IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-124

No. COA20-451

Filed 6 April 2021

Onslow County, No. 18 CRS 54430

STATE OF NORTH CAROLINA,

v.

PATRICIA KIRLEY, Defendant.

Appeal by defendant from judgment entered 5 March 2020 by Judge Henry L. Stevens IV in Onslow County Superior Court. Heard in the Court of Appeals 9 March 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Alexandra M. Hightower, for the State.

Richard Croutharmel, for Appellant-Defendant.

CARPENTER, Judge.

¶ 1 Patricia Kirley ("Defendant") appeals pursuant to N.C. Gen. Stat. § 15A-1444(a) (2019) from judgment entered after a jury found her guilty of simple assault under N.C. Gen. Stat. § 14-33(a). Defendant argues that the trial court erred in not instructing the jury on the defense of automatism or unconsciousness. She further contends that the trial court erred by sentencing her to intermediate punishment,

including a two-day active term of imprisonment, on a prior record level I, class 2 misdemeanor conviction. After careful review, we find no error in the trial proceedings, but we remand for correction of the clerical error in the form order.

I. Factual & Procedural Background

¶ 2 The evidence at trial tended to show the following: Defendant brought her vehicle to an automotive repair shop owned by Mr. Shawn Boggs ("Mr. Boggs") in June of 2018. After the vehicle was repaired**,** Defendant sent Mr. Boggs multiple text messages in which she threatened him and stated she would not be paying for the work performed. Mr. Boggs refused to release Defendant's vehicle due to her non-payment, and he filed a mechanic's lien with the North Carolina Department of Motor Vehicles after the car service remained unpaid for ten days.

¶ 3 Defendant filed a grievance in small claims court against the repair shop, and Mr. Boggs represented the shop at a 6 August 2018 hearing. As the magistrate presiding over the small claims hearing read the verdict in favor of the repair shop, Defendant "lunged over from her seat" and attacked Mr. Boggs by "punch[ing him], claw[ing him], and climb[ing] on [his] face." Defendant testified that she had been standing next to her husband, with whom she was in "a domestic abuse relationship," and he was arguing with Mr. Boggs. Defendant's husband then lifted his hand in the "same way . . . he would smack [her] upside [her] head." According to Defendant, this was a "trigger" for her and "[she] lost it"; she did not remember anything that

happened after, until she awoke in an ambulance.

¶ 4 Two bailiffs of the small claims proceeding, Deputies Peoples and Turner, gained control of Defendant and removed her from the courtroom as she "yell[ed] and scream[ed]." Deputy Peoples testified that once Defendant was out of the courtroom, she "kneeled down on the floor and appeared to have some kind of seizure." According to Deputy Turner, she "was kicking and flailing around" in "a seizing motion." He also testified that Defendant did not appear to lose consciousness during the incident. After the hearing, the bailiffs advised Mr. Boggs to wait and seek treatment after Defendant was transported to the hospital. While Mr. Boggs waited at the courthouse, he filed a criminal complaint against Defendant in the magistrate's office. Mr. Boggs then sought treatment at the local hospital emergency room for gouges and scratches Defendant inflicted on his head.

¶ 5 On 6 August 2018, the Onslow County Sheriff's Office charged Defendant with simple assault pursuant to N.C. Gen. Stat. § 14-33(a). On 25 October 2018, the presiding judge of the Onslow County District Court, the Honorable Henry L. Stevens IV, held a bench trial and found Defendant guilty. On 25 October, the district court sentenced Defendant to 30 days in jail. It suspended this sentence and placed Defendant on a 24-month supervised probation. Defendant was also ordered to obtain a psychiatric evaluation and to comply with treatments ordered as well as to pay $2,144.64 in restitution and costs. On 30 October 2018, Defendant appealed by

filing a written notice of appeal to the superior court for *de novo* review.

