An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-189

No. COA20-784

Filed 15 March 2022

Randolph County, No. 15CRS54303

STATE OF NORTH CAROLINA

v.

KATHLEEN JANE HAYNER, Defendant.

Appeal by defendant from judgment entered 14 October 2019 by Judge James P. Hill Jr. in Randolph County Superior Court. Heard in the Court of Appeals 19 October 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kristine M. Ricketts, for the State-appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for defendant-appellant.

GORE, Judge.

¶ 1 Defendant Kathleen Jane Hayner was indicted for one count of neglect of a disabled or elder adult causing serious injury and one count of involuntary manslaughter. The jury returned verdicts of guilty for the former charge and not guilty for the latter. On appeal, defendant argues the trial court erred in denying her motions to dismiss as there was insufficient evidence for her to be convicted as a

principal or under an acting in concert theory. Additionally, she contends the trial court erred by providing the jury with an acting in concert instruction. We discern no error.

I. Factual and Procedural Background

¶ 2 Prior to a period of hospitalization culminating in her death, 83-year-old Thelma Ruth Hayner lived at home with her son James Hayner, his wife defendant, and defendant's special-needs daughter, Ashley. Thelma began residing with them in 2010 and paid for her own living expenses with her monthly pension and Social Security benefits. Over time, Thelma developed dementia with psychosis and became incontinent. In 2014, Thelma could no longer use the toilet and relied exclusively on adult diapers.

¶ 3 In 2015, James worked as a school bus driver. Defendant had left her employment as an elementary school teacher to homeschool Ashley full time. During the work week, James was away from the home about six hours a day, sometimes more.

¶ 4 James was his mother's primary caretaker. He bathed Thelma, clothed her, helped her move around, changed her adult diapers, and took her to the doctor. While James was at work, defendant checked in on Thelma. James testified that defendant "would just open up the door and say, 'You okay, Ruthy?' and that'd be about it." In early 2015, Thelma developed a bedsore and the Hayners got assistance from an in-

home healthcare provider for treatment.

¶ 5 In February of 2015, James and defendant brought Thelma to see Dr. Lindley Holt because Thelma needed a new primary care physician. Dr. Holt referred Thelma for in-home physical therapy. Physical therapy assistant Leigh Davis was assigned to Thelma's case and frequently visited the Hayners' home. While working in the Hayners' home, Davis primarily interacted with defendant. Davis occasionally spoke with James as she was leaving. Davis testified that "[defendant] was very involved in the care." Thelma's physical therapy ended on 26 March 2015.

¶ 6 On 24 June 2015, defendant brought Thelma to see Dr. Holt for treatment of a wound on Thelma's right hand. Thelma was in a wheelchair, wearing an adult diaper, and was unable to stand independently. Dr. Holt testified that the rest of Thelma's general appearance was neat and clean. During that appointment, defendant reported that Thelma "was becoming more difficult due to her dementia or memory loss." Thelma "was refusing to help with chores; she was ramming people with her walker;" and defendant reported "multiple bruises from where she had been rammed with [Thelma's] walker." Defendant inquired about placing Thelma in an assisted living facility.

¶ 7 In early July of 2015, defendant, James, and Ashley drove to New York to visit defendant's special-needs adult son. James drove defendant and Ashley up to Buffalo, New York, on 7 July 2015, and he flew back to Greensboro, North Carolina,

the next day. Defendant did not want to travel by airplane because she had previously had cancer and her sinus cavities were removed. As a result, she could not smell and the change in pressure from flying gave her headaches. Later in the month, James flew back to New York, and after a delay of a couple of days, he drove defendant and Ashley back to North Carolina.

¶ 8 During those trips, no one provided care for Thelma. James left drinks, chips, and "Crustable-type" prepacked peanut-butter sandwiches for Thelma to eat while they were gone. The Hayners arranged for Noelle Kirkman, a 21-year-old member of their church, to visit their house twice a day, feed their nine cats, and "look in on [Thelma]" while they were gone. Kirkman testified that she was instructed to "watch the cats and feed them" and "make sure they had enough water and food."

¶ 9 Kirkman further testified that the Hayners mentioned Thelma, but "they said just to open the door and kind of just to wave to her and say hi, and that was it, and she had all the food and everything that she needed." Kirkman stated that she remembered having to unhook a latch on Thelma's bedroom door to check in on her but acknowledged on cross-examination that it was possible the door was not latched. During one of her visits to care for the Hayners' cats, Kirkman opened Thelma's door and found her on the floor. Kirkman picked Thelma up off the floor, put her back in her chair, and called the Hayners. Kirkman asked if they needed her to call 911. Kirkman recalled that the Hayners declined her offer to call 911, telling her that

"they would be home, I think they said the next day and that they would handle it then." Kirkman did not specify who she spoke with on the phone. The Hayners returned home from New York on or about 27 July 2015. James stated his mother was doing well when he returned home from both trips.

