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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-1144

Filed: 3 November 2020

Stanly County, Nos. 19 CRS 050047, 19 CRS 050048

STATE OF NORTH CAROLINA

v.

CESARIO CASTRO BUENO, Defendant.

Appeal by Defendant from judgments entered 11 July 2019 by Judge Julia Lynn Gullett in Superior Court, Stanly County. Heard in the Court of Appeals 11 August 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Alan D. McInnes, for the State.

Mary McCullers Reece for Defendant.

McGEE, Chief Judge.

Cesario Castro Bueno (“Defendant”) appeals from the trial court’s judgments entered upon jury verdicts finding him guilty of possession of marijuana and threatening an executive, legislative, or court officer. Defendant argues, as it relates to his conviction for threatening an officer, that the indictment was fatally defective

and the trial court erred when presenting jury instructions. For the reasons discussed below, we find no error.

I. Factual and Procedural Background

The Stanly County Sherriff's Department ("SCSD") and the North Carolina State Highway Patrol ("SHP") received a report on 6 January 2019 that an "intoxicated pedestrian" was walking along Highway 24/27 with an alcoholic beverage in his hand. Deputy Hannah Claiborne ("Deputy Claiborne") of the SCSD and Trooper Whit Efirm ("Trooper Efirm") of the SHP responded to the call. Deputy Claiborne arrived first and observed Defendant walking along the highway. Trooper Efirm arrived shortly after and saw Defendant on the side of the highway yelling and holding a beer bottle. Trooper Efirm told Defendant to put down the bottle and asked Defendant if he had anything else on his person. Defendant gave Trooper Efirm a small bag of marijuana. Because Defendant appeared impaired, Trooper Efirm administered a breathalyzer test. The test showed that Defendant had a blood alcohol concentration level of zero. Deputy Claiborne arrested Defendant for possession of marijuana.

Deputy Claiborne transported Defendant to jail in her police car that was equipped with an in-car camera that recorded Defendant's actions. During transport,

STATE V. BUENO

Opinion of the Court

Defendant appeared “irate” and yelled: “When I get out, I’m going to kill all you bastards. Magistrates, judges, f-----g DAs, police.”

Defendant was charged in indictments with possession of marijuana and with threatening to kill or inflict serious injury on an executive, legislative, or court officer. The indictment for threatening to kill an executive, legislative, or court officer stated Defendant “knowingly ma[de] a threat to kill all Magistrates, Lawyers and Police Officers (Bedgood, Bost, Ingle and ‘that one n----r officer’), all of whom are either officers of the court or law enforcement officers, by shooting them all with a gun.”

Defendant waived his right to counsel and elected to represent himself. Defendant presented no evidence at trial. On the charge of threatening an executive, legislative, or court officer, the trial court instructed the jury that court officers included “[m]agistrates, judges, the district attorney, and the assistant district attorneys[.]” The jury returned verdicts of guilty for both charges on 11 July 2019. The trial court entered judgment on the jury’s verdicts and sentenced Defendant to two consolidated active sentences of 8 to 19 months and 20 days imprisonment. Defendant appealed, *pro se*, on 22 July 2019.

II. Analysis

Defendant asserts three arguments on appeal: (1) the indictment was fatally defective in charging him with threatening an officer because it failed to include an essential element of the crime; (2) the trial court created a fatal variance between the

STATE V. BUENO

Opinion of the Court

indictment and its jury instructions; and (3) the trial court erred in its instructions by failing to define individuals not within the meaning of court officers.

A. *Writ of Certiorari*

We first address Defendant's petition for writ of certiorari filed on 22 January 2020. This Court has statutory jurisdiction and discretionary authority to grant a writ of certiorari where a defendant fails to properly exercise his or her right to appeal and such authority is not otherwise limited by statute. *State v. Ledbetter*, 371 N.C. 192, 195–97, 814 S.E.2d 39, 41–43 (2018). Defendant acknowledges that his *pro se* notice of appeal failed to state clearly the court to which appeal was taken and failed to attach a certificate of service as required by Rules 4(a)(2), 4(b), and 4(c) of the North Carolina Rules of Appellate Procedure. Because Defendant failed to file a proper notice of appeal in compliance with Rule 4, this Court is deprived of jurisdiction and must dismiss Defendant's appeal, unless his petition for writ of certiorari is granted. *State v. Johnson*, 246 N.C. App. 132, 135, 782 S.E.2d 549, 552 (2016).

