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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-830

No. COA22-5

Filed 6 December 2022

Davidson County, No. 19 CRS 51866

STATE OF NORTH CAROLINA

v.

PATRICK SHAWN SYLVESTER

Appeal by Defendant from Judgment entered 20 May 2021 by Judge Robert C. Ervin in Davidson County Superior Court. Heard in the Court of Appeals 24 August 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Robert C. Ennis, for the State.

Blass Law, PLLC, by Danielle Blass, for Defendant-Appellant.

HAMPSON Judge.

Factual and Procedural Background

¶ 1 Patrick Shawn Sylvester (Defendant) appeals from the trial court's Judgment entered 20 May 2021 upon a jury verdict finding Defendant guilty of Assault with a Deadly Weapon Inflicting Serious Injury. The Record before us—including evidence presented at trial—tends to reflect the following:

¶ 2 On 21 March 2019, Defendant and Avery Markham (Markham) were involved in a confrontation at a local convenience store. Security cameras recorded Defendant retrieving a BB gun resembling a semi-automatic handgun from his truck. Defendant approached Markham as Markham was leaving the store. Defendant stated he would kill Markham. Markham attempted to back away from Defendant; however, Defendant struck Markham's face with the handle of the gun, knocking him to the ground, and subsequently struck him two more times. Markham suffered a broken cheekbone, orbital socket, and tear duct, a fractured skull, and a gash above his right eyebrow. Markham's nose also shifted two inches out of place.

¶ 3 On 22 March 2019, Markham met police officers at the convenience store. The officers took photos of Markham's face and obtained a copy of the security footage from the convenience store. On 3 April 2019, Police obtained a warrant for Defendant's arrest.

¶ 4 On 5 April 2019, police visited Defendant's home and obtained Defendant's permission to search his vehicle. Police seized the BB gun and noted it was constructed out of a "metal slide, metal frame, with a plastic grip." Defendant admitted to possessing the BB gun during the assault and police subsequently arrested Defendant. On 8 July 2019, Defendant was indicted for Assault with a Deadly Weapon Inflicting Serious Injury.

¶ 5 On 16 December 2019, Defendant's case came before the trial court during an administrative setting. The issues before the trial court were twofold: (1) Defendant had expressed his intention to discharge his attorney and proceed *pro se*; (2) Defendant wished to reject an offer of a plea proffered by the State. During this hearing, the trial court engaged Defendant in a colloquy consistent with the statutory requirements of N.C. Gen. Stat. § 15A-1242 to ascertain whether Defendant's waiver of counsel was knowing and voluntary. During this colloquy, Defendant asserted he had prior experience representing himself in jury trials.

¶ 6 The trial court informed Defendant that Defendant was charged with Assault with a Deadly Weapon Inflicting Serious Injury classified as a Class E felony. The trial court asked for Defendant's prior record level and the State responded it alleged Defendant to be Prior Record Level II. The trial court informed Defendant that based on the alleged Prior Record Level and classification of the offense charged, "the total maximum sentence for that offense, at your sentencing level, could be a minimum of 36 to a maximum of 56 months in prison[.]" Defendant confirmed he understood. Defendant reaffirmed his choice to waive counsel and signed the written and completed waiver of counsel form. During this hearing, Defendant also rejected a plea agreement in which he would plead guilty and be sentenced to 36-56 months imprisonment but in exchange that sentence would be suspended upon 9 months imprisonment and service of probation.

¶ 7 On 19 February 2020, Defendant was again brought before the trial court by the State. The State was concerned Defendant's prior representations about his jury trial experience were inaccurate and requested the judge assigned to the trial calendar upon which Defendant's case then appeared revisit the colloquy. The trial court conducted a second colloquy. During this colloquy, the trial court informed Defendant "depending on your prior record level and whether the State has aggravating circumstances or given notice of aggravating circumstances, the maximum term of imprisonment for this particular felony is 88 months. . . . Do you understand that?" Defendant confirmed he understood. Defendant signed, and the trial court filed, a second waiver of counsel.

¶ 8 On 25 March 2021, the trial court held a hearing on a Petition for Writ of Habeas Corpus filed by Defendant during his pre-trial confinement. Defendant expressed a desire to represent himself on the Habeas Petition and the trial court conducted another colloquy with Defendant. Defendant signed a third waiver of counsel specifically relating to Defendant's Habeas Corpus proceeding.

