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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-538

Filed: 19 May 2020

Martin County, Nos. 16 CRS 50527–28, 17 CRS 12–14

STATE OF NORTH CAROLINA

v.

KAREN NICOLE KELLER

Appeal by defendant from judgments entered 18 July 2018 by Judge Andrew Taube Heath in Martin County Superior Court. Heard in the Court of Appeals 4 December 2019.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Kacy L. Hunt, for the State.*

*Meghan Adelle Jones for defendant-appellant.*

BRYANT, Judge.

Where defendant failed to assert her statutory right to a capacity hearing and was not denied due process, the trial court did not err in proceeding to trial. Where the indictment was sufficiently specific and facially valid, the trial court did not err in entering judgment upon conviction.

Defendant Karen Nicole Keller is the mother of three children: Timothy, born in July 2013; Keith, born in October 2014; and Lauren, born in October 2015.<sup>1</sup> On 29 August 2015, Keith was taken to a hospital and treated for abrasions and skin infection. Defendant told the treating physician that Keith had fallen and “hit his face and forehead.”

On 30 January 2017, four felony indictments were issued charging defendant as follows: felony child abuse (“FCA”) inflicting serious bodily injury upon Keith from asphyxiation resulting in loss of consciousness occurring on 20 Oct 2015 [16 CRS 50527]; FCA inflicting serious bodily injury by holding Keith’s head under a running faucet in an attempt to drown him [17 CRS 12]; FCA inflicting serious physical injury to Keith causing burns from scalding hot water [17 CRS 13]; and, FCA inflicting serious physical injury to Keith by causing bruises and lacerations to his chin, face, and head area occurring on 29 August 2015 [17 CRS 14]. A misdemeanor child abuse warrant was issued to defendant on 24 May 2016 for causing bruises to the cheek of Timothy on or about 30 November 2013. [16 CRS 50528]

Prior to charges being filed, defendant had admitted to slapping and biting four-month-old Timothy causing bruises to his cheek; admitted to holding Keith’s face under running water for ten to fifteen seconds; admitted to pouring scalding water

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<sup>1</sup> Pseudonyms are used to protect the juveniles’ privacy and for ease of reading.

over Keith's body; admitted to choking Keith; and admitted to placing her hand over Keith's mouth to prevent his crying until he turned blue.

Defendant was tried by a jury before the Honorable Andrew T. Heath, Judge presiding, on 16 July 2018. The State presented significant evidence at trial. In addition to defendant's pretrial admissions, the State introduced expert medical testimony, photographic testimony showing the extent of injuries to Keith and Timothy, as well as witness testimony from law enforcement and DSS, which served to corroborate the charges against defendant.

Defendant was found guilty as charged and sentenced accordingly. Defendant appeals.

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On appeal, defendant argues the trial court erred by I) failing to conduct a capacity hearing and II) entering judgment upon conviction where the indictment was facially invalid.

*I*

First, defendant argues the trial court erred, and thereby denied her right to due process, by deciding to proceed with trial when her capacity was in question. We disagree.

Generally, a "defendant's failure to object to alleged errors by the trial court operates to preclude raising the error on appeal." *State v. Ashe*, 314 N.C. 28, 39, 331

S.E.2d 652, 659 (1985). However, “when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court’s action is preserved, notwithstanding defendant’s failure to object at trial.” *Id.* Therefore, we may review defendant’s statutory argument *de novo*. *State v. Harding*, 258 N.C. App. 306, 316, 813 S.E.2d 254, 262 (2018). “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, 632–33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted).

Pursuant to N.C. Gen. Stat. § 15A-1001,

[n]o person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect [s]he is unable to understand the nature and object of the proceedings against [her], to comprehend [her] own situation in reference to the proceedings, or to assist in [her] defense in a rational or reasonable manner.

N.C.G.S. § 15A-1001(a) (2019). “The question of the capacity of the defendant to proceed may be raised at any time on motion by the prosecutor, the defendant, the defense counsel, or the court[,]” provided that the motion “detail[s] the specific conduct that leads the moving party to question the defendant’s capacity to proceed.” *Id.* § 15A-1002(a). “When the capacity of the defendant to proceed is questioned [pursuant to N.C.G.S. § 15A-1001(a)], the court shall hold a hearing to determine the defendant’s capacity to proceed.” *Id.* § 15A-1002(b)(1).

In applying these statutory provisions, th[e Supreme] Court has recognized that the trial court is only required to

hold a hearing to determine the defendant's capacity to proceed if the question is raised. Therefore, the statutory right to a competency hearing is waived by the failure to assert that right at trial.

*State v. Badgett*, 361 N.C. 234, 259, 644 S.E.2d 206, 221 (2007) (internal citation and quotation marks omitted).

In the instant case, prior to trial, defendant's counsel filed a motion questioning defendant's capacity to proceed to trial as "[her] history, the nature of the charges, [her] statements regarding her own well-being and status of her state of mind, as well as social services'[] investigations and reports . . . raise[d] concerns about defendant's mental status." As a result, the trial court ordered that defendant be committed to the Central Regional Hospital-Butner Campus for psychiatric examination. The hospital later determined that defendant was capable of proceeding to trial.<sup>2</sup> The trial court did not thereafter hold a capacity hearing.

