IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 18-818

Filed: 15 October 2019

Guilford County, Nos. 14CRS91914, 24727

STATE OF NORTH CAROLINA

v.

GARRY JOSEPH GUPTON, Defendant.

Appeal by Defendant from judgment entered 8 November 2017 by Judge Michael D. Duncan in Guilford County Superior Court. Heard in the Court of Appeals 21 August 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Teresa M. Postell, for the State

Anne Bleyman for Defendant.

INMAN, Judge.

I. FACTUAL AND PROCEDURAL HISTORY

The record below discloses the following:

On 8 November 2014, Defendant Garry Joseph Gupton ("Defendant") went to Chemistry, a gay bar in Greensboro. It was Defendant's first time at this type of

establishment, and he had a number of alcoholic drinks. Over the course of about four hours, Defendant interacted with several patrons.

At around 2:00 a.m. Defendant approached the bar and appeared to be crying and upset. There he met Steven White ("White") who comforted and talked to him. When Chemistry closed at around 2:30 a.m., Defendant and White left together in a taxi. Both appeared to be intoxicated.

At around 3:00 a.m. the two arrived at the Battleground Inn, where White booked a room. Defendant testified that he "started freaking out" and hallucinating after White became sexually aggressive with him. Defendant struck White, then used the hotel room telephone cord to strangle him until he stopped moving, then struck him several times with the receiver. Defendant threw the room's television onto White, and then lit the bed's comforter on fire and threw that on top of him as well.

At approximately 4:15 a.m. the Battleground Inn's front desk clerk received a call from a guest reporting a man yelling on the fourth floor. Before the clerk could investigate, Defendant came out of the elevator into the lobby, shouting, and knocked the computer monitor and guest register off of the clerk's desk. He also threw a cigarette lighter behind the desk. The clerk called 911 to report Defendant's behavior, then ran up to the fourth floor, saw smoke coming from White's room, and called 911 again to report the fire.

Police officers arrived and found Defendant outside on his hands and knees, screaming, saying that "he was going to die tonight" and that he hoped the officers were not going to "shoot him in the back of the head." When placed in handcuffs, Defendant began to mumble that "Jihadis were inside the building with bombs."

Firefighters and the police began evacuating the hotel. The room White and Defendant had occupied was filled with smoke, and firefighters found White lying face down with furniture on top of him. They evacuated him from the building and he was transported to Wake Forest Baptist Medical Center. White "had burns on his left side from his chest and shoulder down," which were still burning and smoking as responders carried him out of the room. Two weeks later, White died due to complications from his burns.

On 15 December 2014, Defendant was indicted for first-degree murder and first-degree arson. On 2 October 2017 Defendant's case came on for trial in Guilford County Superior Court. During trial, Defendant presented expert testimony regarding his mental state and capacity at the time of the alleged acts. The jury was charged, including instructions on the defense of insanity, and found Defendant guilty of both first-degree murder and first-degree arson, recommending a sentence of life in prison without the possibility of parole for the murder conviction. Defendant was sentenced to life in prison without parole for the murder, and a consecutive term of 64 to 89 months in prison for the arson conviction. Defendant appeals.

II. ANALYSIS

A. Sufficiency of Evidence as to Arson

Defendant first argues that the trial court erred by denying his motion to dismiss the arson charge for insufficient evidence. He argues that the State did not provide substantial evidence of burning sufficient to support an arson conviction. We disagree.

Upon a defendant's motion to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the charged offense and (2) that the defendant is the perpetrator. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). The evidence must be viewed in the light most favorable to the State, and any contradictions and discrepancies must be resolved in the State's favor, as they are for the jury to resolve. *State v. Benson,* 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). We review *de novo* the trial court's denial of a motion to dismiss based on insufficient evidence. *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33.

The essential elements of first-degree arson are (1) the willful and malicious burning (2) of the dwelling house of another, (3) which is occupied at the time of the burning. *State v. Scott,* 150 N.C. App. 442, 453, 564 S.E.2d 285, 293 (2002). Defendant argues that the State only provided evidence that carpeting in the hotel room was burned, and that carpeting is not legally a part of the dwelling such that burning it can constitute arson. No controlling authority supports this argument.

In determining whether the carpet was part of the structure of the building, we look to the law of fixtures. A fixture is an object that "though originally a movable chattel, is, by reason of its annexation to land, . . . regarded as a part of the land[.]" *Little v. Nat'l Serv. Indus., Inc.,* 79 N.C. App. 688, 692, 340 S.E.2d 510, 513 (1986) (citing 1 Thompson on Real Property). In *State v. Hardy* we held that an air conditioner installed in a mobile home was a fixture and therefore evidence that the defendant had damaged it could support a conviction for willful and wanton injury to real property. 242 N.C. App. 146, 158, 774 S.E.2d 410, 418 (2015). This Court noted that the air conditioner was permanently installed, could not be easily removed without damaging it, and was attached for the use and the enjoyment of the occupant, creating a presumption that its purpose was to enhance the value of the real property. *Id.*

We have found no binding precedent resolving the question of whether carpeting is a fixture. Our Supreme Court has determined that where "the evidence discloses that the wallpaper in a dwelling has been burned, it competently substantiates the charring element of arson." *State v. Oxendine*, 305 N.C. 126, 130-31, 286 S.E.2d 546, 548-49 (1982) (emphasis omitted). Wallpaper is "generally immovable and permanently attached thereto and as such becomes part of the realty." *Id.* at 130, 286 S.E.2d at 548 n.3. Similarly, the carpeting in this case was glued to the concrete floor, indicating a permanent installation that made it a part of

the structure. Evidence that Defendant burned the carpeting, therefore, is sufficient to satisfy the burning element of arson.

