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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-562

Filed: 5 May 2020

Clay County, No. 17CRS000053-54

STATE OF NORTH CAROLINA

v.

DWIGHT SCOTT MCCLURE, Defendant.

Appeal by defendant from judgment entered on or about 6 September 2018 by Judge Mark E. Powell in Superior Court, Clay County. Heard in the Court of Appeals 21 January 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Brenda Rivera, for the State.*

*The Law Office of Rich Cassidy, by Rich Cassidy, for defendant-appellant.*

STROUD, Judge.

Defendant appeals judgment convicting him of felony breaking and or entering, larceny after breaking/entering, and attaining the status of habitual felon. Based upon the record, we have sufficient information to review defendant's argument of ineffective assistance of counsel. Because the defenses of necessity and

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voluntary intoxication were not applicable based upon the evidence viewed in the light most favorable to defendant, defendant's counsel did not provide ineffective assistance by failing to request the trial court to submit these defenses to the jury. We therefore find no error.

I. Background

The State's evidence tended to show that on 4 March 2017, Ms. Parker entered her home and found glass from the kitchen door on the floor, "blood, her mail strewn about, and her medicine cabinet empty." Ms. Parker called 911, and law enforcement responded. Law enforcement found defendant, Ms. Parker's estranged step-grandson, naked in her home. During his trial, defendant testified that he had been "using drugs and different things, drinking all morning long." Defendant was walking home when he saw a deputy and then swallowed all the methamphetamine he had because he knew there was a warrant out for his arrest "for a DUI from 2015, and at the point I saw the deputy, I had some methamphetamine in my pocket which I consumed, I swallowed it orally." Defendant testified he was freezing and wet from falling into a river and had first gone to a friend's house to seek shelter. Defendant was turned away, so he then decided to walk to Ms. Parker's home. Ms. Parker was not home, so he broke into the house because he feared he was "going to die" from an overdose and the cold.

On cross-examination, defendant admitted he did not remember it was actually 62 degrees during that day. Defendant also admitted that a convenience store was about 100 yards from Ms. Parker's home, but he did not go there to seek help. Defendant was ultimately convicted by a jury of felony breaking and/or entering, larceny after breaking/entering, and attaining the status of habitual felon. The trial court entered judgment, and defendant appeals.

II. Ineffective Assistance of Counsel

Defendant raises two ineffective assistance of counsel arguments.

A. Necessity Defense Instruction

Defendant first contends his trial counsel was ineffective "by not requesting a necessity defense instruction[.]"

It is well established that ineffective assistance of counsel claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required. . . . The standard of review for alleged violations of constitutional rights is *de novo*. . . .

....

In order to prevail on a claim of ineffective assistance of counsel ("IAC"), a "defendant must first show that his defense counsel's performance was deficient and, second, that counsel's deficient performance prejudiced his defense.

*State v. Nickens*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 821 S.E.2d 864, 870-76 (2018) (citations, and quotation marks omitted).

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“Under the necessity defense, a person is excused from criminal liability if he acts under a duress of circumstances to protect life or limb or health *in a reasonable manner and with no other acceptable choice.*” *State v. Thomas*, 103 N.C. App. 264, 265, 405 S.E.2d 214, 215 (1991) (emphasis added) (citation, quotation marks, and brackets omitted). “The elements of necessity are that the defendant engaged in (1) reasonable though illegal action, (2) taken to protect life, limb, or health of a person, and (3) no other acceptable choices were available.” *State v. Miller*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 812 S.E.2d 692, 698 (2018) (citation, quotation marks, and brackets omitted). Defendant cites to *Com. v. Magadini*, 52 N.E.3d 1041, 1045 (Mass. 2016), as persuasive authority in support of his argument. In *Magadini*, the Supreme Judicial Court of Massachusetts determined the trial court erred when it did not provide an instruction on a defense of necessity for a homeless man charged with several counts of trespassing. *See id.* at 1047-51. But *Magadini* is distinguishable on many grounds. *See id.*, 52 N.E.3d 1041. Most of the charges in *Magadini* stemmed from days when the weather was extremely cold as it was February and March in Massachusetts; the defendant was in a mixed-use building and had been in open and public spaces such as a lobby and a “Creamery[;]” and he did not cause any property damage. *See id.* at 1046.

Here, defendant’s own evidence demonstrates that his actions were not reasonable and he had acceptable alternatives to breaking into a house. If he was ill

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or needed shelter, he testified there was a store near Ms. Parker's home where he could have sought help. After defendant broke into the home, he did not seek to use a phone to call 911 for assistance. And even if we assume it was much colder than 62 degrees when he entered the home and he was seeking shelter from the weather, defendant did far more than enter the home. Defendant also went through Ms. Parker's mail, emptied her entire medicine cabinet, caused extensive damage to her home, and crawled into her bed. Defendant's attorney did not provide ineffective assistance of counsel in failing to request a necessity defense instruction as it is not applicable to this case. This argument is without merit.

B. Voluntary Intoxication

Defendant next contends his trial counsel provided ineffective assistance "by not timely filing notice of intent to present a voluntary intoxication defense or object to the denial of the same[.]" "Voluntary intoxication in and of itself is not a legal excuse for a criminal act. It is only a viable defense if the degree of intoxication is such that a defendant could not form the specific intent required for the underlying offense." *State v. Ash*, 193 N.C. App. 569, 576, 668 S.E.2d 65, 70 (2008) (citation omitted). Defendant's underlying offenses include felony breaking and or entering and larceny after breaking/entering. See N.C. Gen. Stat. § 14-54(a) (2017) ("Any person who breaks or enters any building *with intent* to commit any felony or larceny therein shall be punished as a Class H felon." (emphasis added)); see also *State v.*

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*Barbour*, 153 N.C. App. 500, 503, 570 S.E.2d 126, 128 (2002) (“Larceny involves a trespass, either actual or constructive. The taker must have had *the intent* to steal at the time he unlawfully takes the property from the owner’s possession by an act of trespass.” (emphasis added) (citations and quotation marks omitted)).

Defendant’s argument here suffers from deficiencies similar to his argument regarding the necessity defense instruction; his evidence does not support this defense either. Although defendant testified he was impaired by the drugs, his own testimony demonstrates he was able to form intent. Defendant testified he ingested the drugs and because of his concern regarding an overdose, he first went to a friend’s home to seek help, where he was turned away. Defendant then decided to go to another house he was familiar with to seek shelter. Defendant then decided to break into the house since Ms. Parker was not at home and ultimately he went through the mail and emptied the medicine cabinet. Defendant denied he had any intent to commit a felony or to steal when he entered the house, but this is not evidence he was so intoxicated he was unable to form a specific intent. Defendant’s attorney did not provide ineffective assistance of counsel in failing to file notice of a voluntary intoxication defense or objecting to the trial court’s refusal to give an instruction on voluntary intoxication to the jury. This argument is without merit.

### III. Lesser Included Offense

Lastly, defendant contends the trial court erred in not instructing on the lesser

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included offense of misdemeanor larceny. Defendant's entire approximately one-page argument is dependent upon the jury being instructed upon and concluding the necessity defense was applicable; because we have already concluded it was not, we need not address this argument. This argument is without merit.

IV. Conclusion

For the foregoing reasons, we conclude there was no error.

NO ERROR.

Chief Judge MCGEE and Judge BROOK concur.

Report per Rule 30(e).