¶ 10 In the early morning of 4 September 2015, James called 911 to report Thelma had a bedsore. James acknowledged he first noticed a sore on Thelma's left hip about three to four weeks earlier, which he described as "round" with "a black texture to it. It looked like a scab." James applied "some triple acting antibiotic salve" and "bandages" to the wound. James claimed he got up at 5 a.m. on 4 September 2015 and began his "usual routine." When he was changing Thelma's adult diaper, he "noticed the bedsore had gotten worse." He recalled "[i]t wasn't black anymore. The skin was starting to decay. And I did see a hole—I couldn't see the whole thing, but then I said, 'This doesn't look good.'" James woke defendant up and told her, "You need to come see this." Defendant told him to call 911, which he did.

¶ 11 Emergency services arrived at the Hayner home and took Thelma to Randolph Hospital. Thelma had multiple serious bedsores on her hips, buttocks, and back. Thelma's case was referred to Randolph County Department of Social Services, Adult Protection Services ("APS") for alleged neglect, and social worker Nicolette Martinez responded to the hospital. Martinez testified that prior to entering Thelma's hospital room, she "could smell her" and the odor "smelled like a dead body." Upon seeing

Thelma's condition, including multiple bedsore wounds, Martinez remarked that it was the "worst case I had ever had and I was disgusted."

¶ 12 In addition to the bedsores, Martinez observed that Thelma had very long chin hairs, "either dirt or feces underneath her fingernails that were not being cared for. Her toenails were not trimmed[,] and I don't know what was underneath her toenails, but it was not very—they were not very clean. It was very nasty looking. And, of course, her feet were swollen." Martinez spoke with James at the hospital, and he told her that he was the "primary caregiver" and that defendant "didn't take care of [Thelma] hardly any longer because [Thelma] would get hostile with [defendant]." Martinez testified that based on her experience and observations, even without a finding of bedsores, the situation was indicative of neglect.

¶ 13 As an APS social worker, Martinez was required to make a criminal referral "[i]f there is serious enough wounds, evidence of wounds, evidence of serious neglect, [or] evidence of exploitation." She took several photos of Thelma's wounds and electronically sent them to Asheboro Police Department ("APD"). Officer Michael Dehaven of the APD responded to the hospital to investigate Martinez's referral. Officer Dehaven testified that he saw Thelma in the ICU and she seemed "disoriented." He took several photos of wounds on her back, ankles and heel, spine, and on each buttock.

¶ 14 Later that day, APD simultaneously and separately interviewed defendant and

James; both interviews were recorded. Defendant admitted to knowing about Thelma's bedsore for about a week, helping to purchase bandages for it, and participating in applying ointment to the wound. Both said James was the only one who changed Thelma's diapers.

¶ 15 While defendant and James were being interviewed, Detective Snodgrass of the APD obtained and executed a search warrant on the Hayners' home where he took several photographs. At trial, those photos were shared with the jury for illustrative purposes, and he testified about what he saw that day. He described Thelma's bedroom and a latch-hook lock on the outside of her doorframe. He described adult diapers, part of an adult toilet and chair device, and a peanut-butter jar. In one drawer, he found a handwritten note that read, "I will listen and clean my bathroom without being told." He looked in the washing machine and found "foul-smelling bedding or blankets inside" that "smell[ed] of fecal matter." Outside, under the back porch and beneath bags of potting soil, he discovered a mattress, a plastic fitted sheet, and a white fitted sheet containing both fecal matter and human tissue, and a wet pillow. In the Hayners' city-issued trash dumpster, he found a blanket soiled with both wet and dry fecal matter.

¶ 16 On 8 September 2015, Thelma was transferred from Randolph Hospital to Kindred Long-Term Acute Care Hospital in Greensboro under the care of Dr. Jason Van Eyk. During his initial assessment of Thelma, who was without family present

and unable to speak, Dr. Van Eyk and his team noted "multiple wounds" that were "pretty severe." These wounds, bedsores, are also called pressure ulcers and decubitus wounds. Dr. Van Eyk explained the different stages of bedsores:

> Stage I through IV basically talks about . . . the depth of the wound. Stage I is . . . where you can touch the wound, it's red, it hasn't opened up, but you touch it and it doesn't blanche. . . . Stage II is a partial thickness that goes maybe down to the dermis. Stage III is where you can see down to the fat and that is called a full-thickness wound. Stage IV is where you can see down to the tendon or muscle. We get worried about bone infections with that. And unstageable is basically an ulcer that you can't tell what stage it is because it's got a black eschar or it's got so much necrosis on the top of it you can't see underneath it.