¶ 9 On 17 May 2021, this case proceeded to a jury trial. Prior to trial, the trial court conducted a fourth colloquy to ensure Defendant still wished to represent himself at trial. Defendant orally asserted his continued desire to represent himself. The trial court also offered Defendant "the option potentially of stand-by counsel," which Defendant also refused.

¶ 10 At the close of the State's evidence and at the close of all evidence, the trial court provided Defendant an opportunity to be heard. Defendant made no motion to dismiss at either opportunity. On 19 May 2021, the jury reached a unanimous verdict finding Defendant guilty of Assault with a Deadly Weapon Inflicting Serious Injury. Defendant was sentenced to an active sentence of 26-44 months imprisonment. Defendant gave oral Notice of Appeal in open court.

Issues

¶ 11 The issues on appeal are whether: (I) Defendant's multiple waivers of counsel were and remained valid at the time of trial; and (II) this Court should invoke Rule 2 of the Rules of Appellate Procedure to review the sufficiency of the evidence to submit the charge of Assault with a Deadly Weapon Inflicting Serious Injury to the jury in the absence of any motion to dismiss made in the trial court.

Analysis

I. Waivers of Counsel

¶ 12 Defendant contends: (A) the 16 December 2019 waiver of counsel was invalid because—Defendant asserts—the trial court failed to accurately inform Defendant of the maximum punishment he faced; (B) both the 16 December 2019 and 16 February 2020 waivers of counsel were invalid on the basis they were secured, in part, on Defendant's representation of his own experience trying cases *pro se*; (C) the 25 March 2021 waiver of counsel was limited to the Habeas proceeding; and (D) in any

event, these waivers of counsel had all "effectively expired" by the time of Defendant's trial in May 2021. We disagree.

¶ 13 The right to counsel in a criminal proceeding is protected by both the federal and state constitutions. *See* U.S. Const. amend. VI; N.C. Const. art. I, §§ 19, 23. However, a criminal defendant also "has a right to handle [their] own case without interference by, or the assistance of, counsel forced upon [them] against [their] wishes." *State v. Mems*, 281 N.C. 658, 670-71, 190 S.E.2d 164, 172 (1972). "Before allowing a defendant to waive in-court representation by counsel, however, the trial court must [e]nsure that constitutional and statutory standards are satisfied." *State v. Thomas*, 331 N.C. 671, 673, 417 S.E.2d 473, 475 (1992). Our Supreme Court has held "[N.C. Gen. Stat. §] 15A-1242 satisfies any constitutional requirements by adequately setting forth the parameters of such inquiries." *State v. Fulp*, 355 N.C. 171, 175, 558 S.E.2d 156, 159 (2002). N.C. Gen. Stat. § 15A-1242 states in relevant part:

> A defendant may be permitted at [their] election to proceed in the trial of [their] case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of [their] right to the assistance of counsel, including [their] right to the assignment of counsel when [they are] so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and

(3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242 (2021). "When a defendant executes a written waiver which is in turn certified by the trial court, the waiver of counsel will be presumed to have been knowing, intelligent, and voluntary, unless the rest of the record indicates otherwise." *State v. Warren*, 82 N.C. App. 84, 89, 345 S.E.2d 437, 441 (1986).

¶ 14 Our review is *de novo* in cases implicating constitutional rights. *State v. Diaz*, 372 N.C. 493, 498, 831 S.E.2d 532, 536 (2019). Similarly, "[p]rior cases addressing waiver of counsel under N.C. Gen. Stat. § 15A-1242 have not clearly stated a standard of review, but they do, as a practical matter, review the issue *de novo*." *State v. Watlington*, 216 N.C. App. 388, 393-94, 716 S.E.2d 671, 675 (2011). As such, more recently, we have acknowledged: "This [C]ourt reviews the sufficiency of a trial court's statutory inquiry concerning a defendant's waiver of [their] rights to counsel *de novo*." *State v. Harper*, 2022-NCCOA-630, ¶44. When reviewing an issue *de novo*, the Court considers the matter anew and may freely substitute its own judgment for that of the trial court. *State v. Schumann*, 257 N.C. App. 866, 876, 810 S.E.2d 379, 386 (2018).