Despite these deficiencies, the State filed a timely response to Defendant's brief; the State did not respond to Defendant's petition and does not otherwise contend that it would be prejudiced by this Court's review on the merits; and this Court has a full and complete record on appeal to aid our review. *Hale v. Afro-American Arts Int'l, Inc.*, 335 N.C. 231, 232, 436 S.E.2d 588, 589 (1993) (“[A] party upon whom service of notice of appeal is required may waive the failure of service by

STATE V. BUENO

Opinion of the Court

not raising the issue by motion or otherwise and by participating without objection in the appeal[.]”); see *State v. Mills*, 248 N.C. App. 285, 287, 788 S.E.2d 640, 642 (2016) (granting certiorari on similar grounds when the State failed to allege prejudice); *Johnson*, 246 N.C. App. at 135, 782 S.E.2d at 552 (electing to review merits of the case despite Rule 4 defects). For the foregoing reasons, we elect to grant Defendant’s petition.

B. Sufficiency of the Indictment

We now turn to the merits of Defendant’s appeal. Defendant argues the indictment for threatening an officer was fatally defective because it did not include the essential element of retaliation against the officer “because of the exercise of that officer’s duties.” N.C.G.S. § 14-16.7(a) (2019). We review the sufficiency of an indictment *de novo*. *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2009).

“[A] valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony.” *State v. Campbell*, 368 N.C. 83, 86, 772 S.E.2d 440, 443 (2015) (citation and quotation marks omitted). “An indictment must allege all the essential elements of the offense endeavored to be charged[.]” *State v. Spivey*, 368 N.C. 739, 742, 782 S.E.2d 872, 874 (2016) (quotation marks and citation omitted). In determining the essential elements of an offense, this Court reviews the applicable statute. “A criminal statute must be strictly construed . . . and interpreted to ‘give

STATE V. BUENO

Opinion of the Court

effect to the legislative intent.” *State v. Ferbee*, 137 N.C. App. 710, 715, 529 S.E.2d 686, 689 (2000) (quoting *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 389 (1978)). “If the language of a statute is unambiguous, this Court ‘will give effect to the plain meaning of the words[.]’” *State v. Fields*, 374 N.C. 629, 633, 843 S.E.2d 186, 190–91 (2020) (citation omitted). “Where a statute contains two clauses which prescribe its applicability, and the clauses are connected by a disjunctive [‘or’], the application of the statute is not limited to cases falling within both clauses, but will apply to cases falling within either of them.” *Davis v. N.C. Granite Corp.*, 259 N.C. 672, 675, 131 S.E.2d 335, 337 (1963).

In the present case, the statute establishing the offense of threats against executive, legislative, or court officers states, in relevant part:

(a) Any person who knowingly and willfully makes any threat to inflict serious bodily injury upon or to kill any legislative officer, executive officer, or court officer, or who knowingly and willfully makes any threat to inflict serious bodily injury upon or kill any other person as retaliation against any legislative officer, executive officer, or court officer because of the exercise of that officer’s duties, shall be guilty of a felony and shall be punished as a Class I felon.

N.C.G.S. § 14-16.7(a) (emphasis added). The statute is clear and unambiguous.

