortly after being contacted by a Winston-Salem police officer responding to a call from [J.F.] and the threat was made in a manner and under circumstances which would cause a reasonable person to believe that the threat was likely to be carried out and the person threatened believed that the threat would be carried out.

On April 28, 2017, Defendant was convicted of misdemeanor stalking in District Court. Defendant's seventy-five day sentence was suspended, and he was placed on supervised probation for eighteen months. The District Court dismissed

the communicating threats charge. Defendant appealed his conviction to Superior Court.

Defendant was tried in Superior Court on October 4 and 5, 2017. J.F. testified that prior to October 25, 2016, she had blocked Defendant's phone number because "he would call me at times when I told him not to call me, like late at night or really early in the morning." She further testified that between October 25 and November 8, 2016 she had seen Defendant parked outside her residence three times. During at least two of those instances, he would sit in his car, take pictures of her residence, and send them to her via social media. She testified that the photo sent to her on November 4, 2016 had made her feel "annoyed" and "aggravated" because she did not like "not knowing what to expect" if she was to walk outside and encounter Defendant.

J.F. further testified that on November 4, 2016 Defendant had insisted that he be allowed in her residence. She continued to refuse, but later that night Defendant insisted that he was going to come over, and J.F. maintained that he "better not come." At 10:20 p.m., Defendant messaged J.F. "[d]on't act asleep when I pull up," to which she replied "[g]o harass someone else . . . I have stated leave me alone and you haven't." Defendant did not leave J.F. alone: he called three separate times at 1:44 a.m., 1:51 a.m., and 2:05 a.m. on November 5, 2016.

Later that night on November 5, 2016, Defendant messaged her "[w]hy didn't you come to the door." She replied that he wasn't invited. However, Defendant continued to message her and interrogate her on her whereabouts for the evening. The following exchange then occurred:

> Defendant: I'm about ten seconds away from [expletive deleted] you up.
> [J.F.]: Is that a threat?
> Defendant: [Expletive deleted] around and do some dumb [expletive deleted] and find out
> [J.F.]: Boy bye
> Defendant: Try me. What's the lights on for
> [J.F.]: I always leave them on the hall way light
> Defendant: That's not the hall light
> [J.F.]: Yes it is
> Defendant: I'm looking at it
> [J.F.]: Why are you there you're a creep

J.F. testified that Defendant's showing up unannounced at her home and constant messaging made her feel as if she "[a]lways ha[d] to be cautious" because Defendant "could be out there just watching or waiting for [her] to come out." She further testified that Defendant's actions changed her daily life because she "would look before [she] went outside. [She] wouldn't take [her] son outside because [she] didn't know if he would be out there and like try to get [their son] in times that [Defendant] wasn't supposed to get him because he was mad at [her] for whatever reason." At one point, she stayed with her mother for a couple of days. Finally, on November 8, 2016, she called the police because Defendant had come to her residence

uninvited, "wouldn't leave and he wouldn't stop ringing the doorbell . . . [for] like 30 minutes."

At the close of the State's evidence, Defendant moved to dismiss the charge arguing that "there is insufficient evidence to submit to a jury charge for harassment," that "the evidence is insufficient as a matter of law on every element of each charge to support submission of the charge to the jury and that submission to the jury would therefore violate the 14th Amendment," and that "as to each charge there is a variance between the crime alleged in the indictment and any crime for which the State's evidence may have been sufficient to warrant submission to the jury and that submission to the jury would therefore violate the 5th and 6th and 14th Amendments." At the close of all the evidence Defendant renewed his "motion to dismiss as previously stated on each and every element." The trial court denied the motion.

During the jury charge conference, Defendant objected and requested that the "course of conduct" language from the Misdemeanor Stalking Pattern Jury Instruction be omitted because "the State has opted with their warrant to prove, [harassment], not a course of conduct." The trial court overruled the objection. Defendant then requested that the definition of "harassment" included in the stalking statute be instructed to the jury. *See* N.C. Gen. Stat. § 14-277.3A(b)(2). The trial court agreed to define "harassment" and instructed the jury accordingly:

> For you to find the defendant guilty of this offense the State must prove two things beyond a reasonable doubt:
>
> First, that the defendant willfully on more than one occasion harassed or engaged in a course of conduct directed at the alleged victim without legal purpose. Harass or harassment means knowing conduct, including written or printed communication or transmission, telephone, cellular, or other wireless telephone communication, facsimile transmission, paper messages or transmissions, answering machine or voice mail messages or transmissions, and electronic mail messages or other computerized or electronic transmissions directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose.
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> The second element, that the defendant at that time knew or should have known that the harassment or course of conduct would cause a reasonable person to fear for that person's safety. One is placed in reasonable fear when a person of reasonable firmness under the same or similar circumstances would fear bodily injury or suffer substantial emotional stress by placing that person in a fear of bodily injury or continued harassment.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant willfully on more than one occasion harassed or engaged in a course of conduct directed at the alleged victim without legal purpose and that the defendant at that time knew or should have known that the harassment or course of conduct would cause a reasonable person to fear for that person's safety or suffer substantial emotional stress by placing the person in fear of bodily injury or continued harassment, it would be your duty to return a verdict of guilty to that charge.

After the trial court instructed the jury, Defendant renewed his objection to the inclusion of "course of conduct" in the jury instruction because it had not alleged in the warrant. Defendant also objected and requested a curative instruction in light

of the State's reference to a "course of conduct" in its closing arguments. The trial court overruled Defendant's objection and denied his request.

On October 5, 2017, the jury found Defendant guilty of stalking. He was sentenced to fifty days in custody and ordered not to contact the victim. Defendant timely appealed.

Analysis

Defendant first contends that his ability to prepare a defense at trial was affected because the arrest warrant did not allege a "course of conduct" theory of stalking. We disagree.