¶ 6 On 3 March 2020, the Honorable Henry L. Stevens IV, now sitting as a superior court judge, began Defendant's jury trial in the Onslow County Superior Court. Defendant entered a plea of not guilty. Arguing her attack was unintentional and a result of a seizure, Defendant moved to dismiss upon the close of the State's evidence, and the trial court denied this motion. At the conclusion of all evidence, Defendant moved for directed verdict, which the trial court also denied. At the charge conference, Defendant did not make any special requests for jury instructions and did not otherwise object to the instructions. The jury found Defendant guilty of simple assault.

¶ 7 On 5 March 2020, the superior court sentenced Defendant based upon having no previous convictions and a prior record "level I." Upon the oral announcement of the court's judgment, Defendant was ordered to serve 30 days in jail; the sentence was suspended, and Defendant was placed on 24 months of supervised probation upon the conditions that she: serve two-days' confinement in the custody of the sheriff's department, not make contact with the victim, comply with the treatment recommended by her psychological evaluation, and pay restitution in the amount of $2,144.64 and costs. Contrary to the court's order, the sentencing worksheet indicated that her supervised probation was for a term of 18 months rather than 24 months. It also indicated the two-day sentence was "intermediate punishment,"

instead of a condition of "community and intermediate probation" imposed by N.C. Gen. Stat. § 15A-1343(a1). Defendant gave oral notice of appeal in open court.

II. Jurisdiction

¶ 8 This Court has jurisdiction to address Defendant's appeal pursuant to N.C. Gen. Stat. § 15A-1444(a) (2019).

III. Issues

¶ 9 The issues on appeal are whether: (1) the trial court erred by failing to instruct the jury on the defense of automatism, or unconsciousness, where Defendant testified that she did not recall her attack on the victim; (2) the trial court erred by sentencing Defendant to a two-day active term of imprisonment as a condition of intermediate punishment on a prior record level I, class 2 misdemeanor conviction.

IV. Jury Instruction on Defense of Automatism

¶ 10 Defendant contends that the trial court erred by not instructing on the defense of automatism,[1] despite her failing to object to the jury instructions or request special

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[1]In North Carolina, "automatism" is defined as:

> connoting the state of a person who, though capable of action, is not conscious of what he is doing. It is to be equated with unconsciousness, involuntary action [and] implied that there must be some attendant disturbance of conscious awareness. Undoubtedly automatic states exist and medically they may be defined as conditions in which the patient may perform simple or complex actions in a more or less skilled or uncoordinated fashion without having full awareness of what he is doing.

State v. Fields, 324 N.C. 204, 208, 376 S.E.2d 740, 742 (1989) (citations omitted).

instructions.

A. Standard of Review

¶ 11 Since Defendant did not object to the trial court's instructions or request an alternate jury instruction, the standard of review for this claim is plain error. *State v. Rogers*, 219 N.C. App. 296, 307, 725 S.E.2d 342, 349 (2012).

¶ 12 Pursuant to Rule 10(a)(4) of the North Carolina Rules of Appellate Procedure,

> [i]n criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(a)(4). In reviewing the record, the appellate court must find that "the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done . . . ." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (quotations omitted) (emphasis in original). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted).

B. Analysis

¶ 13 In her first argument, Defendant alleges that the trial court committed plain and reversible error by not instructing the jury on the defense of automatism because

she testified that she could not recall attacking her victim. We disagree.

¶ 14 Our Supreme Court has recognized that automatism, or unconsciousness, "is a complete defense to a criminal charge, separate and apart from the defense of insanity; that it is an affirmative defense; and that the burden rests upon the defendant to establish this defense, unless it arises out of the State's own evidence, to the satisfaction of the jury." *State v. Caddell*, 287 N.C. 266, 290, 215 S.E.2d 348, 363 (1975). In *Caddell*, the Court also noted that its

> research ha[d] disclosed no decision, other than *State v. Mercer*, [275 N.C. 108, 165 S.E.2d 328 (1969), *overruled in part by Caddell*, 287 N.C. at 290, 215 S.E.2d at 363] in which any court has held that the defendant's uncorroborated and unexplained testimony that, at the moment of his otherwise criminal act, he "blacked-out," and so does not remember what, if anything he did, is sufficient to carry to the jury the question of unconsciousness as a defense.