N.C.G.S. § 14-16.7(a) allows conviction based upon either of two alternative theories of guilt. First, the accused may be guilty if they “knowingly and willfully make[] any threat to inflict serious bodily injury upon or to kill any legislative officer,

STATE V. BUENO

Opinion of the Court

executive officer, or court officer[.]” N.C.G.S. § 14-16.7(a). Second, the accused may be guilty if they “knowingly and willfully make[] any threat to inflict serious bodily injury upon or kill any other person as retaliation against any legislative officer, executive officer, or court officer because of the exercise of that officer’s duties[.]” N.C.G.S. § 14-16.7(a). The first theory of guilt punishes threats made directly to an officer for any reason, while the second punishes threats made to an officer or a third party in retaliation as a result of an officer’s conduct. The two theories of guilt are separated by the disjunctive, “or.” *Id.* Therefore, “the application of the statute is not limited to cases falling within both clauses, but will apply to cases falling within either of them.” *Davis*, 259 N.C. at 675, 131 S.E.2d at 337.

Under N.C.G.S § 14-16.7, alleging a single theory of guilt is a complete statement of the law. This Court reviewed the constitutionality of the statute in *State v. Taylor*, ___ N.C. App. ___, ___, 841 S.E.2d 776, 789 (2020). In its summary of the facts below, this Court defined the offense at issue as “knowingly and willfully mak[ing] any threat . . . to kill any . . . court officer[.]” *Id.* The second theory of guilt, threats made in retaliation, was not discussed in *Taylor*.

Similarly, in *State v. Jones-White*, No. COA06-1402, 2007 WL 2034115, at *2 (N.C. App. Jul. 17, 2007), this Court defined the offense as threatening a judge and an assistant district attorney. This Court did not—and had no need to—include the

STATE V. BUENO

Opinion of the Court

second theory of guilt, retaliation, in either case, because it was not the theory of guilt upon which the defendant was convicted.

Furthermore, the North Carolina Pattern Jury Instructions also recognize this distinction because a separate instruction exists for each theory of guilt. *See* N.C.P.I.–Crim. 208.04 (threatening to kill or inflict serious bodily injury), N.C.P.I.–Crim. 208.04B (threatening to kill or inflict serious bodily injury upon a person as retaliation). In the Introduction to the North Carolina Pattern Jury Instructions for Criminal Cases, the committee states “[t]he body of the instruction sets out the elements of the applicable crime,” explaining that a full statement of the law is included in each individual instruction. North Carolina Conference of Superior Court Judges, Committee on Pattern Jury Instructions, *North Carolina Pattern Jury Instructions for Criminal Cases* 7 (2019). Therefore, a full statement of the law as it relates to N.C.G.S § 14-16.7 does not require the judge to read each individual instruction associated with the statute. The trial court is not required to read from both N.C.P.I.–Crim. 208.04 and N.C.P.I.–Crim. 208.04B, and to reference both theories of guilt, in order to sufficiently instruct the jury with respect to this offense.

Defendant contends the State erred by failing to allege that Defendant spoke his threats “as retaliation against any legislative officer, executive officer, or court officer because of the exercise of that officer’s duties[.]” N.C.G.S. § 14-16.7(a). Presuming the requirement in N.C.G.S. § 14-16.7(a) that the threats be spoken as

STATE V. BUENO

Opinion of the Court

“retaliation” is an essential element of the crime, the language at issue appears in the statute’s second theory of guilt. In this case, the State chose to prosecute its case against Defendant based upon the first theory of guilt in N.C.G.S. § 14-16.7(a). This first theory of guilt requires only that the State show the defendant “[1] knowingly and willfully [2] make[] any threat to inflict serious bodily injury upon or to kill [3] any legislative officer, executive officer, or court officer[.]” The indictment charged Defendant with “[1] knowingly [2] mak[ing] a threat to kill all [3] Magistrates, Lawyers and Police Officers (Bedgood, Bost, Ingle, and ‘that one n----r officer’), all of whom are either officers of the court or law enforcement officers[.]” The language in the indictment sufficiently alleged the elements of the first theory of guilt in N.C.G.S. § 14-16.7(a), and the State was not required to also allege the elements of the second theory of guilt. *See Davis*, 259 N.C. at 675, 131 S.E.2d at 337.