¶ *15* *A.* *16 December 2019 Waiver: Range of Permissible Punishments*

¶ 16 Defendant first asserts his 16 December 2019 waiver of counsel was invalid because the trial court failed to correctly inform Defendant of the maximum possible

punishment. *See State v. Lindsey*, 271 N.C. App. 118, 127, 843 S.E.2d 322, 329 (2020) ("The trial court must specifically advise a defendant of the possible maximum punishment[.]"). Specifically, Defendant argues the trial court, at this hearing, incorrectly informed him the maximum punishment he faced was 36-56 months imprisonment.

¶ 17 Defendant offers no citation to authority to support the contention this constituted an incorrect statement of the maximum punishment Defendant faced. To the contrary, Defendant was charged with Assault with a Deadly Weapon Inflicting Serious Injury which is a Class E felony. N.C. Gen. Stat. § 14-32(b) (2021). The State expressly alleged Defendant attained a Level II Prior Record Level for sentencing. The highest minimum aggravated sentence for a Class E felony with a Level II Prior Record Level was indeed 36 months. N.C. Gen. Stat. § 15A-1340.17(c) (2021). The corresponding maximum sentence was 56 months. N.C. Gen. Stat. § 15A-1340.17(e) (2021). As such, and certainly in the absence of being pointed to any specific authority otherwise, we cannot conclude that by informing Defendant of the particular maximum punishment for his specific alleged Prior Record Level, the trial court incorrectly informed Defendant of the maximum punishment that could be imposed.

¶ 18 Nevertheless, even assuming without deciding, the trial court might have erred in this regard, the Record fails to reflect any likelihood Defendant would have

made a different decision had he been provided different information. This Court has held:

> [W]e do not believe that a mistake in the number of months which a trial judge employs during a colloquy with a defendant contemplating the assertion of [their] right to proceed *pro se* constitutes a *per se* violation of N.C. [Gen. Stat.] § 15A-1242. Instead, such a calculation error would only contravene N.C. [Gen. Stat.] § 15A-1242 if there was a reasonable likelihood that the defendant might have made a different decision with respect to the issue of self-representation had [they] been more accurately informed about the range of permissible punishments.

State v. Gentry, 227 N.C. App. 583, 599-600, 743 S.E.2d 235, 246 (2013) (quotation marks omitted). Here, rather, the Record reflects just months later in February 2020, during the second colloquy on Defendant's election to proceed *pro se*, the trial court there informed Defendant the maximum aggravated sentence for a Class E felony was 88 months. This is the maximum aggravated sentence for a Class E felony with a Level VI Prior Record Level. N.C. Gen. Stat. § 15A-1340.17(c), (e) (2021). Nevertheless, even when presented with this information, Defendant elected to proceed *pro se* after engaging in the colloquy and signed a written waiver of counsel reflecting his decision. Moreover, Defendant was provided with the same information about the maximum punishment he faced during his colloquy with the trial court concerning Defendant's choice to proceed *pro se* immediately prior to trial in May 2021. Defendant again elected to proceed *pro se*. Thus, the Record does not demonstrate a reasonable likelihood Defendant would have made a different decision

had he been informed his maximum punishment could have been 88 months imprisonment. Therefore, Defendant's argument is without merit.

¶ 19 *B.* ___*19 December 2019 and 20 February 2020 Waivers: Prior Trial Experience*___

¶ 20 Defendant next asserts his pre-trial waivers of counsel were invalid "due to [Defendant's] false belief that he had *pro se* jury trial experience." Defendant, however, fails to point to any support in the Record for the assertion that Defendant's belief in his *pro se* jury trial experience was false. Defendant points to no evidence in the Record to show he did not have the trial experience he professed to have. Rather, on each occasion, the State questioned the accuracy of Defendant's assertions that he had prior jury trial experience and, the Record reflects, Defendant remained confident in his prior experience.