Caddell, 287 N.C. at 290, 215 S.E.2d at 363. In *Mercer*, the Court stated that the "defendant was entitled to an instruction to the effect the jury should return verdicts of not guilty if in fact defendant was *completely* unconscious" at the time of the transpiring events. *State v. Mercer*, 275 N.C. 108, 119, 165 S.E.2d 328, 336 (1969) (emphasis in original). "When determining whether an instruction of diminished capacity should be submitted to the jury, the Court must consider whether there is evidence sufficient to cause a reasonable doubt in the mind of a juror as to whether defendant had a culpable mental state." *State v. Bush*, 164 N.C. App. 254, 265, 595

S.E.2d 715, 722 (2004) (citation omitted). A trial court may only give instructions that are supported by "some reasonable view of the evidence." *State v. Lampkins*, 283 N.C. 520, 523, 196 S.E.2d 697, 699 (1973).

¶ 15 Cases in which automatism has been found to be an appropriate defense tend to have evidence other than a defendant's own testimony. *See State v. Jerrett*, 309 N.C. 239, 266, 307 S.E.2d 339, 353 (1983) (holding that an instruction for automatism was warranted where testimony from the defendant's parents and two psychiatrists corroborated the defendant's testimony that he had a history of black-outs); *State v. Fields*, 324 N.C. 204, 212, 376 S.E.2d 740, 744 (1989) (holding the defendant's family's testimony that the defendant had a substantial history of being "in his own world" in conjunction with the expert witness's testimony that he was in a "disassociative state" when he shot the victim permitted a jury to find the defendant was not conscious when he committed the act); *State v. Smith*, 59 N.C. App. 227, 230, 296 S.E.2d 315, 317 (1982) (holding that the defendant's competent evidence that she drank and used large amounts of narcotics before committing an armed robbery supported a jury instruction on automatism).

¶ 16 Here, Defendant relies solely on her own testimony as evidence she was unconscious when she attacked Mr. Boggs. After being advised of her rights, Defendant testified that when her husband "lifted his hand up, then it just—I lost it." She went on to testify: "I don't remember anything. I didn't have any intention."

Defendant did not provide expert testimony, medical evidence, or any other evidence at trial to explain her "black-out" or purported seizure or that she had a history of "black-outs" or seizures; she provided only "uncorroborated and unexplained testimony" as well as conclusory statements regarding her mental state. *See Caddell*, 287 N.C. at 290, 215 S.E.2d at 363.

¶ 17 In support of her argument, Defendant attempts to distinguish her case from *State v. Morganherring*, 350 N.C. 701, 517 S.E.2d 622 (1999), *cert. denied*, 529 U.S. 1024, 120 S. Ct. 1432 (2000); *State v. Boyd*, 343 N.C. 699, 473 S.E.2d 327 (1996), *cert. denied*, 519 U.S. 109, 117 S. Ct. 778 (1997); and *State v. Graves*, 234 N.C. App. 117, 761 S.E.2d 754, 2014 N.C. App. LEXIS 518 (N.C. Ct. App., May 20, 2014) (unpublished) on the grounds "that there was evidence other than her own testimony that tended to show she may have lost consciousness." In *Morganherring*, the Court held that "[e]ven though [the] defendant claim[ed] not to remember all of his actions during the murders, there [was] no evidence in the record which indicate[d] that defendant was either unconscious or not conscious of his actions." *Morganherring*, 350 N.C. at 733–34, 517 S.E.2d at 641. In *Boyd*, the defendant claimed to have had memory loss as a result of flashbacks from his experiences in Vietnam. *Boyd*, 343 N.C. at 713, 473 S.E.2d at 334. The Court held his own testimony at trial was insufficient to support an instruction on unconsciousness, particularly since his graphic confession to police on the day of the incident tended to contradict his

