IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-63

Filed 5 December 2023

Pender County, Nos. 20 CRS 51264, 20 CRS 51408

STATE OF NORTH CAROLINA

v.

HECTOR ZAPATA, Defendant.

Appeal by defendant from judgments entered 2 June 2022 by Judge R. Kent Harrell in Pender County Superior Court. Heard in the Court of Appeals 20 September 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Carl Newman, for the State.

Daniel M. Blau, for defendant.

DILLON, Judge.

This case arises out of two incidents at the same house in the summer of 2020.

I. Background

Defendant Hector Zapata and his former girlfriend Anita Balloon broke up in early 2020. Ms. Balloon then moved to a new house (which she eventually shared with her new boyfriend). Three of their children moved with Ms. Balloon: her adult

daughter, a daughter she shared with Defendant, and Defendant's daughter from a previous relationship. The evidence at trial tended to show the following:

On 26 July 2020, Defendant entered Ms. Balloon's house through an unlocked door and knocked on her new boyfriend's bedroom door, yelling about wanting to see his daughters. The boyfriend and Defendant fought, and the boyfriend eventually pushed Defendant out of the house and into the attached carport, where Defendant injured his head and promptly left the scene.

A month later, in the early morning on 23 August 2020, Defendant entered Ms. Balloon's carport and committed arson. He poured gasoline on her boyfriend's motorcycle and lit it on fire. The fire heavily damaged the motorcycle and also spread to the carport ceiling and into the rafters.

Defendant was tried for both incidents together. Defendant was found guilty of breaking or entering with intent to terrorize or injure for the earlier July 2020 incident. He was also found guilty of first-degree arson and felonious breaking or entering for the August 2020 incident. Defendant appeals.

II. Analysis

Defendant makes several arguments on appeal, which we address in turn.

A. Ineffective Assistance of Counsel

First, Defendant argues he received ineffective assistance of counsel ("IAC") based on his counsel's failure to publish to the jury exculpatory evidence about the July 2020 incident.

"To make a successful ineffective assistance of counsel claim, a defendant must show that (1) defense counsel's 'performance was deficient' and (2) 'the deficient performance prejudiced the defense.' " *State v. Waring*, 364 N.C. 443, 502, 701 S.E.2d 615, 652 (2010) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

Regarding the first element, a defendant must prove that defense counsel's performance "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Our review of counsel's performance "must be highly deferential" and "indulge a strong presumption" that the performance was reasonable. *Id.* at 689. Defense counsel has "wide latitude in matters of strategy," making the defendant's burden of proof "a heavy one for defendant to bear." *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001).

Defendant maintains that he entered Ms. Balloon's house to see his daughters and dogs, not to terrorize her boyfriend. If Defendant lacked an intent to terrorize or injure, then Defendant would only be guilty of misdemeanor breaking or entering, rather than felony breaking or entering. *See* N.C. Gen. Stat. § 14-54(a1), (b) (2020).

A critical piece of evidence suggestive of Defendant's intent was a screwdriver. The boyfriend testified that Defendant was holding a screwdriver when he opened the bedroom door and first saw Defendant, while defense counsel argued that Defendant was not holding a screwdriver at that time. Defense counsel cross-examined the officer on the scene that day about the screwdriver, to which the officer replied he did not recall "anything about a screwdriver." Defendant contends his

counsel should have introduced additional evidence concerning the screwdriver, namely, body camera footage in which the boyfriend told the officer that Defendant picked up the screwdriver *after* being pushed out of the house.

We conclude that the record is not developed sufficiently for our Court to make a determination on this issue. We, therefore, dismiss Defendant's IAC claim without prejudice to allow Defendant to file a motion in the trial court to consider this issue.

B. Motion to Sever Offenses for Trial

Next, Defendant argues the trial court abused its discretion by denying his motion to sever the July 2020 and August 2020 offenses for trial. Defendant asserts that he wanted to testify on his own behalf about the July 2020 breaking or entering with intent to terrorize or injure charge, but reserve his Fifth Amendment right not to testify in regard to the August 2020 arson charge.

