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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-706

Filed 7 May 2024

Guilford County, No. 20 CRS 88040

STATE OF NORTH CAROLINA

v.

JODY CHINNAS

Appeal by defendant from judgment entered 19 September 2022 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 6 February 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Brenda Menard, for the State.

Hynson Law, PLLC, by Warren D. Hynson, for defendant-appellant.

ZACHARY, Judge.

Defendant Jody Chinnas appeals from the judgment entered against him upon a jury's verdict finding him guilty of misdemeanor cruelty to animals. After careful review, we conclude that Defendant received a fair trial, free from error. We decline to invoke Rule 2 of our Appellate Rules to review Defendant's unpreserved constitutional argument.

BACKGROUND

The evidence at trial, viewed in the light most favorable to the State, tended to show as follows: Ron Murphy owns the Air Harbor Airport (the "Airport") in Greensboro. The Airport property consists of "about 40 acres." The runway is mostly grass with "a 25-foot paved section[,]" which is "about a hundred feet wide." "[T]here are trees all the way around" the Airport property.

Mr. Murphy testified that when he purchased the Airport, he gave Defendant permission to hunt there. In 2010, Mr. Murphy also allowed Defendant to erect a "deer stand" on the property.

In addition, Mr. Murphy "let individuals walk their dogs" off leash on the Airport property. One of those individuals was Kenny Rotenstreich. For at least two years, Mr. Rotenstreich walked Charlie at the Airport. Charlie was a seven-year-old white female Siberian Husky with gray around her ears and light markings "on her hind" who weighed "every bit of a hundred pounds." Mr. Rotenstreich and Charlie usually walked on the Airport property twice a week on the weekends before sunrise. When he brought Charlie to the Airport, he would "walk down the runway, and Charlie would hang out on the edge of the runway inside the trees, down . . . where this abandoned hunting house was."

At around 6 o'clock in the morning on 14 November 2020, Defendant arrived at the Airport and set up to hunt from the deer stand. Roughly one hour later, Mr. Rotenstreich went to the Airport to walk Charlie.

Mr. Rotenstreich explained that, on the morning of 14 November 2020, "as [he] walked down [the runway] about halfway, Charlie was on the tree-line . . . . There's a lake off to the left, . . . and we passed there. We got to the opening down at the bottom. And Charlie followed around the tree-line." He stated that "[a]s we continued walking down, I hear[d] this loud rifle shot . . . about 40 feet from where I was. And then next thing I heard was Charlie just crying like a baby, just howling and howling and howling. And then there was a second shot."

"About that time, [Defendant] came out of the shooting box" holding "a gun . . . in the air[.]" Mr. Rotenstreich asked, "Did you shoot my dog? You shot my 'blank' dog . . . ." Defendant's first response was that he "didn't see a collar" and that he "do[esn't] like dogs in [his] hunting area. They scare things off." He also stated that he "thought [Charlie] was a coyote[,]" to which Mr. Rotenstreich responded: "A coyote weighs 45 pounds and is brown. This a white dog. Why are you shooting my white dog?" Defendant "repeated he doesn't like dogs in his hunting area." Defendant then had a "discussion with [Mr. Rotenstreich] about [it] being open season on a coyote[.]"

Larry Oppegaard's property is adjacent to the Airport. He testified that since 2016 he has "walk[ed] [his] dog, Spot, at least once-a-day, and sometimes three times a day" at the Airport. Mr. Oppegaard and Spot walked with Mr. Rotenstreich and Charlie at the Airport "numerous times." When Mr. Oppegaard saw Mr. Rotenstreich and Charlie on the morning of 14 November 2020, he said, "Spot, . . . we'll just go out there and let you run with Charlie this morning." Mr. Oppegaard went outside not

long after, heard Mr. Rotenstreich's screams, and then helped him to collect Charlie's body.

On 8 December 2020, a magistrate issued a criminal summons against Defendant charging him with misdemeanor cruelty to animals in violation of N.C. Gen. Stat. § 14-360(a). On 1 September 2021, the district court entered judgment finding Defendant guilty of misdemeanor cruelty to animals. On 7 September 2021, Defendant filed written notice of appeal to the superior court.