"It is essential to jurisdiction that a criminal offense be charged in the warrant or indictment upon which the State brings the defendant to trial." *State v. Vestal*, 281 N.C. 517, 520, 189 S.E.2d 152, 155 (1972). "To be sufficient, any charging instrument, whether an indictment, arrest warrant, or otherwise, must allege all essential elements of the crime sought to be charged. The purpose of this requirement is to ensure that a defendant may adequately prepare his defense and be able to plead double jeopardy if he is again tried for the same offense." *State v. Madry*, 140 N.C. App. 600, 601, 537 S.E.2d 827, 828 (2000) (citation omitted). An arrest warrant may serve as the pleading of the State for a misdemeanor unless the prosecutor files a statement of charges. N.C. Gen. Stat. § 15A-922(a) (2017).

> If the arrest warrant . . . is used as a criminal pleading pursuant to N.C. Gen. Stat. § 15A-921(3), it must

> contain [a] plain and concise factual statement ... which ... asserts facts supporting every element of [the] criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant ... of the conduct which is the subject of the accusation. Generally, a warrant which substantially follows the words of the statute is sufficient [as a criminal pleading] when it charges the essentials of the offense in a plain, intelligible, and explicit manner. If the statutory language, however, fails to set forth the essentials of the offense, then the statutory language must be supplemented by other allegations which plainly, intelligibly, and explicitly set forth every essential element of the offense as to leave no doubt in the mind of the defendant and the court as to the offense intended to be charged.

State v. Garcia, 146 N.C. App. 745, 746, 553 S.E.2d 914, 915 (2001) (citations and quotation marks omitted). For example, when the criminal pleading names the defendant, lists his address, and states the date and at what time the offense occurred, "it is sufficient to inform the defendant of the charge so that he is able to prepare his defense, to enable the court to know what judgment to pronounce in the event of conviction and to protect defendant from subsequent prosecution for the same offense." *State v. Coker*, 312 N.C. 432, 441, 323 S.E.2d 343, 350 (1984). To apprise a defendant of a "course of conduct" theory of stalking, the charging document should allege the following:

> Two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, is in the presence of, or follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.

N.C. Gen. Stat. § 14-277.3A(b)(1) (2017).

In the present case, the arrest warrant did assert facts supporting every element of stalking, including a "course of conduct." The arrest warrant stated that Defendant had been charged with misdemeanor stalking and communicating threats, and cited the relevant statutes. Moreover, the arrest warrant indicated that *between* October 25, 2016 and November 8, 2016, Defendant "on more than one occasion" called; texted; sat in his car outside J.F.'s residence; took pictures of her residence and texted them to her; rang her doorbell; and banged on her door at night. Although the arrest warrant never used the words "course of conduct," the allegations in the arrest warrant had apprised Defendant of the conduct under which he could be convicted: two or more acts in which Defendant directly or indirectly followed, monitored, observed, threatened or communicated, or interfered with J.F. Thus, Defendant had the ability to prepare his defense because the arrest warrant asserted the facts and conduct to support a "course of conduct" theory of stalking.

Defendant also argues that the trial court committed prejudicial error by instructing the jury that it could find Defendant guilty of stalking under a "course of conduct" theory even though the State did not allege that theory of guilt in the arrest warrant. We find no error.

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675

S.E.2d 144, 149 (2009). "This Court reviews jury instructions contextually and in its entirety. The charge will be held sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed[.]" *State v. McGee*, 234 N.C. App. 285, 287, 758 S.E.2d 661, 663 (2014) (citations and quotation marks omitted).

"According to well-established North Carolina law, it is error for the trial judge to charge on matters which materially affect the issues when they are not supported by the evidence." *State v. Malachi*, ___ N.C. ___, ___, 821 S.E.2d 407, 416 (2018) (citations and quotation marks omitted). "In order to obtain a new trial it is incumbent on a defendant to not only show error but also to show that the error was so prejudicial that without the error it is likely that a different result would have been reached." *Id.* at ___, 821 S.E.2d at 418. "However, in the event that the State presents exceedingly strong evidence of defendant's guilt on the basis of a theory that has sufficient support and the State's evidence is neither in dispute nor subject to serious credibility-related questions, it is unlikely that a reasonable jury would elect to convict the defendant on the basis of an unsupported legal theory." *Id.* at ___, 821 S.E.2d at 421. Moreover, when "the State had to prove more than was required in order to obtain a conviction, there is no prejudice to defendant." *State v. Dale*, 245 N.C. App. 497, 506, 783 S.E.2d 222, 228 (2016).

Here, as stated above, we have already determined that the arrest warrant sufficiently alleged a "course of conduct" theory of stalking. Therefore, we now address whether there was sufficient evidentiary support for the trial court's inclusion of a "course of conduct" instruction to the jury. According to J.F.'s testimony at trial, Defendant, on at least three occasions, sat in his car outside her home when she had not invited him over. On two occasions, Defendant sent her unsolicited pictures of her residence while he had been sitting in his car outside her home. J.F. further testified that Defendant would constantly message her or call her on her phone after she had asked him to stop or to leave her alone. Thus, the evidence reveals that Defendant had directly and with the use of his cell-phone, observed and surveilled J.F., which interfered with her daily life and property. Because the evidence presented at trial supported a "course of conduct" theory of stalking, "it is unlikely that a reasonable jury would elect to convict the defendant on the basis of an unsupported legal theory." *Malachi*, ___ N.C. at ___, 821 S.E.2d at 421. Accordingly, we find no error.

Conclusion

For the reasons stated above, we find no error.

NO ERROR.

Judge HAMPSON concurs.

Judge ZACHARY concurs in result only.

Report per Rule 30(e).