¶ 17 Dr. Van Eyk testified using photos taken during his exam. He said that some of Thelma's wounds were "not acute[,]" did not "occur in 48 hours[,]" and "could have been there for weeks." Thelma had several Stage IV bedsores, the most severe involving visible tendon, muscle, or bone, on her hips and sacral area. Dr. Van Eyk stated, "you could look down in those wounds and see her bone, you could see her hip." He testified that several of the wounds could have been caused by "a whole number of things," such as "pressure[,]" "nutrition status[,]"or "an infection." Moreover, "[f]ecal matter in the wound can help break the wound down more and . . . hinder healing."

¶ 18 As a physician, Dr. Van Eyk is required to report cases to the Department of Social Services and typically makes such referrals once or twice per year. After

examining Thelma's history, wounds, and lab results, Dr. Van Eyk personally called APS "as soon as [he] walked out of [her] room." He expected Thelma to recover from her wounds, albeit slowly.

¶ 19 Thelma died approximately two weeks later on 23 September 2015. Thelma's cause of death was hypertensive cardiovascular disease. State Medical Examiner Dr. Lauren Scott indicated "that dementia and decubitus ulcers in the setting of neglect likely contributed to death."

¶ 20 James and defendant were each charged with one count of neglect of a disabled or elder adult causing serious injury and one count of involuntary manslaughter. James pled guilty to the former charge and was convicted of involuntary manslaughter at trial.

¶ 21 Defendant rejected an offer to plead guilty to neglect of a disabled or elder adult causing serious injury in exchange for dismissal of involuntary manslaughter and imposition of a probationary sentence. At the close of all evidence by each party, the trial court denied defense counsel's motions to dismiss the charges.

¶ 22 At the charge conference, the State requested an acting in concert instruction arguing that defendant and James:

> both take—claim a role during [Thelma's] care during the day . . . regardless of [James's] testimony that the [d]efendant's interaction was very limited opening the door and asking how [Thelma] is[.] I believe we have established a nexus that they were acting in concert in the care or the

> lack thereof, the neglect of Thelma Ruth Hayner[.]

Defense counsel objected, arguing, "There is evidence that [defendant] did care for [Thelma] and there is evidence that James did negligently care for [Thelma], but that's not for the common purpose." The trial court overruled defense counsel's objection and instructed the jury that it could convict defendant of the offenses under a theory that she acted in concert with James.

¶ 23 The jury acquitted defendant of involuntary manslaughter but found her guilty of neglect of a disabled or elder adult causing serious injury. At sentencing, the trial court found two mitigating factors and imposed an active term of 10 to 21 months' imprisonment. Defendant entered oral notice of appeal in open court.

II. Motion to Dismiss

¶ 24 Defendant argues the trial court erred by denying her motion to dismiss as there was insufficient evidence to convict her of neglect of a disabled or elder adult causing serious injury. We disagree.

A. Standard of Review

¶ 25 "We review a trial court's denial of a motion to dismiss *de novo*." *State v. Hicks*, 241 N.C. App. 345, 353, 772 S.E.2d 486, 492 (2015) (citation omitted). "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).

B. Discussion

¶ 26 A motion to dismiss is properly denied if "there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Evidence is deemed less than substantial if it raises no more than mere suspicion or conjecture as to the defendant's guilt." *State v. Wilkins*, 208 N.C. App. 729, 731, 703 S.E.2d 807, 809 (2010) (*purgandum*). "All evidence, both competent and incompetent, and any reasonable inferences drawn therefrom, must be considered in the light most favorable to the State. Additionally, circumstantial evidence may be sufficient to withstand a motion to dismiss when a reasonable inference of defendant's guilt may be drawn from the circumstances." *State v. Blakney*, 233 N.C. App. 516, 518, 756 S.E.2d 844, 846 (2014) (citation omitted).

¶ 27 "The State is entitled to every reasonable inference to be drawn from the evidence. Contradictions and discrepancies do not warrant dismissal of the case; rather, they are for the jury to resolve. Defendant's evidence, unless favorable to the State, is not to be taken into consideration." *Id.* (citation and quotation marks omitted).

