IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-725

No. COA20-832

Filed 21 December 2021

Cumberland County, No. 18 CRS 63173

STATE OF NORTH CAROLINA,

v.

MARCUS ANTWON PARKS, Defendant.

Appeal by Defendant from judgment entered 24 October 2019 by Judge James F. Ammons, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 6 October 2021.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for Defendant-Appellant.

WOOD, Judge.

¶ 1 Defendant Marcus Parks ("Defendant") appeals from his conviction for first-degree arson. On appeal, Defendant contends the trial court erred in failing to dismiss multiple counts of arson where a single dwelling house was burned. After careful review of the record and applicable law, we find no prejudicial error.

I. Factual and Procedural Background

¶ 2 In the fall of 2017, Kesa Turpin ("Turpin") met Defendant on a dating website. Thereafter, they engaged in a romantic relationship. In the summer of 2018, Defendant informed Turpin that his apartment management had asked him to vacate the premises. Because Defendant "didn't have a place to stay," he moved in with Turpin. At the time, Turpin resided in a single-family home that had been converted into three apartment units. Turpin resided in Apartment A; Apartment B was occupied by Sade Morris ("Morris"); and Apartment C was vacant.

¶ 3 On September 14, 2018, Turpin and Defendant had an argument. Defendant agreed to move out of Turpin's apartment and return to his previous apartment, but the couple would remain together. At the time, Hurricane Florence was approaching Fayetteville. Turpin testified she was afraid because she had "never been . . . subjected to anything like that before." Defendant left Turpin's apartment but told her that he would return later that night.

¶ 4 After Defendant left for his previous apartment, Turpin lost power as the weather worsened. When Defendant did not return to Turpin's apartment, she became concerned for Defendant's wellbeing. Turpin blew out the candles she was using as a light source, put her dog in her vehicle, and drove to Defendant's apartment complex. Turpin was unsure in which unit Defendant resided but observed his vehicle in the parking lot.

¶ 5 Turpin exited her vehicle, leaving her dog inside, and began knocking on

apartment doors looking for Defendant. Upon knocking on one door, Turpin heard a female voice ask, "Who is it?" When Turpin asked if Defendant was there, she heard Defendant instruct the female not to open the door. Unbeknownst to Turpin, Defendant was in the apartment of Jessica Cameron ("Cameron"). Turpin suspected Defendant was dating both women and asked Cameron if she knew Defendant had been dating Turpin. At some point during this interaction, law enforcement was called to the apartment complex. When law enforcement officers arrived to assess the situation, Defendant left the apartment complex. Shortly thereafter, law enforcement officers left because Turpin and Cameron appeared to be having a calm conversation. The women "compar[ed] notes, trying to figure out how [Defendant] got one over on two professional women."

¶ 6 While the women were conversing outside of Cameron's apartment, Defendant returned to the complex. Defendant "came in so fast – there was like a little embankment up into the . . . yard area of the apartments . . . and he pulled in so quickly that his truck came up onto the . . . embankment area." Because of this, Cameron ran into her apartment but Turpin remained outside. Defendant "came to the door and started kicking and hitting and trying to open the door. He had a key at that point also and tried to use that key." Because Cameron had a sliding chain lock on her apartment door, Defendant did not obtain access to the apartment. While trying to gain entry to the apartment, Defendant was screaming for Cameron to

"[o]pen the goddamn door." When Turpin told Defendant to stop, "[h]e turned around and hit [her] several times on [her] face." After beating Turpin, Defendant returned to his vehicle "and took off and when he took off he then rammed into the back of [Turpin's] car . . . and [the impact] threw" Turpin's dog from the backseat of her vehicle to the front floorboard. Defendant rammed his vehicle into Turpin's vehicle three times before leaving the apartment complex.

¶ 7 Law enforcement officers returned to the apartment complex and called an ambulance for Turpin. Turpin was transported to Cape Fear Valley Hospital where she was treated for a fractured nose and orbit.

¶ 8 While Turpin was at Cape Fear Valley Hospital, Morris was awakened by the fire alarm in Turpin's apartment. Morris testified that the wall between her apartment and Turpin's apartment was hot to the touch. Morris exited her apartment and noticed Turpin's door was open and in "a blaze of fire." Morris then called 911. The fire department responded, and investigators later determined the fire had been set intentionally.