Defendant essentially requests this Court to require the State to allege the elements of both theories of guilt in N.C.G.S. § 14-16.7(a) in order to appropriately indict under either theory of guilt. However, our Supreme Court has held that requiring the State to allege alternative theories of guilt may itself render an indictment uncertain and fatally defective:

[A]n indictment or information must not charge a person disjunctively or alternatively in such manner as to leave it uncertain what is relied on as the accusation against him. Two offenses cannot, in the absence of statutory permission, be alleged alternatively in the same count. As a general rule, where a statute specifies several means or

STATE V. BUENO

Opinion of the Court

ways in which an offense may be committed in the alternative, it is bad pleading to allege such means or ways in the alternative.

State v. Albarty, 238 N.C. 130, 132, 76 S.E.2d 381, 383 (1953) (quoting 42 C.J.S. *Indictments and Informations* § 101 (1991)); see *Jones*, 242 N.C. at 564–65, 89 S.E.2d at 130–31. We hold that the indictment sufficiently alleged each element of the offense on which the State chose to proceed, and therefore find no error.

C. *Jury Instructions*

Defendant argues the trial court erred in instructing the jury in two ways. First, by fatally varying from the indictment by instructing the jury that they could convict Defendant for threatening “alleged victims” rather than defining the victims as listed in the indictment. Second, by failing to instruct the jury on the category of people not within the meaning of court officers. We address each argument in turn.

Defendant acknowledges that he did not object to the jury instructions at trial, and “respectfully requests that this Court review the instructions for plain error.” This Court may review unpreserved arguments regarding evidentiary issues and jury instructions for plain error. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). In doing so, we examine the entire record to decide whether “the instructional error had a probable impact on the jury’s finding of guilt.” *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983). A defendant may fail to meet his burden under plain error review of jury instructions if he “fails to cite to any case

STATE V. BUENO

Opinion of the Court

law or statute which requires the trial court to define [specific] terms during its jury instruction.” *State v. Wood*, 174 N.C. App. 790, 794, 622 S.E.2d 120, 123 (2005).

1. Fatal Variance

Defendant alleges the trial court created a fatal variance when it instructed the jury that they could convict Defendant for threatening the “alleged victims[,]” rather than defining the victims as “Magistrates, Lawyers and Police Officers (Bedgood, Bost, Ingle, and ‘that one n---r officer’)” as stated in the indictment. Specifically, Defendant contends that, “rather than confining the jury’s consideration to those persons alleged in the indictment, the trial court allowed the jury to choose ‘alleged victims’ who qualified as court officers without limitation.” “Without a clear instruction as to the ‘alleged victims’ in the indictment,” Defendant argues, “there is no way of knowing which person or persons the jurors considered.” We disagree.

First, the instruction in this case did not permit the jury to convict based upon an abstract theory of guilt. A court creates a fatal variance between the indictment and the jury instruction, amounting to prejudicial error, when it provides the jury with the opportunity to convict the defendant based upon an abstract theory of guilt. *State v. Williams*, 318 N.C. 624, 629, 350 S.E.2d 353, 356 (1986).

An abstract theory of guilt is introduced to the jury when the trial court instructs the jury upon a theory of guilt not charged in the indictment. *State v. Shipp*, 155 N.C. App. 294, 300, 573 S.E.2d 721, 725 (2002). The purpose of an indictment is

STATE V. BUENO

Opinion of the Court

to provide sufficient notice to a defendant to aid in their preparation for trial, and the State may proceed only on those charges and theories of guilt properly alleged in the indictment. N.C.G.S. § 15A-924 (a)(5) (2019); *State v. Saults*, 294 N.C. 722, 726, 242 S.E.2d 801, 805 (1978). A jury instruction may result in plain error if the instruction permits the jury to convict based upon a theory of guilt not charged in the indictment. *State v. Tucker*, 317 N.C. 532, 537–38, 346 S.E.2d 417, 420 (1986); *Shipp*, 155 N.C. App. at 300, 573 S.E.2d at 725. However, “when the variance between the indictment and the jury instructions is favorable to defendant, there is no prejudicial error.” *State v. Farrar*, 361 N.C. 675, 676, 651 S.E.2d 865, 865 (2007); *see also State v. Dale*, 245 N.C. App. 497, 506, 783 S.E.2d 222, 228 (2016); *State v. Rogers*, 227 N.C. App. 617, 625, 742 S.E.2d 622, 628 (2013).