This matter came on for hearing in superior court on 13 September 2022. On 14 September 2022, the jury returned its verdict finding Defendant guilty of cruelty to animals. On 19 September 2022, the trial court entered judgment against Defendant for misdemeanor cruelty to animals, sentencing Defendant to 30 days in the custody of the Guilford County Sheriff, suspending the sentence, placing Defendant on unsupervised probation for 12 months, and ordering Defendant to pay court costs. The trial court ordered as a special condition of probation that "Defendant shall forfeit [his] hunting license for a period of 3 years, after which Defendant must reapply for [a] license." Defendant timely filed written notice of appeal.

APPELLATE JURISDICTION

On 28 September 2022, Defendant filed written notice of appeal from the judgment entered against him with a certificate of service indicating that he served the notice of appeal on the district attorney. However, Defendant failed to designate in his notice of appeal the court to which appeal was taken.

Therefore, on 2 October 2023, Defendant filed a petition for writ of certiorari requesting that this Court permit review of the judgment entered against him in the event that his "right to appeal may have been waived for trial counsel's failure to include the name of the court to which appeal was taken pursuant to" Rule 4.

Rule 4 of the North Carolina Rules of Appellate Procedure provides, in pertinent part, that a written notice of appeal must "designate the . . . court to which appeal is taken[.]" N.C.R. App. P. 4(b). However, "a defendant's failure to designate this Court in a notice of appeal does not warrant dismissal of the appeal where this Court is the only court possessing jurisdiction to hear the matter and the State has not suggested that it was misled by the defendant's flawed notice of appeal." *State v. Sitosky*, 238 N.C. App. 558, 560, 767 S.E.2d 623, 624 (2014), *disc. review denied*, 368 N.C. 237, 768 S.E.2d 847 (2015).

Here, the State does not contend that it suffered any prejudice as a result of Defendant's failure to state his intent to appeal to this Court, "which we interpret to mean that the State was not misled by the defective notice." *State v. Springle*, 244 N.C. App. 760, 763, 781 S.E.2d 518, 521 (2016). Accordingly, "we conclude that a dismissal of Defendant's appeal is not warranted. We therefore dismiss Defendant's petition for writ of certiorari and proceed to address the merits of the appeal." *Sitosky*, 238 N.C. App. at 561, 767 S.E.2d at 625.

DISCUSSION

Defendant argues that "the State's uncontroverted evidence" at trial "showed that [Defendant] genuinely believed he was lawfully hunting a coyote"; thus, the trial court erred in denying his motion to dismiss the charge of cruelty to animals because the State "failed to meet its burden" to show that he "possessed the requisite intent . . . and knowingly shot a dog" as required by the statute creating the offense.

Defendant additionally asserts that the trial court "violated [his] State Constitutional right to hunt when it required him to forfeit his hunting license for 3 years as a condition of special probation."

<u>Defendant's Motion to Dismiss</u>

A. Standard of Review

"We review the denial of a motion to dismiss based on an insufficiency of evidence de novo." *State v. Steele*, 281 N.C. App. 472, 476, 868 S.E.2d 876, 880, *disc. review denied*, 382 N.C. 719, 878 S.E.2d 809 (2022). "In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Osborne*, 372 N.C. 619, 626, 831 S.E.2d 328, 333 (2019) (citation omitted). Substantial evidence is that amount of evidence "necessary to persuade a rational juror to accept a conclusion." *Id.* (citation omitted).

The evidence is "considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom." *Id.* (cleaned up). However, "the defendant's evidence, unless

favorable to the State, is not to be taken into consideration." *State v. Israel*, 353 N.C. 211, 216, 539 S.E.2d 633, 637 (2000) (citation omitted). "[I]f the record developed before the trial court contains substantial evidence, whether direct or circumstantial, or a combination, to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *Osborne*, 372 N.C. at 626, 831 S.E.2d at 333 (cleaned up).

B. Analysis

The State charged Defendant in this case with misdemeanor cruelty to animals in violation of N.C. Gen. Stat. § 14-360(a). That section provides:

> If any person shall intentionally overdrive, overload, wound, injure, torment, kill, or deprive of necessary sustenance, or cause or procure to be overdriven, overloaded, wounded, injured, tormented, killed, or deprived of necessary sustenance, any animal, every such offender shall for every such offense be guilty of a Class 1 misdemeanor.