testimony in which he claimed he had no memory of the events. *Id.* at 715, 473 S.E.2d at 334–35. In the unpublished case of *Graves*, the defendant testified that he lost consciousness when he punched his victim, which was contradicted by the State's testimony that the defendant admitted to the offense. *State v. Graves*, 234 N.C. App. 117, 761 S.E.2d 754, 2014 N.C. App. LEXIS 518, at *3, *13. The Court held that the trial court did not abuse its discretion in denying the defendant's request for an instruction on automatism. *Id.* at *13–14.

¶ 18 We find Defendant's attempt at distinguishing the aforementioned cases unpersuasive. As in *Morganherring*, *Boyd*, and *Graves*, the record here does not present sufficient evidence to indicate Defendant was unconscious or not conscious when she attacked Mr. Boggs.

¶ 19 Defendant also asserts that the State's evidence of her seizure-like movements tended to show that she "did not appear to be in her right mind" and tended to corroborate her testimony. We disagree. Although the State's testimony tended to show that Defendant's physical movements were characteristically similar to that of a seizure episode, the State's evidence did not corroborate Defendant's testimony. The testimony from the deputies only described her behavior as "seizure-like" and "[she] appeared to have some kind of seizure." Furthermore, as the State correctly points out, Defendant's "seizure-like" episode did not occur until after she attacked Mr. Boggs and was outside the courtroom; thus, this testimony did not prove

Defendant was "not conscious of h[er] actions" during her attack on Mr. Boggs. *See Morganherring*, 350 N.C. at 733–34, 517 S.E.2d at 641.

¶ 20 The burden is on Defendant to establish the defense of automatism. *See Caddell*, 287 N.C. at 290, 215 S.E.2d at 363. Although Defendant alleged that she had a seizure after the attack, she failed to provide evidence of this medical condition and that the condition caused her to be unconscious when she attacked Mr. Boggs. *See State v. Andrew*, 154 N.C. App. 553, 557–58, 572 S.E.2d 798, 802 (2002), *disc. rev. denied*, 358 N.C. 156, 592 S.E.2d 696 (2004) (denying defendant's request for an instruction on automatism for lack of sufficient evidence after hearing general testimony from defendant's expert witness, a board-certified pharmacotherapist, who described symptoms of serotonergic syndrome and indicated that defendant's medications could have caused a person to act unknowingly). We hold that there was not sufficient evidence "to cause a reasonable doubt in the mind of a juror" as to whether Defendant was conscious during her attack on Mr. Boggs; therefore, the trial court did not commit plain error by not instructing on automatism. *See Bush*, 164 N.C. App. at 265, 595 S.E.2d at 722.

V. Sentencing Error

¶ 21 Defendant claims in her second argument that the trial court erred in sentencing her to intermediate punishment.

A. Standard of Review

¶ 22 "In North Carolina, a defendant's right to appeal in a criminal proceeding is purely a creation of state statute." *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869, *disc. review denied*, 356 N.C. 442, 573 S.E.2d 163 (2002); *see* N.C. Gen Stat. § 15A-1444 (2019).

> N.C. Gen. Stat. § 15A-1444 . . . governs a defendant's right to appeal from judgment entered upon a guilty plea and limits it to specific circumstances. This includes when a sentence '[c]ontains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level.'

State v. Allen, 249 N.C. App. 376, 379, 790 S.E2d 588, 590 (2016) (quoting N.C. Gen. Stat. § 15A-1444(a2)(2) (2015)); N.C. Gen. Stat. § 15A-1444(a2)(2) (2019). N.C. Gen. Stat. § 15A-1401 provides that "[r]elief from errors committed in [misdemeanor] criminal trials and proceedings . . . may be sought" by appeal as provided in Article 90. N.C. Gen. Stat. § 15A-1401 (2019).