¶ 9 Specifically, the fire was classified as "incendiary,"

> [m]eaning that a person purposefully lit this fire to burn in a place where fire does not belong. It's an intentional act that occurred. A person introduced a heat source to the fuel that was present. Meaning that this was a criminal act.

Investigators also determined that there had been no forced entry into Turpin's

apartment. Turpin testified that she locked her door before leaving, and Defendant's personal belongings that were stored in her apartment prior to the fire were not there after the fire.

¶ 10 On March 11, 2019, Defendant was indicted for one count of first-degree arson, one count of second-degree arson, one count of assault inflicting serious bodily injury, three counts of injury to personal property, and one count of communicating threats. Defendant's trial began on October 22, 2019.

¶ 11 Defense counsel moved to dismiss the charges at the close of the State's evidence and renewed the motion at the close of all evidence. In addition to challenging the sufficiency of the evidence, defense counsel argued that, under *State v. Jones*, 296 N.C. 75, 248 S.E.2d 858 (1978), and *State v. Wyatt*, 48 N.C. App. 709, 269 S.E.2d 717 (1980), the State's evidence supported only one charge of arson. The trial court denied Defendant's motion to dismiss on the sufficiency of the evidence but deferred ruling on the number of arson charges until the charge conference.

¶ 12 During the charge conference, defense counsel again argued that only one charge of arson should be submitted to the jury. The trial court denied Defendant's motion to dismiss; however, the trial court "nonsuited" one charge of first-degree arson to second-degree arson.

¶ 13 The trial court submitted one count of second-degree arson with respect to Turpin's apartment and one count of first-degree arson with respect to Morris's

apartment to the jury. On October 24, 2019, the jury acquitted Defendant of first-degree arson as to Morris's apartment and convicted Defendant of second-degree arson as to Turpin's apartment. Defendant timely gave notice of appeal in open court.

II. Discussion

¶ 14 On appeal, Defendant contends the trial court erred in failing to dismiss one count of arson as only one "dwelling house" was burned. Alternatively, Defendant argues there was error in the trial court's jury instructions and that a reasonable jury would not convict Defendant of second-degree arson where Morris was present in her apartment unit. After careful review, we find no prejudicial error.

¶ 15 We review the trial court's ruling on a motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (citation and internal quotation marks omitted). To withstand a motion to dismiss, each element of the crime charged must be supported by "substantial evidence," which is that amount of evidence that a reasonable mind might accept as adequate to support a conclusion. *State v. Burton*, 224 N.C. App. 120, 124, 735 S.E.2d 400, 404 (2012) (citations omitted).

¶ 16 In considering a motion to dismiss, "[a]ll evidence, both competent and incompetent, and any reasonable inferences drawn therefrom, must be considered in

the light most favorable to the State." *Id.* (citing *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 115 S. Ct. 2565, 132 L. Ed. 2d 818 (1995)). When so considered, if the evidence is sufficient only to raise a suspicion or conjecture as to the commission of the offense, a motion to dismiss should be allowed. *See State v. Chappelle*, 193 N.C. App. 313, 324, 667 S.E.2d 327, 334 (2008).

¶ 17 "The common law definition of arson is still in force in North Carolina." *State v. Scott*, 150 N.C. App. 442, 452, 564 S.E.2d 285, 293, *appeal dismissed and disc. review denied*, 356 N.C. 443, 573 S.E.2d 508 (2002) (citations omitted). "Common law arson is the willful and malicious burning of the dwelling house of another person." *State v. Shaw*, 305 N.C. 327, 336, 289 S.E.2d 325, 330 (1982) (citation omitted); *see also State v. Lance*, ___ N.C. App. ___, 2021-NCCOA-236, ¶ 19 ("Arson 'is the willful and malicious burning of the dwelling house of another person.' " (citation omitted)). North Carolina bifurcates arson into first and second-degree depending on whether the dwelling house was occupied at the time of burning. N.C. Gen. Stat. § 14-58 (2020). A defendant is guilty of first-degree arson where "the dwelling burned was occupied at the time of the burning," but is guilty of arson in the second-degree, "[i]f the dwelling burned was unoccupied at the time of the burning." N.C. Gen. Stat. § 14-58. "[T]he common law arson requirement that the dwelling burned be that of 'another' is satisfied by a showing that some other person or persons, together with the defendant, were joint occupants of the same dwelling unit." *Shaw*, 305 N.C. at

338, 289 S.E.2d at 331.