A trial court must grant a motion to sever of offenses if "necessary to promote a fair determination of the defendant's guilt or innocence of each offense[.]" N.C. Gen. Stat. § 15A-927(b)(1) (2022). "This rule requires a two-step analysis: (1) a determination of whether offenses have a transactional connection, and (2) if there is such a connection, consideration then must be given as to whether the accused can receive a fair hearing on more than one charge at the same trial." *State v. Perry*, 142 N.C. App. 177, 180-81, 541 S.E.2d 746, 748 (2001) (cleaned up). We review a trial court's decision on a motion for joinder or severance for abuse of discretion. *State v. Golphin*, 352 N.C. 364, 399, 533 S.E.2d 168, 195 (2000).

Defendant contends the trial court failed to conduct the second step of the *Perry* analysis. In contrast, we find that the trial court engaged in both steps of the analysis, as demonstrated by the following quote from the motion hearing transcript:

> [I]n the exercise of the Court's discretion, I do find that the two charges are *transactionally related* in that they involve the same location and the same parties. The two crimes are not so separate in time or place as to render the consolidation *unjust or prejudicial to the defendant*[.]

(Emphasis added.) Each sentence corresponds to a step in the *Perry* analysis. The trial court explicitly addressed in the second sentence whether Defendant could receive a fair hearing when it determined the joinder of the offenses *not to be unjust or prejudicial*.

Further, the trial court's determination that Defendant could still receive a fair hearing despite the consolidation of his offenses was not an abuse of discretion. Even without testifying, Defendant could still present a defense to his breaking or entering with intent to terrorize or injure charge. Indeed, the evidence at trial included Defendant's statements spoken during the offense (presented via the boyfriend's testimony), where he claimed his reason for entering the house was to see his daughters and dogs. Defendant's duplicative statements about his intent for entering the house were not necessary for a fair hearing on the charge. Thus, we cannot say the trial court abused its discretion in denying Defendant's motion to sever.

C. Definition of "Building" Element

In his third argument, Defendant contends the trial court erred in denying his

motion to dismiss the felony breaking or entering charge from the August 2020 incident for insufficient evidence. Specifically, Defendant contends there was insufficient evidence that the carport he entered satisfied the criminal statute's "building" element. We disagree.

In reviewing the sufficiency of the evidence, we inquire "whether there is substantial evidence of each essential element of the offense charged . . . [and t]he evidence is to be considered in the light most favorable to the State[.]" *State v. Workman*, 309 N.C. 594, 598, 308 S.E.2d 264, 267 (1983).

The pertinent statute states that "[a]ny person who breaks or enters any building with intent to commit any felony or larceny therein shall be punished as a Class H felon." N.C. Gen. Stat. § 14-54(a) (2020). Further, "'building' shall be construed to include any dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house, and any other structure designed to house or secure within it any activity or property." N.C. Gen. Stat. § 14-54(c).

There are two possible categories of "buildings" at issue here: (1) a "building within the curtilage of a dwelling house" and (2) "any other structure designed to house or secure within it any activity or property."

Additionally, our Court previously considered the definition of the term "building" in *State v. Gamble*, 56 N.C. App. 55, 56-59, 286 S.E.2d 804, 805-06 (1982). The *Gamble* Court's definition of "building" turned on the existence of a roof. *Id.* at

59, 286 S.E.2d at 806 (concluding that an enclosed fence was not a "building" because "[a]lthough [it] may have the characteristics of a wall, it does not have a roof."). The Court also noted that "the legislature always intended 'building' to be restricted to that which has—or is intended to have—one or more walls and a roof, its common definition[.]" *Id.*

Here, Defendant entered the carport attached to Balloon's house to light her boyfriend's motorcycle on fire. The carport has a roof and two walls. It shares a roof with the one-story, ranch-style house. It also shares a brick wall with the house, and it includes a back wall which connects to the house. The other two sides are open. Two beams support the carport's roof on the open sides. Because the carport has "one or more walls and a roof[,]" it satisfies the legislature's common definition. *See id.* It also meets the *Gamble* Court's definition, as it has a roof.