¶ 23 Generally, "[w]hen a defendant assigns error to the sentence imposed by the trial court, our standard of review is 'whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing.'" *State v. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997) (citation omitted); N.C. Gen. Stat. § 15A-1444(a1) (2019). However, when an "alleged sentencing error is only clerical in nature, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth." *Allen,* 249 N.C. App. at 379, 790 S.E.2d

at 591 (citations and quotations omitted). Our Court has defined the term "clerical error" to mean: "[a]n error resulting from a minor mistake or inadvertence, esp[ecially] in writing or copying something on the record, and not from judicial reasoning or determination." *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000) (quoting *Clerical Error*, Black's Law Dictionary (7th ed. 1999)). We have held that the inadvertent checking of a box on a judgment form to be a clerical error. *See State v. Gell*, 351 N.C. 192, 218, 524 S.E.2d 332, 349 (2000); *Allen*, 249 N.C. App. at 382, 790 S.E2d at 592.

B. Analysis

¶ 24 Defendant contends more specifically that the trial court erred by "enter[ing an] order under a misapprehension of the law," which resulted in the court sentencing her to intermediate punishment on a prior record level I, class 2 misdemeanor conviction. She further argues that the trial court erred by ordering her to serve a two-day jail sentence prior to serving probation. Accordingly, Defendant requests that the Court vacate her sentence and remand the case for resentencing. The State asserts that Defendant was correctly sentenced to two days of confinement as part of community probation, and any errors claimed by Defendant are clerical in nature. After careful consideration of the record, we agree with the State.

¶ 25 "The prior conviction level of a misdemeanor offender is determined by calculating the number of the offender's prior convictions . . . ." N.C. Gen. Stat. § 15A-

1340.21(a) (2019). A prior conviction level for misdemeanor sentencing is a "level I" when an offender has no prior convictions. N.C. Gen. Stat. § 15A-1340.21(b) (2019). A sentence of community punishment within the duration of one to thirty days is permitted for a defendant with a prior conviction level I and a conviction of a class 2 misdemeanor offense. N.C. Gen. Stat. § 15A-1340.23(c)(2) (2019). According to N.C. Gen. Stat. § 15A-1340.11(2) (2019), "community punishment" is "[a] sentence in a criminal case that does not include an active punishment or assignment to a drug treatment court, or special probation defined in [Gen. Stat. §] 15A-1351(a). It may include any one or more of the conditions set forth in [Gen. Stat. §] 15A-1343(a1)." One such condition under N.C. Gen. Stat. § 15A-1343(a1) that may be imposed by a court as part of a community or intermediate probation is

> [s]ubmission to a period or periods of confinement in a local confinement facility for a total of no more than six days per month during any three separate months during the period of probation. The six days per month confinement provided for in this subdivision may only be imposed as two-day or three-day consecutive periods.

N.C. Gen. Stat. § 15A-1343(a1)(3) (2019) (emphasis added).

¶ 26 In pertinent part, the trial court orally announced its judgment and sentenced Defendant to a suspended 30-day confinement in the custody of the Onslow County Sheriff's Department, an 18-month supervised probation, and a two-day period of confinement in the custody of the Onslow County Sheriff's Department. The trial

court reduced its statements to writing on form AOC-CR-604D – Judgment Suspending Sentence – Misdemeanor (the "Judgment"); however, there were inconsistencies between what was ordered by the trial judge and the sentence that was recorded on the written Judgment. The sentence recorded is a valid community punishment in compliance with N.C. Gen. Stat. § 15A-1343 notwithstanding the block being marked that the trial court imposed an intermediate sanction.