¶ 18 On appeal, Defendant does not challenge the sufficiency of the evidence for first-degree arson. Rather, Defendant argues the trial court erred in denying his motion to dismiss because, although Turpin and Morris resided in separate apartments, there was only one dwelling house.

¶ 19 In *State v. Jones*, 296 N.C. 75, 248 S.E.2d 858 (1978), our Supreme Court held "[w]here there are several apartments in a single building," a person may be convicted of arson if they "set[] fire to any part of the building." 296 N.C. at 77-78, 248 S.E.2d at 860. There is no requirement that every unit of the apartment building be occupied, a "tenant who sets fire to his own rooms . . . may be convicted of arson for burning the 'dwelling' of one of the other tenants even if the fire was actually confined to the rooms occupied by the wrongdoer." *Id*. at 77, 248 S.E.2d at 860 (citing Perkins on Criminal Law, at 227 (2d ed. 1969) (citation omitted)).

¶ 20 Relying on *Jones*, this Court affirmed the notion that a defendant can be convicted of arson while living in a multi-unit residence in *State v. Wyatt*, 48 N.C. App. 709, 269 S.E.2d 717 (1980). In *Wyatt*, the Court agreed with the State's position that an apartment building with six units "constituted one dwelling house such that the requirements of a burning could be satisfied by the charring of [one unit] while the requirement of occupancy could be satisfied" by a tenant's presence in another unit. 48 N.C. App. at 711-12, 269 S.E.2d at 718 (citations omitted).

¶ 21 Following *Jones, Wyatt*, and their progeny, our Courts have held a single structure with multiple dwelling units constitutes one dwelling house. *See, e.g., State v. Bryant*, COA06-155, 186 N.C. App. 305, 2007 WL 2827991 (N.C. Ct. App. Oct. 2, 2007) (unpublished) ("[A]n apartment building constitutes one dwelling house.") (citing *Jones*, 296 N.C. at 77-78, 248 S.E.2d at 860)), *cert. denied*, 362 N.C. 88, 656 S.E.2d 278 (2007). Thus, Defendant correctly notes that the apartment building in which Turpin and Morris resided was only one dwelling house.

¶ 22 However, we are not persuaded Defendant was prejudiced by the trial court's declination to dismiss one count of arson. "After all, there is a presumption of regularity in the trial. In order to overcome that presumption it is necessary for matters constituting material and reversible error be made to appear in the case on appeal." *State v. Sanders*, 280 N.C. 67, 72, 185 S.E.2d 137, 140 (1971). "Even so, the burden is upon the appellant not only to show error but to show that such error was prejudicial." *State v. Poolos*, 241 N.C. 382, 383, 85 S.E.2d 342, 343 (1955); *see also State v. Kirby*, 15 N.C. App. 480, 486, 190 S.E.2d 320, 324 (1972) (citation omitted). Here, the jury *acquitted* Defendant of the first-degree arson charge relating to Morris's apartment. Thus, Defendant was not prejudiced by the trial court's denial of his motion to dismiss. *See State v. Lee*, 335 N.C. 244, 273, 439 S.E.2d 547, 562 (1994) (the test for whether error is prejudicial is "whether there is a reasonable possibility that had the error not occurred, a different result would have been reached at the

trial." (citation omitted)).

¶ 23 Next, Defendant contends in the alternative that his conviction for second-degree arson relating to Turpin's apartment must be reversed because no reasonable jury would convict him of second-degree arson where Morris was present in one of the other apartments. Arson in the first-degree is punishable as a Class D felony, and a defendant *may* be convicted of first-degree arson "[i]f the dwelling house was occupied at the time of the burning." N.C. Gen. Stat. § 14-58. Under our current law, so long as one apartment unit is occupied, the occupancy requirement of first-degree arson is met. *See Shaw*, 305 N.C. at 338, 289 S.E.2d at 331; *see also State v. Allen*, 322 N.C. 176, 196-97, 367 S.E.2d 626, 637 (1988); *Bryant*, 2007 WL 2827991, at * 3; *Wyatt*, 48 N.C. App. at 712, 269 S.E.2d at 718-19.