N.C. Gen. Stat. § 14-360(a) (2023). Subsection (c) provides that "the term 'animal' includes every living vertebrate in the classes Amphibia, Reptilia, Aves, and Mammalia except human beings." *Id.* § 14-360(c). However, among other statutory exemptions, the term does not apply to "[t]he lawful taking of animals under the jurisdiction and regulation of the Wildlife Resources Commission," *id.* § 14-360(c)(1), or to "[l]awful activities conducted for the primary purpose of providing food for human or animal consumption[,]" *id.* § 14-360(c)(2a).

"To be punishable as a violation of G.S. 14-360, the act must first be willful . . . ." *State v. Fowler*, 22 N.C. App. 144, 147, 205 S.E.2d 749, 751 (1974). "[T]he intent of the defendant [is] an essential element to determine willfulness . . . ." *Id.* "A defendant's intent is seldom provable by direct evidence and must usually be proved through circumstantial evidence." *State v. Bediz*, 269 N.C. App. 39, 42, 837 S.E.2d 188, 191 (2019) (citation omitted). "Intent is a mental attitude" that is "ordinarily . . . proved by circumstances from which it may be inferred." *State v. Baskin*, 190 N.C. App. 102, 109, 660 S.E.2d 566, 572 (citation omitted), *disc. review denied*, 362 N.C. 475, 666 S.E.2d 648 (2008).

Moreover, "there is no element of 'malice' required for a defendant to be found guilty of misdemeanor cruelty to animals"; the State need only present substantial evidence that the defendant "did intentionally overdrive, overload, wound, injure, torment, kill, or deprive of necessary sustenance, or cause or procure to be overdriven, overloaded, wounded, injured, tormented, killed, or deprived of necessary sustenance, any animal." *State v. Gerberding*, 237 N.C. App. 502, 507, 507, 767 S.E.2d 334, 338, 337 (2014) (cleaned up).

In this case, "[w]hen viewed in a light most favorable to the State, sufficient evidence supported the inference that Defendant intended" to kill Mr. Rotenstreich's dog, Charlie. *State v. Rogers*, 255 N.C. App. 413, 416, 805 S.E.2d 172, 174 (2017). Mr. Rotenstreich testified that, on the morning of the shooting, the fog was "light[,]" "the

visibility was well over 300 feet[,]"[1] and that he "had no problems seeing[.]" He also testified that it "was daylight at [the] time" because "[t]he sun was coming up." In addition, the State presented evidence concerning the magnifying scope that Defendant used that morning. Mr. Rotenstreich testified that, after the shooting, he asked Defendant "about his scope, [and] he told me it was a ten-time scope; meaning, if [an object] was 10 feet away, he saw it a foot away. If it was 50 feet away, it appeared to be 5 feet away." Defendant also told him that, before the shooting, he "had zeroed in his gun; that he could shoot clearly a hundred yards away with his scope[.]" Mr. Rotenstreich explained to the jury: "[T]hat astonished me, because the dog was 15 yards away . . . . That's why I just didn't believe [Defendant] when he said he thought [Charlie] was a coyote." Defendant admitted that he was able to see within "30 to 40 yards," and that he looked into his scope before shooting his rifle.

Mr. Oppegaard testified that he had seen Defendant several times before on the Airport property, and that they had interacted sometime in 2018 or 2019. Mr. Oppegaard said that he saw Defendant there during deer season as Mr. Oppegaard "was coming back from walking [his] dog and [Defendant] was coming out from his deer stand, and he said to me, 'I wish you wouldn't walk your dog down here. The smell of dog scares away my deer.' "

[1] Mr. Rotenstreich testified that he was able to estimate this distance based on the Airport's runway markings.

Additionally, the State asked Defendant: "[F]rom '93, '94, up until 2020, had you ever seen dogs on the property and owners and their dogs walking?" Defendant answered: "Oh, yeah." Defendant also agreed that he was "aware that people walked their dogs without a leash on that property[.]" Defendant testified that "[a]s far as creating a mess[,] [i]t's kind of annoying" whenever an animal or a person invades his hunting area "because of all the time and effort you spend and they don't contribute nothing to it, but then you go down there and you see that they're down there . . . just walking around, just, you know, just doing nothing."

Finally, the following exchange occurred during the State's cross-examination of Defendant:

> Q. And you indicated that you could see about 30 yards. So you were able to see her pretty clearly?
>
> A. Yeah. At that point, yeah.
>
> Q. And . . . you thought that the hundred pound husky was a 30- to 40-pound coyote?
>
> A. I did not sit there and size it up. . . . I did not sit there and analyze it.