In *Tucker*, our Supreme Court found the defendant was convicted on an abstract theory of guilt where the jury was instructed based upon an alternative theory of guilt permitted by the statute, but uncharged in the indictment. *Tucker*, 317 N.C. at 537–38, 246 S.E.2d at 420. The defendant was indicted for kidnapping solely on the theory of “removing [the victim] from one place to another, without her consent.” *Id.* at 537, 346 S.E.2d at 420. The trial court instructed the jury that they could find the defendant guilty of kidnapping if the defendant “unlawfully restrained [the victim.]” *Id.* The trial court failed to properly instruct the jury on the theory of removing the victim. The Court held the difference between the indictment and the

STATE V. BUENO

Opinion of the Court

instruction was prejudicial because it is a “well-established rule” that it is prejudicial error for the “trial [court] to permit a jury to convict upon some abstract theory [of guilt] not supported by the bill of indictment.” *Id.* at 537–38, 346 S.E.2d at 420.

This Court agreed with the Supreme Court’s explanation of a conviction based upon an abstract theory of guilt in *State v. Turner*, when it held that an improper identification in the trial court’s jury instructions was an abstract theory of guilt. *State v. Turner*, 98 N.C. App. 442, 447–48, 391 S.E.2d 524, 527 (1990). In *Turner*, the defendant was indicted for “conspir[ing] with Ernie Lucas to commit the felony of trafficking to deliver to *Ernie Lucas* 28 grams or more . . . of cocaine.” *Id.* at 447, 391 S.E.2d at 527 (emphasis added). The trial court instructed the jury that they could find the defendant guilty of conspiracy if the “defendant agreed with Ernie Lucas to deliver 28 grams or more of cocaine to *another*.” *Id.* at 447–48, 391 S.E.2d at 527. (emphasis added). The trial court failed to properly define to whom the cocaine was to be delivered—a specific, named co-defendant or an unnamed third party. This Court held the instruction was prejudicial because it did not properly recognize the intended recipient as alleged in the indictment. *Id.*

This case is distinguishable from the circumstances in both *Tucker* and *Turner*. In the present case, Defendant was indicted with “knowingly mak[ing] a threat to kill all Magistrates, Lawyers and Police Officers[.]” The trial court instructed the jury that they could find Defendant guilty if they found beyond a reasonable doubt:

STATE V. BUENO

Opinion of the Court

First, that the Defendant knowingly and willfully made a threat to inflict serious bodily injury upon or kill the alleged victims.

Second, that the alleged victims were court officers. Magistrates, judges, the district attorney, and the assistant district attorneys are court officers.

And, third, that the Defendant knew or had reasonable grounds to know that the alleged victims were court officers.

The language of the trial court's jury instructions varied from the language in the indictment, but such variance did not allow Defendant to be convicted based upon an abstract theory of guilt. The trial court summarily referred to the group of officers which Defendant threatened as the "alleged victims." Unlike in *Tucker*, this summary reference did not allow Defendant to be convicted based upon an alternative theory of guilt provided for in the statute. As discussed above, the indictment did not allege that Defendant made his threats in "retaliation," and the trial court likewise did not instruct on this theory of guilt. And, unlike in *Turner*, the trial court's instructions did not open up the possible identities of an individual named in the indictment. Rather, the trial court used the term "alleged victims" to refer back to the specific list of individuals named in the indictment and included in the evidence presented to the jury. The trial court simultaneously instructed the jury that they could only convict Defendant if they found that those "alleged victims" were members of a defined set of "court officers."