We note that neither defendant nor her defense counsel asserted at trial that defendant was entitled to a capacity hearing. Additionally, neither challenged the determination that defendant was competent, understood the charges, and was able to proceed with the trial. Nothing in the record of the trial proceedings indicates any conduct or cause to question defendant's capacity to proceed to trial. In fact, following her conviction on all counts of child abuse, the trial court asked defendant if she

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<sup>2</sup> The State's motion to amend the record on appeal—to include a document dated 13 December 2017 in the clerk's file referencing file number 17 CRS 12, which indicated defendant was capable of proceeding to trial—is allowed.

wanted to be heard with respect to her sentencing. Defendant briefly spoke about becoming a better, “much more responsible” mother to her newborn child—a factor she wanted the trial court to consider for her sentence. As such, defendant waived her statutory right to a hearing under N.C.G.S. § 15A-1002(b)(1) by her failure to assert that right. *See State v. Dollar*, 292 N.C. 344, 350, 233 S.E.2d 521, 525 (1977) (stating that the defendant had waived his right to a hearing by failing to assert that right after a psychiatric examination revealed that the defendant was capable of proceeding to trial, and the trial court did not conduct any further hearing on the issue); *see also State v. Young*, 291 N.C. 562, 568, 231 S.E.2d 577, 580–81 (1977) (holding that the defendant waived his statutory right to a hearing subsequent to his commitment by failing to assert that right and that failure to hold such hearing did not deprive the defendant of due process).

Here, as in *Dollar* and *Young*, after defense counsel’s motion for competency was filed, a determination was made that defendant was capable of proceeding to trial. As a result, when no further question was raised prior to trial regarding defendant’s competency, the trial court properly proceeded to trial. *See Badgett*, 361 N.C. at 259–60, 644 S.E.2d at 221. Lastly, we reject defendant’s assertion—made without citation to any authority—that a change in defendant’s counsel somehow affected defendant’s legal status regarding her competency to proceed. Therefore, the

trial court did not err in failing to conduct a hearing where defendant waived that right. Defendant's argument is overruled.

*II*

Defendant also argues the trial court lacked jurisdiction to enter judgment for felonious child abuse inflicting serious bodily injury because the indictment failed to allege a "serious bodily injury." We disagree.

This Court reviews an indictment alleged to be facially invalid *de novo*. *State v. McKoy*, 196 N.C. App. 650, 654, 675 S.E.2d 406, 410 (2009). "[W]here an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (2000).

"It is well established that [a] felony conviction must be supported by a valid indictment which sets forth each essential element of the crime charged." *State v. Williams*, 242 N.C. App. 361, 364, 774 S.E.2d 880, 883 (2015) (alteration in original) (citation and quotation marks omitted). "As a [p]rerequisite to its validity, an indictment must allege every essential element of the criminal offense it purports to charge, although it need only allege the ultimate facts constituting each element of the criminal offense." *State v. Harris*, 219 N.C. App. 590, 592, 724 S.E.2d 633, 636 (2012) (alteration in original) (internal citation and quotation marks omitted). "An indictment that fails to state some essential and necessary element of the offense is

fatally defective, and if the indictment at issue is fatally defective, the superior court lacks subject matter jurisdiction over the case[.]” *Williams*, 242 N.C. App. at 364, 774 S.E.2d at 883 (internal citations and quotation marks omitted).

“[W]hile an indictment should give a defendant sufficient notice of the charges against him, it should not be subjected to hyper[-]technical scrutiny with respect to form.” *Harris*, 219 N.C. App. at 592, 724 S.E.2d at 636 (citation omitted). Generally, “an indictment for a statutory offense is sufficient, if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words.” *Id.* at 593, 724 S.E.2d at 636 (citation omitted).

In the instant case, defendant was charged with felonious child abuse inflicting serious bodily injury under N.C. Gen. Stat. § 14-318.4(a3), which provides that:

[a] parent . . . of a child less than 16 years of age who intentionally inflicts any serious bodily injury to the child or who intentionally commits an assault upon the child which results in any serious bodily injury to the child . . . is guilty of a Class B2 felony.

N.C.G.S. § 14-318.4(a3) (2019). “Serious bodily injury,” which is an essential element to felonious child abuse inflicting serious bodily injury, is defined as “[b]odily injury that creates a substantial risk of death or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization.” *Id.* § 14-318.4(d)(1).

Here, the indictment clearly mirrored the language of N.C.G.S. § 14-318.4(a3) because the State alleged that defendant “unlawfully, willfully and feloniously did intentionally inflict serious bodily injury, [by] holding [Keith’s] head under a running water faucet in an attempt to drown him[;] [Keith] . . . was one year old and thus under 16 years of age[;] [and a]t the time [] defendant inflicted the injury[,] defendant was providing care for [Keith] as the child’s parent.” The indictment properly named Keith as the child victim; the age of Keith, who was only one year old; named defendant as the child’s parent; and described the assault suffered by Keith, which created a substantial risk of death by drowning.

While defendant argues that “the State specifically allege[d] [an act] which is not a serious bodily injury,” her argument is without merit. The indictment sufficiently included the statutory elements of the crime with the ultimate facts necessary to allow defendant to prepare a proper defense. *See State v. Farrar*, 361 N.C. 675, 678, 651 S.E.2d 865, 866 (2007) (“[T]he primary purpose of the indictment is to enable the accused to prepare for trial.” (citation and quotation marks omitted)); *see also State v. Penley*, 277 N.C. 704, 707, 178 S.E.2d 490, 492 (1971) (“If an indictment charges the offense in a plain, intelligible, and explicit manner and contains averments sufficient to enable the court to proceed to judgment, and to bar a subsequent prosecution for the same offense, it is sufficient.”).

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*Opinion of the Court*

For example, the indictment in 16 CRS 50527, describing an *act* of asphyxiation which resulted in a loss of consciousness, is no different with respect to notice of the charge against defendant as the challenged *act* of holding a one-year-old's head under running water in a deliberate attempt to drown him. Thus, we find the indictment was facially valid. Defendant's argument is overruled.

NO ERROR.

Judges COLLINS and HAMPSON concur.

Report per Rule 30(e).