¶ 28 The State charged defendant with one count of neglect of a disabled or elder

adult causing serious injury under N.C. Gen. Stat. § 14-32.3(b) (2015). The statute provides in pertinent part:

> [a] person is guilty of neglect if that person is a caretaker of a disabled or elder adult who is residing in a domestic setting and, wantonly, recklessly, or with gross carelessness: (i) fails to provide medical or hygienic care, or (ii) confines or restrains the disabled or elder adult in a place or under a condition that is unsafe, and as a result of the act or failure to act the disabled or elder adult suffers mental or physical injury.
>
> If the disabled or elder adult suffers serious injury from the neglect, the caretaker is guilty of a Class G felony.

N.C. Gen. Stat. § 14-32.3(b).

¶ 29 Defendant concedes, and there is substantial evidence in the record to support that she: (1) was a caretaker for Thelma; (2) Thelma was a disabled and elder adult; and (3) Thelma resided in a domestic setting. On appeal, defendant contends the State presented insufficient evidence of the remaining elements.

1. Unsafe Condition

¶ 30 Defendant argues she could not be convicted as a principal under a theory that she confined Thelma in a place or under an unsafe condition resulting in serious injury. First, she contends that Kirkman gave ambiguous testimony about whether the latch on Thelma's door was hooked or unhooked when she visited the Hayners' residence while they were away in New York. However, such discrepancies are for the jury to resolve as the trier of fact. *See Blakney*, 233 N.C. App. at 518, 756 S.E.2d

at 846. When asked whether she recalled a hook on Thelma's door, Kirkman testified:

> [THE STATE]: Now do you recall that hook on the door back in the summer of 2015?
>
> [KIRKMAN]: I didn't remember it until we had the trial for [James] Hayner and, then, I was able to remember more.
>
> [THE STATE]: Okay. Do you recall—now, as you sit here today, do you recall the hook on that door?
>
> [KIRKMAN]: Yes.
>
> [THE STATE]: Do you recall ever having to manipulate the hook on that door?
>
> [KIRKMAN]: Yes, I do.
>
> . . .
>
> [KIRKMAN]: . . . I do remember unhooking the latch and just opening the door just to see and I would wave to her. Sometimes she would acknowledge me but she never really spoke. Then I would just close the door.

Thus, the State presented substantial evidence that Thelma's door was latched when the Hayners left for New York.

¶ 31 Next, defendant contends that, assuming *arguendo,* the State establishes confinement in a place or under an unsafe condition, there was insufficient evidence to establish the necessary *mens rea* or a causal link between such confinement and the severe bedsores that Thelma later developed. However, we note that the State presented substantial evidence that defendant was aware of Thelma's cognitive

decline and severely impaired autonomy. When defendant brought Thelma to Dr. Holt for treatment, Thelma could not stand unassisted, relied on adult diapers, and "was becoming more difficult due to her dementia and memory loss." At that time, defendant inquired about placing Thelma in an assisted living facility.

¶ 32 The State presented substantial evidence that defendant went to New York with James and Ashley despite being aware of Thelma's compromised mental and physical condition. When Kirkman called to tell the Hayners that she found Thelma lying on the floor and offered to call 911, the Hayners declined assistance because "they would be home . . . the next day and [ ] they would handle it." A reasonable inference can be drawn from this evidence that Thelma spent an additional night confined in an unsafe condition without remotely adequate care. This, at a minimum, is substantial evidence to present to a jury of defendant's conscious and reckless disregard for Thelma's safety and wellbeing.

¶ 33 Defendant asserts the State presented no evidence establishing a causal link between confinement and the exacerbation of Thelma's bedsores to a severity seen when Thelma was later hospitalized. However, as Dr. Van Eyk testified, Thelma's bedsores were "not acute[,]" did not "occur in 48 hours[,]" and would have taken weeks to develop. James testified that he first noticed one of Thelma's bedsores, already large in diameter and marked with necrosis, a week after Kirkman found Thelma lying on the floor in the Hayners' home. A reasonable inference can be drawn from

this evidence that Thelma's wounds were caused or exacerbated by being left alone, confined in her bedroom, in an unsafe condition.

2. Failure to Provide Medical or Hygienic Care

¶ 34 Defendant argues she was only an ancillary caretaker for Thelma, and her husband James was solely responsible for intimate care such as dressing, bathing, and changing Thelma's adult diaper. As Thelma's most severe bedsores were located on her buttocks, back, and body parts that only James would see, defendant maintains that she was wholly unaware of the severity of Thelma's bedsores until he informed her of the issue on 4 September 2015.

¶ 35 However, the statute does not distinguish between a primary and ancillary caretaker. A "caretaker," is "a person who has the responsibility for the care of a disabled or elder adult as a result of *family relationship* or who has assumed the responsibility for the care of a disabled or elder adult voluntarily or by contract." N.C. Gen. Stat. § 14-32.3(d)(1) (emphasis added). Defendant acknowledges her role as a caretaker for Thelma. A caretaker, even an ancillary one, has a duty "to provide medical or hygienic care . . . ." § 14-32.3(b).