Contrary to Defendant's assertions, the trial court's instructions favorably narrowed the jury's considerations to a specific, previously defined person or group of persons. *See Farrar*, 361 N.C. at 676, 651 S.E.2d at 865 (“[W]hen the variance between the indictment and the jury instructions is favorable to defendant, there is no prejudicial error.”). The jury was instructed to convict Defendant only if it found that he threatened those specific categories of people—regardless of whether he threatened individuals not within the definition provided by the Court. The court's use of “alleged victims” in this case referenced a predefined category of individuals. We hold that the trial court's instructions did not allow conviction based upon an abstract theory of guilt as defined in *Tucker* and *Turner*, and therefore did not create a fatal variance.

2. Definition of Court Officer

Defendant also contends the trial court erred by failing to define individuals not within the meaning of court officer. Defendant acknowledged the trial court did in fact define court officers, but specifically argues that the definition was incomplete because it failed to define the individuals or groups of individuals which were *not* court officers. We disagree.

A trial court has “the affirmative duty to explain the law of the case sufficiently enough for the jury to understand it, and make an intelligent determination of the evidence with respect to the law.” *State v. Patton*, 18 N.C. App. 266, 268, 196 S.E.2d

STATE V. BUENO

Opinion of the Court

560, 561 (1973). The trial court is not required “to instruct with any greater particularity upon any element of the offense than is necessary to enable the jury to apply that law to the evidence bearing on the element.” *Id.* This Court has held where the “defendant fails to cite to any case law or statute which requires the trial court to define [specific] terms during its jury instruction,” the defendant fails to meet his burden under plain error review. *Wood*, 174 N.C. App. at 794, 622 S.E.2d at 123. The existence of a statutory definition is not enough to require the trial court to define the term in the jury instructions. *Id.* (holding no error in failing to define “reckless driving,” even though a statutory definition for the term existed under N.C.G.S. § 20-140 (2005)).

“Court officer” is defined under N.C.G.S. § 14-16.10(1) (2019); however, the statute does not require the trial court to define the specific term during its jury instruction. Defendant must show plain error because he failed to make a request for a particular instruction in this case and did not object to the instructions at trial. Defendant cites to no case law or statute in his brief on appeal which requires the trial court to define “court officer” during its jury instruction. As a result, Defendant failed to meet his burden of proof to show plain error. *Wood*, 174 N.C. App. at 794, 622 S.E.2d at 123.

Nonetheless, the trial court in this case provided a sufficient definition of “court officer.” The trial court fulfilled its duty to explain the law of the case by narrowly

STATE V. BUENO

Opinion of the Court

defining court officers to include “[m]agistrates, judges, the district attorney, and the assistant district attorneys.” The trial court correctly instructed the jury on the definition of “court officer,” while excluding law enforcement officers from the definition—though the evidence showed Defendant also threatened to kill a number of police officers. The trial court’s instructions explained “the law of the case sufficiently enough for the jury to understand it, and make an intelligent determination of the evidence with respect to the law.” *Patton*, 18 N.C. App. at 268, 196 S.E.2d at 561.

The trial court is also not required “to instruct with any greater particularity upon any element of the offense than is necessary to enable the jury to apply that law to the evidence bearing on the element.” *Patton*, 18 N.C. App. at 268, 196 S.E.2d at 561. Though Defendant, here, only threatened a particular group of people outside of the trial court’s provided definition—law enforcement officers—requiring the trial court to define every individual, or group of individuals, not within the meaning of court officer is unnecessarily particular. The trial court enabled the jury to apply the law to the evidence presented at trial to determine if Defendant threatened individuals within the meaning of court officers. We cannot say, and the Defendant has not shown, the trial court’s decision not to define every individual not within the provided definition of court officer “had a probable impact on the jury’s finding of

STATE V. BUENO

Opinion of the Court

guilt.” *Odom*, 307 N.C. at 661, 300 S.E.2d at 379. We find no error, much less plain error.

III. Conclusion

We hold that the indictment provided Defendant with sufficient notice of all essential elements of the crime charged in order to aid Defendant’s ability to prepare for trial. We also hold the trial court appropriately instructed the jury as to the identity of the victims in this case and as to the definition of “court officer.” Therefore, we hold the trial court committed no error.

NO ERROR.

Judges TYSON and COLLINS concur.

Report per Rule 30(e).