¶ 21 Even assuming, however, Defendant either intentionally or unintentionally mispresented his prior trial experience to the trial court, "the issue is not whether the defendant has the skill and training to represent [themselves] adequately but whether the defendant is able to understand the consequences of waiving court appointed counsel and representing [themselves]." *State v. Gerald*, 304 N.C. 511, 518, 284 S.E.2d 312, 317 (1981). Here, it is evident that in accepting Defendant's election to proceed *pro se*, the trial court at no stage was doing so based solely on Defendant's claims as to his prior trial experience. Rather, at each appearance, on 19 December 2019 and 20 February 2020—and again prior to trial in May 2021—

each trial court engaged in a robust colloquy with Defendant to ensure Defendant had been advised of his right to counsel, appreciated and understood the consequences of his decision, and understood the nature of the charge against him and the potential punishments. Thus, the trial courts in each instance appropriately ensured Defendant's waivers of counsel were knowing, intelligent, and voluntary. Therefore, we reject Defendant's argument.

C. *25 March 2021 Waiver: Habeas Proceeding*

¶ 22 Defendant also argues his waiver of counsel during his separate habeas proceeding should have no bearing on whether he validly waived counsel at trial on the merits of the charge against him. We agree. It is clear Defendant's waiver of counsel at that hearing was limited to the habeas proceeding. The habeas proceeding is not before us for review. As such, it has no bearing on our analysis here.

¶ 23 *D. May 2021 Trial: "Effective Expiration" of Waiver of Counsel*

¶ 24 Defendant further contends that, in any event, by the time his case was tried in May 2021, the prior pre-trial waivers of counsel should be deemed to have expired given the lengthy passage of time. Yet again, however, Defendant's argument is factually flawed. This is so because, immediately prior to trial on 17 May 2021, the trial court engaged in a brand new and complete colloquy with Defendant to ensure Defendant desired to represent himself. While the trial court in that instance did not require or file a written form—at least on the record before us—this was not required.

See State v. Paterson, 208 N.C. App. 654, 662, 703 S.E.2d 755, 760 (2010) ("[A] waiver of counsel form is not required . . . so long as the defendant's waiver was given knowingly, intelligently, and voluntarily.").

¶ 25 Nevertheless, again overlooking the fact Defendant ratified and reaffirmed his choice to proceed *pro se* immediately before trial, our caselaw—as Defendant notes—is inapposite to his argument. A "waiver in writing once given was good and sufficient until the proceeding finally terminated, unless the defendant [themselves] makes known to the court that [they desire] to withdraw the waiver and have counsel assigned to [them]. The burden of showing the change in the desire of the defendant for counsel rests upon the defendant." *State v. Watson*, 21 N.C. App. 374, 379, 204 S.E.2d 537, 540 (1974). While we acknowledge the length of time Defendant was in pre-trial confinement—largely due to the ongoing pandemic's impact on jury trials—and accept that a defendant might change their mind as to whether to proceed *pro se* after so long in confinement, it remains the defendant's burden to make that change of desire apparent. Here, there is no evidence Defendant ever wavered in his desire to represent himself at trial, even after the trial court on its own initiative inquired extensively as to Defendant's decision to proceed *pro se*. Thus, Defendant's waivers of counsel remained effective at the trial of this matter in May 2021. Therefore, Defendant validly waived assistance of counsel. Consequently, the trial court did not err in permitting Defendant to represent himself at the trial of this matter.

II. Sufficiency of the Evidence

¶ 26 Defendant further contends the trial court erred in failing to dismiss Defendant's charge of Assault with a Deadly Weapon Inflicting Serious Injury as the State failed to establish the BB gun was a deadly weapon. "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10 (a)(1) "It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion." *Id.* Furthermore, "[i]n a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action, or for judgment as in case of nonsuit, is made at trial." N.C. R. App. P. 10(a)(3). Thus, "Rule 10(a)(3) requires a defendant to make a motion to dismiss in order to preserve an insufficiency of the evidence issue[.]" *State v. Golder*, 374 N.C. 238, 245, 839 S.E.2d 782, 788 (2020).

¶ 27 Here, Defendant failed to make a motion to dismiss at the close of the State's evidence, and at the close of all evidence, in order to preserve an insufficiency of the evidence issue on appeal. Instead, citing *State v. Hart*, Defendant "respectfully requests that the Court suspend the operation of the Rules of Appellate Procedure pursuant to [N.C. R. App. P.2] to prevent a miscarriage of justice in this case." Under

N.C. R. App. 2, this Court may "suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions." N.C.R. App. P. 2 (2021). However, in *State v. Hart*, the Supreme Court of North Carolina held:

> [b]efore exercising Rule 2 to prevent a manifest injustice . . . the Court of Appeals must be cognizant of the appropriate circumstances in which the extraordinary step of suspending the operation of the appellate rules is a viable option. Fundamental fairness and the predictable operation of the courts for which our Rules of Appellate Procedure were designed depend upon the consistent exercise of this authority.