¶ 27 In *State v. Allen*, the Court confronted a similar issue of a trial court's inadvertent clerical error when the court sentenced a defendant to "intermediate punishment" on a form order after it had sentenced her to community punishment and a ten-day term of confinement pursuant to a plea agreement. 249 N.C. App. at 378, 790 S.E.2d at 590. We held that the 10-day sentence was permitted under the terms of a "community punishment" pursuant to N.C. Gen. Stat. 15A-1343(a1)(3), even though the form order had erroneously indicated "Special Probation – G.S. 15A-1351" under "Intermediate Punishments" rather than under "Community and Intermediate Probation Conditions – G.S. 15A-1343(a1)." *Id.* at 381, 790 S.E.2d at 592. The Court stated that the error was "purely . . . clerical" based on the facts of the case. *Id.* at 381, 790 S.E.2d at 592. We remanded the case to the trial court for correction of the clerical error. *Id.* at 382, 790 S.E.2d at 592.

¶ 28 The facts of this case are strikingly similar to those of *Allen* in that the defendants in both cases entered a proper sentence for community punishment, but

the court erroneously indicated the sentence was a condition of special probation under "Intermediate Punishments" on the form order. *See id.* at 381, 790 S.E.2d at 591–92. One notable difference between *Allen* and the case at bar is the trial court in *Allen* explicitly specified that the defendant would serve "community punishment" as part of her plea agreement. *Id.* at 377, 790 S.E.2d at 589.

¶ 29 Here, the trial court did not specify at the sentencing hearing whether Defendant was subject to intermediate punishment or community punishment. However, based on the record and the conformity of the trial court's orders with the relevant sentencing statutes, the errors made by the trial court in completing the Judgment were inadvertent clerical errors.

¶ 30 The superior court correctly noted at the sentencing hearing that Defendant had "zero prior record level points and would be a record level I for misdemeanor sentencing" following her conviction of a class 2 misdemeanor, and properly recorded this information on the Judgment form. Pursuant to N.C. Gen. Stat. § 15A-1340.23(c)(2), a suspended 30-day confinement in the custody of the sheriff's department as part of a community punishment was permitted for Defendant's sentencing in light of her prior record level I. The Judgment erroneously ordered Defendant to serve an active sentence of two days' confinement in the custody of the sheriff's department as "Special Probation – G.S. 15A-1351" under "Intermediate Punishments" rather than a two-day confinement as part of "Community and

Intermediate Probation Conditions – G.S. 15A-1343(a1)." However, a two-day confinement was permitted as a condition of community and intermediate probation under N.C. Gen. Stat. 15A-1343(a1)(3).

¶ 31 The court also placed Defendant on 18 months of supervised probation instead of 24 months as ordered. Under N.C. Gen. Stat. § 15A-1343.2(d)(1) (2019), **"**[u]nless the court makes specific findings that longer or shorter periods of probation are necessary, the length of the original period of probation for [misdemeanor] offenders sentenced [to community punishment] under Article 81B" is "not less than [6] nor more than 18 months."

¶ 32 In considering the proper length of Defendant's probation, she was sentenced under Article 81B pursuant to N.C. Gen. Stat. § 15A-1340.21. Although the trial court ordered her to 24 months of probation contrary to the permitted duration of probation under structured sentencing without making specific findings, it correctly denoted "18 months" on the written Judgment entered by the court. Defendant does not argue that 18 months was incorrect nor did the form order conflict with the relevant structured sentencing statutes. Since the trial court did not make any specific findings that a longer probation term was necessary, the trial court was correct in sentencing Defendant to an 18-month term of probation even if the trial judge had incorrectly ordered 24 months while orally announcing its judgment at the sentencing hearing.

VI. Conclusion

¶ 33 The trial court did not err in not instructing the jury on the defense of automatism or unconsciousness because Defendant failed to present sufficient evidence that would support the instruction. The trial court's classification of Defendant's two-day sentence as an "intermediate punishment" as opposed to a "community and intermediate probation condition" was an inadvertent clerical error when the court's sentence was reduced to writing on the form order. We remand the Judgment for correction of the clerical error consistent with the trial court's order and N.C. Gen. Stat. 15A-1343.2(d)(1).

NO ERROR IN PART, REMANDED FOR CORRECTION OF CLERICAL ERROR IN PART.

Judges STROUD and DIETZ concur.

Report per Rule 30(e).