¶ 24 Second-degree arson is a lesser-included offense of first-degree arson. *Scott*, 150 N.C. App. at 453-54, 564 S.E.2d at 293-94. Relying on *State v. Arnold*, 329 N.C. 128, 404 S.E.2d 822 (1991), Defendant contends his conviction for second-degree arson must be reversed as there was no evidence of inoccupancy. *Arnold*, however, is readily distinguishable. In *Arnold*, our Supreme Court found the trial court erred by instructing the jury on second-degree murder where no evidence negated the premeditation and deliberation requirement of first-degree murder. *See* 329 N.C. at 138-39, 404 S.E.2d at 828-29. The *Arnold* court went on to note,

> Our inquiry does not end with the determination that the

> court erred in this case. This Court has held that some errors of this type are not prejudicial to the defendant because had the jury not had the option of convicting on the lesser offense, it would likely have convicted on the greater offense, subjecting the defendant to harsher penalties.

Id. at 140, 404 S.E.2d at 829 (citing *State v. Vestal*, 283 N.C. 249, 195 S.E.2d 297, *cert. denied*, 414 U.S. 874, 94 S. Ct. 157, 38 L. Ed. 2d 114 (1973)). Thus, "the appropriate standard for review in the case at bar is found in [N.C. Gen. Stat.] § 15A-1443(b)." *Arnold*, 329 N.C. at 140, 404 S.E.2d at 829. Section 15A-1443(b) provides

> A violation of defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.

N.C. Gen. Stat. § 15A-1443(b) (2020). "Where defendant is convicted upon a charge for which there is insufficient evidence, defendant's federal due process rights have been violated." *Arnold*, 329 N.C. at 140, 404 S.E.2d at 829 (citing *Thompson v. Louisville*, 362 U.S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654 (1964); *Hopper v. Evans*, 456 U.S. 605, 102 S. Ct. 2049, 72 L. Ed. 2d 367 (1982); *Beck v. Alabama*, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980)). "Overwhelming evidence of a defendant's guilt may render constitutional error harmless beyond a reasonable doubt." *Id.* at 139, 404 S.E.2d at 829-30 (citing *State v. Brown*, 306 N.C. 151, 293 S.E.2d 569, *cert. denied*, 459 U.S. 1080, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982)).

¶ 25 Notably, Defendant does not argue there was insufficient evidence for first-

degree arson. Defendant merely argues that, because Morris's apartment was occupied at the time, no reasonable jury would convict him of an offense that required inoccupancy. Where there is sufficient evidence to prove a greater crime, there is necessarily sufficient evidence to prove the lesser included offense and therefore judgment on the lesser offense is proper. *See State v. Perry*, 291 N.C. 586, 591-92, 231 S.E.2d 262, 265-66 (1977); *see also Scott*, 150 N.C. App. at 453-54, 564 S.E.2d at 294. Thus, this argument is overruled.

¶ 26 In a second alternative argument, Defendant contends the trial court erred in that it "should've instructed the jury on only a single count of first-degree arson – and nothing else." Here, the trial court instructed the jury on both first-degree arson and second-degree arson. Where a trial court denies a defendant's requested jury instruction, we review the decision *de novo*. *See State v. Campos*, 248 N.C. App. 393, 397, 789 S.E.2d 492, 495 (2016) (citations omitted).

Here, the State presented overwhelming evidence that Defendant committed the offenses charged: Defendant physically attacked Turpin earlier in the evening; Defendant's belongings that were stored in Turpin's apartment were removed prior to the fire; there was no indication that the perpetrator of the fire forcibly entered Turpin's apartment; and Defendant had a key to Turpin's residence. Morris testified that she was in her apartment at the time of the fire, observed the blaze, and that her apartment was damaged. Accordingly, we hold the trial court did not commit

prejudicial error in instructing the jury on both charges.

III. Conclusion

¶ 27 After careful review of the record and applicable law, we hold Defendant received a fair trial free from prejudicial error.

NO PREJUDICAL ERROR.

Judges ZACHARY and CARPENTER concur.

Report per Rule 30(e).