Additionally, the carport is deemed part of a building under both statutory categories discussed above. Regarding the category of "building within the curtilage of a dwelling house[,]" the carport is not a *separate* building within the curtilage, but it is clearly *part of* a building (the dwelling house) within the curtilage. Under the other category of "any other structure designed to house or secure within it any activity or property[,]" the carport again qualifies. It is a structure with a roof and two walls, and it secures property (such as bikes, cars, and the motorcycle set on fire in this case) within it.

Thus, we conclude the carport is a "building" pursuant to N.C. Gen. Stat. § 14-

54(a), meaning the trial court did not err in denying Defendant's motion to dismiss.

D. Jury Instructions

Fourth, Defendant argues the trial court erred by incorrectly defining the term "building" in its jury instructions regarding the felony breaking or entering charge for the August 2020 incident. We disagree.

We conclude this issue is unpreserved. At the charge conference, the trial court and both parties discussed the proposed jury instructions for the August 2020 breaking or entering charge. The trial court proposed, "So what I would say there is that walking into the carport would be an entry, especially since it's under the roofline of the structure," to which defense counsel responded, "Sure." The trial court then added those changes to the jury instructions, and both parties reviewed the instructions overnight and agreed to them the next morning. While reading the jury instructions aloud to the jury, the trial court read, "The term 'building' includes any area under the roof of the structure[,]" an instruction to which the parties had already agreed. Accordingly, we review for plain error. *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012) ("Unpreserved error in criminal cases . . . is reviewed only for plain error.").

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Id.*

at 518, 723 S.E.2d at 334.

Here, we conclude Defendant cannot meet his high burden to show that the jury instruction amounted to plain error: after examining the record, we do not find that Defendant was prejudiced by the court's definition of "building." Thus, the court did not err.

E. Defendant's Prior Record Level at Sentencing

Defendant argues his 1991 Connecticut attempted murder conviction was scored improperly during calculation of his prior record level, leading to a harsher sentence than appropriate. We disagree.

"In calculating a defendant's prior record level, a trial court must determine whether the statute under which a defendant was convicted in another state is substantially similar to a statute of a particular felony in North Carolina, which the State must show by a preponderance of the evidence." *State v. Graham*, 379 N.C. 75, 79, 863 S.E.2d 752, 754-55 (2021). If the statutes are substantially similar, the out-of-state conviction will be "treated as that class of [North Carolina] felony for assigning prior record level points." N.C. Gen. Stat. § 15A-1340.14 (2022).

Here, the difference between the Connecticut and North Carolina murder statutes is the malice element. Connecticut does not require malice, whereas North Carolina does. Conn. Gen. Stat. § 53a-54a(a) (1990); *State v. Coble*, 351 N.C. 448, 449, 527 S.E.2d 45, 47 (2000). Malice is satisfied if a defendant "take[s] the life of another intentionally without just cause, excuse, or justification." *State v. Reynolds*,

307 N.C. 184, 191, 297 S.E.2d 532, 536 (1982) (citation omitted).

A murder in North Carolina has malice if the defendant *intends to kill*, and one element of the Connecticut murder statute is the *intent to cause another's death*. *See* Conn. Gen. Stat. § 53a-54a(a) ("A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception[.]"). Thus, we hold that the North Carolina and Connecticut murder statutes are substantially similar, and Defendant's prior record level was scored correctly.

III. Conclusion

We dismiss Defendant's IAC claim without prejudice to his right to bring it as a Motion for Appropriate Relief for his counsel's alleged failure to publish to the jury certain evidence tending to show that Defendant did not possess a screwdriver when he entered Ms. Balloon's home during the first incident. This dismissal is without prejudice to any right Defendant may have to raise this issue in a motion in the trial court. We, otherwise, conclude Defendant had a fair trial, free from reversible error.

NO ERROR in part, DISMISSED in part.

Judges ARROWOOD and GORE concur.

Report per Rule 30(e).