Defendant agreed that the coyote that he had seen recently on his trail camera was not white. Mr. Rotenstreich testified that Charlie stood tall and "[w]ell above [his] knees[,]" and that the coyotes he had seen in the past were "thirty-five to 45 pounds. They are dark brown, brown eyes, are scrawny-looking." Mr. Oppegaard testified that he had also seen coyotes at the Airport several times before, and that it

was always "[l]ate in the afternoon, early evening" because "coyotes [are] nocturnal[.]" He testified that they are "not . . . nearly as big as a large dog. They're . . . like a small to medium-size dog." He testified that they are "medium-brown" in color and that "[t]hey are pretty hungry and scraggly-looking." Mr. Oppegaard testified that he had never "seen a hundred pound coyote at the . . . Airport" nor had he ever "seen a white coyote" there. Mr. Rotenstreich testified that Charlie did not "have any red or brown spots on her" and that she was mostly "white with some black and gray on her." The State also introduced a picture of a coyote. Officer Griffin testified that he has seen possibly "[a] hundred coyotes" and confirmed that he was not "aware of" any "hundred pound coyote" nor had he "seen a completely white coyote[.]"

When viewed in the light most favorable to the State, we conclude that there was substantial evidence from which a jury could reasonably infer that Defendant knew that he was shooting a dog, and that this evidence was sufficient to establish the requisite intent under N.C. Gen. Stat. § 14-360(a). *Rogers*, 255 N.C. App. at 416, 805 S.E.2d at 174; *see Baskin*, 190 N.C. App. at 109, 660 S.E.2d at 572 (explaining that intent is "ordinarily . . . proved by circumstances from which it may be inferred"); *State v. Hamilton*, 77 N.C. App. 506, 512, 335 S.E.2d 506, 510 (1985) (noting that "[i]n borderline or close cases, our courts have consistently expressed a preference for submitting issues to the jury" (cleaned up)), *disc. review denied*, 315 N.C. 593, 341 S.E.2d 33 (1986). The trial court therefore did not err when it denied Defendant's motion to dismiss the charge of misdemeanor cruelty to animals.

Special Condition of Probation

Defendant next argues that "the trial court erred and violated [his] state constitutional right to hunt when it required him to forfeit his hunting license for 3 years as a condition of special probation."

Defendant concedes that "[n]o objection was made in the trial court to the trial court's imposing a term of special probation" and that, "[a]s such, this Court can only review this issue by invoking Rule 2 of the North Carolina Rules of Appellate Procedure." *See State v. Spinks*, 277 N.C. App. 554, 571, 860 S.E.2d 306, 320 (2021) ("In that we will not ordinarily consider a constitutional question not raised before the trial court, Defendant cannot prevail on this issue without our invoking Rule 2, because his constitutional argument was waived." (cleaned up)).

Rule 2 of the North Carolina Rules of Appellate Procedure authorizes this Court to suspend the appellate rules in order to reach the merits of an otherwise unpreserved issue when doing so would be "necessary to prevent manifest injustice to a party[.]" *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008) (cleaned up). Rule 2, however, is an "extraordinary step" that "must be invoked cautiously[.]" *Id.* (cleaned up). As our Supreme Court has explained, "Rule 2 relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest, or to prevent injustice which appears manifest to the Court and only in such instances." *State v. Hart*, 361 N.C. 309, 315–16, 644 S.E.2d 201, 205 (2007) (citation omitted).

In the present case, we discern no manifest injustice that would result from declining to review the merits of Defendant's argument concerning the forfeiture of his hunting license for three years as a special condition of his probation. Thus "[i]n our discretion, we decline to invoke Rule 2 to review Defendant's unpreserved [constitutional] argument." *Spinks*, 277 N.C. App. at 571, 860 S.E.2d at 320 (cleaned up).

CONCLUSION

For the reasons set forth herein, we conclude that Defendant received a fair trial, free from error. We further decline, in our discretion, to invoke Rule 2 to review Defendant's unpreserved constitutional argument concerning the special condition of his probation.

NO ERROR.

Chief Judge DILLON and Judge FLOOD concur.

Report per Rule 30(e).