¶ 36 Defendant was the only caretaker present for approximately six hours a day while James was at work. The State's evidence suggests that defendant did not provide any medical or hygienic care at all. During that time, defendant "would just open up the door and say, 'You okay, Ruthy?' and that'd be about it." Defendant did

not investigate any of Thelma's wounds, which would have been visually apparent and "smelled like a dead body." Defendant claims she could not smell at all due to an underlying medical condition. However, this evidence is not considered when ruling on a motion to dismiss as it was not presented by the State, was unfavorable to the State, and unsubstantiated outside of James's testimony. Defendant did not notice or care for Thelma's fingernails or nail beds, which had "either dirt or feces underneath[,] . . . were not trimmed[,] and . . . very nasty looking." A reasonable inference can be drawn from the circumstances that defendant "wantonly, recklessly, or with gross carelessness" breached her duty as a caretaker to her mother-in-law, an elderly and disabled woman with dementia, by failing to provide any "medical or hygienic care" whatsoever. *Id.*

3. Acting in Concert Theory

¶ 37 Defendant argues the State presented insufficient evidence of her guilt under an acting in concert theory.

> There is a principle in our law known as acting in concert. For a person to be guilty of a crime, it is not necessary that he himself do all of the acts necessary to constitute the crime. If two or more persons act together, with a common purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal, if the other commits that particular crime, but he is also guilty of any other crime committed by the other, in pursuance of the common purpose, or as a natural or probable consequence of the common purpose.

State v. Waring, 364 N.C. 443, 503, 701 S.E.2d 615, 652-53 (2010).

¶ 38 Defendant argues there was no evidence that she and James had a "common plan or scheme to commit a culpably negligent act." *State v. Robinson*, 83 N.C. App. 146, 149, 349 S.E.2d 317, 319 (1986). Defendant's argument is without merit. The State presented evidence that both defendant and James left for New York together, leaving a disabled elderly woman with dementia at home alone. They told Kirkman, when arranging for their cats to be fed, that Thelma had everything she needed. When Kirkman found Thelma on the floor, they refused an offer for medical assistance, explaining that they would attend to her when they returned the following day. The State's evidence indicates defendant and James knew about Thelma's wounds prior to 4 September 2015, when they first called 911 because of Thelma's deteriorated condition. When viewing all evidence in a light most favorable to the State, and allowing all reasonable inferences to be drawn therefrom, we conclude the trial court properly denied defendant's motion to dismiss.

III. Jury Instruction on Acting in Concert

¶ 39 Defendant argues, alternatively, that the trial court erred by instructing the jury that it could convict her under an acting in concert theory. We disagree.

A. Standard of Review

¶ 40 Challenges to "the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d

144, 149 (2009) (citations omitted).

B. Discussion

¶ 41 "Where an instruction is requested by a party, and where that instruction is supported by the evidence, it is error for the trial court not to instruct in substantial conformity with the requested instruction." *State v. Rose*, 323 N.C. 455, 458, 373 S.E.2d 426, 428 (1988) (citations omitted). "Under the principle of acting in concert, an individual may be found guilty of an offense if he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *State v. Cox*, 303 N.C. 75, 86, 277 S.E.2d 376, 383 (1981) (*purgandum*).

¶ 42 As outlined above in our discussion of acting in concert, the State presented substantial evidence that defendant and James had a "common plan or scheme to commit a culpably negligent act." *Robinson*, 83 N.C. App. at 149, 349 S.E.2d at 319. For example, they agreed to leave Thelma at home alone overnight without arranging for anyone to change her diaper or otherwise care for her basic hygiene and health. When informed that Thelma was found on the floor, they declined an offer to get medical assistance, knowing they would not be able to attend to Thelma until the next day. As an acting in concert instruction was requested and supported by the evidence produced at trial, the trial court had a duty to "instruct in substantial

conformity with the requested instruction." *Rose*, 323 N.C. at 458, 373 S.E.2d at 428 (1988) (citations omitted). We discern no error.

IV. Conclusion

¶ 43 For the foregoing reasons, the trial court did not error by denying defendant's motion to dismiss the charge of neglect of a disabled or elder adult causing serious injury. As the evidence presented at trial supported a conviction on a theory of acting in concert, it was not error for the trial court to provide that requested instruction to the jury.

NO ERROR.

Chief Judge STROUD and Judge INMAN concur.

Report per Rule 30(e).