State v. Hart, 361 N.C. 309, 317, 644 S.E.2d 201, 206 (2007).

¶ 28 Defendant contends as a *pro se* defendant, he "was not in a position to properly preserve issues for appeal" and "was prejudiced because there was insufficient evidence of the crime for which he was convicted." Thus, Defendant contends this Court should invoke "Rule 2 to prevent a manifest injustice where defendant failed to preserve sufficiency of the evidence for appellate review but where State failed to meet its burden of proof" as in *State v. Bachelor*. "However, our Supreme Court cautioned that Rule 2 . . . must be invoked cautiously, and reaffirmed its prior holdings as to the exceptional circumstances which allow the appellate courts to take this extraordinary step." *State v. Batchelor*, 190 N.C. App. 369, 378, 660 S.E.2d 158, 164 (2008) (citation and quotation marks omitted). "[P]recedent cannot create an

automatic right to review via Rule 2. Instead, whether an appellant has demonstrated that [their] matter is the rare case meriting suspension of our appellate rules is always a discretionary determination to be made on a case-by-case basis." *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 603 (2017).

¶ 29 When a defendant elects to represent themself in a criminal action:

> the trial court is not required to abandon its position as a neutral, fair and disinterested judge and assume the role of counsel or advisor to the defendant. The defendant *waives counsel at* [their] *peril* and by so doing acquires no greater rights or privileges than counsel would have in representing [them].

State v. Rogers, 194 N.C. App. 131, 141, 669 S.E.2d 77, 84 (2008). "The right of self-representation is not a license to . . . not to comply with relevant rules of procedural and substantive law." *Faretta v. California*, 422 U.S. 806, 834, 95 S. Ct. 2525, 2541, 45 L. Ed. 2d 562 n. 46 (1975). Here, we have already determined Defendant validly elected to proceed *pro se* and Defendant knowingly, voluntarily, and intelligently waived his right to counsel. "Nevertheless, this Court's imperative to correct fundamental error . . . may necessitate appellate review of the merits despite the occurrence of default." *State v. Davis*, 198 N.C. App. 146, 149, 678 S.E.2d 709, 712 (2009) (citation and quotation marks omitted). As such, "we examine the circumstances surrounding the case at hand to determine whether defendant's appeal merits substantive review. *Id*. at 150, 678 S.E.2d at 713.

¶ 30 In this case, Defendant contends there was insufficient evidence the BB gun used to assault Markham constituted a "deadly weapon" for purposes of proving the offense of Assault with a Deadly Weapon Inflicting Serious Injury. Defendant asserts a BB gun is not deemed to be a deadly weapon *per se* and, thus, the State was required to present evidence the BB gun was capable of inflicting death or serious bodily injury. Assuming Defendant's premise is correct, our review of the Record reflects the State did present evidence from which the jury could conclude the BB gun, as used in this case, constituted a deadly weapon. The State presented evidence of the BB gun and how it was used—not as a BB gun—but to bludgeon Markham's face resulting in serious injury. Even Defendant concedes the "manner of use and injuries are certainly problematic" to his argument. Moreover, Defendant makes no argument the jury was incorrectly instructed on the definition of a deadly weapon. Thus, on the facts of this case, there is insufficient merit to Defendant's argument justifying substantive review of this matter in the absence of it being properly preserved. Therefore, we decline to invoke N.C.R. App. P. 2 to review Defendant's argument on the sufficiency of the evidence. Consequently, we further conclude the trial court did not err in submitting the offense of Assault with a Deadly Weapon Inflicting Serious Injury to the jury.

Conclusion

¶ 31 Accordingly, for the foregoing reasons, we conclude there was no error at trial and affirm the trial court's 20 May 2021 Judgment.

NO ERROR.

Judges COLLINS and JACKSON concur.

Report per Rule 30(e).