B. Defendant's Insanity Defense

Defendant next argues that the trial court erred by failing to grant Defendant's motion to dismiss the charge of first-degree murder because the State did not present substantial evidence of Defendant's sanity at the time of the commission of the charged offense. Defendant acknowledges that insanity is an affirmative defense, which he bears the burden of proving to the satisfaction of the jury. Despite this, Defendant on appeal addresses the issue of insanity entirely within the context of the sufficiency of the State's evidence, and argues that the issue was preserved for our review due to the trial court's denial of the motion to dismiss the murder charge on that basis.

Sanity is not an element of first-degree murder that must be proved by the State. Our test for insanity is whether the accused, at the time of the alleged act, was "incapable of knowing the nature and quality of the act" or was "incapable of distinguishing between right and wrong in relation to such an act." *State v. Jones*, 293 N.C. 413, 425, 238 S.E.2d 482, 490 (1977). Defendants are presumed to be sane, and bear the burden of rebutting that presumption. *Id.* at 426, 238 S.E.2d at 490. Accordingly, "the insanity defense is a separate issue from proof of the elements of a crime," *State v. Thompson,* 328 N.C. 477, 484, 402 S.E.2d 386, 389 (1991), and a claim

of insanity does not negate any element of a homicide charge. *State v. Marley*, 321 N.C. 415, 420, 364 S.E.2d 133, 136 (1988). Defendant's assertion that he was not guilty by reason of insanity was not preserved by his motion to dismiss the murder charge based on insufficient evidence.

In the absence of a timely objection to the trial court, issues are generally not preserved for appellate review. N.C. R. App. 10(a)(1). However, out of an abundance of caution we elect in this case to review Defendant's assignment of error regarding the insanity defense. Defendant argues that the expert testimony introduced at trial rebutted the presumption of sanity, and that the State was therefore required to present evidence that Defendant was sane at the time of the alleged acts. We disagree.

As an affirmative defense to criminal acts, the defendant bears the burden of establishing his insanity to the satisfaction of the jury. *State v. Leonard*, 296 N.C. 58, 64, 248 S.E.2d 853, 856 (1978). In this case, Defendant presented the testimony of multiple expert witnesses. These experts opined, in part, that Defendant "did not have the ability to appreciate the nature and quality of his actions" and could not understand the wrongfulness of his act at the time that he set the fire.

Defendant argues that the presentation of evidence of insanity rebuts the legal presumption of sanity and shifts the burden to the State to prove Defendant was sane at the time of the alleged acts. This argument is unsupported by law. When a

defendant offers evidence of insanity, "the State *may* seek to rebut it *or to establish the defendant's sanity by the presumption of law*, or by the testimony of witnesses, or by both." *State v. Harris*, 223 N.C. 697, 703, 28 S.E.2d 232, 237 (1943) (emphasis added). Regardless of the evidence presented by Defendant, the State is not required to present evidence of sanity in response. A diagnosis of mental illness by an expert is not conclusive on the issue of insanity. *Leonard*, 296 N.C. at 65, 248 S.E.2d at 857. Instead, this issue is one for the jury to weigh and should not be removed from its consideration. *State v. Leonard*, 300 N.C. 223, 235, 266 S.E.2d 631, 639 (1980) ("[A] directed verdict of not guilty by reason of insanity would be improper.").

Here, the jury found Defendant guilty of first-degree murder, but afterwards found in mitigation that Defendant was "under the influence of mental or emotional disturbance" and that his capacity "to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired." From this verdict, it is clear that Defendant was allowed to present his insanity defense to the jury.

Defendant implies that these findings indicate that Defendant proved his insanity to the satisfaction of the jury. However, these factors only mitigate the severity of Defendant's crime for sentencing purposes. To find a defendant not guilty by reason of insanity, the jury must be convinced the Defendant was not just impaired, but *incapable* of knowing the nature and quality of the act or distinguishing between right and wrong. *Jones*, 293 N.C. at 425, 238 S.E.2d at 490. As the jury found

Defendant guilty, after being instructed on these standards, it is clear that it rejected Defendant's insanity defense.

C. Indictment

Defendant also argues that the "short-form" indictment charging him with first-degree murder is facially invalid. However, Defendant acknowledges that this issue is controlled by previous decisions which hold that this indictment meets all applicable constitutional and statutory requirements. *See, e.g., State v. Braxton*, 352 N.C. 158, 175, 531 S.E.2d 428, 437-38; *State v. Avery*, 315 N.C. 1, 13, 337 S.E.2d 786, 793. We are bound on this issue by decisions of our Supreme Court.

III. Conclusion

We hold that Defendant has failed to demonstrate error. The trial court properly denied his motion to dismiss based on insufficient evidence, the issue of insanity was properly submitted to the jury, and the indictment was sufficient to confer jurisdiction to the trial court.

NO ERROR

Judges HAMPSON and BROOK concur.

Report per Rule 30(e).