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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-481

No. COA21-511

Filed 5 July 2022

Johnston County, No. 15 CRS 54366

STATE OF NORTH CAROLINA

v.

JORGE ANTONIO PORTILLO-TOBIAS

Appeal by defendant from judgment entered 25 January 2021 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 11 May 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Kindelle McCullen, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

ZACHARY, Judge.

¶ 1 Defendant Jorge Antonio Portillo-Tobias appeals from a judgment entered upon the trial court's verdict finding him guilty of assault with a deadly weapon. On appeal, Defendant argues that the trial court committed plain error by neither reading its jury instructions into the record nor providing findings of fact and conclusions of law in support of its verdict. In the alternative, Defendant asserts that

the trial court erred by accepting his waiver of the right to a jury trial because the waiver colloquy was inadequate. After careful review, we affirm.

Background

¶ 2 On 11 July 2015, Defendant allegedly cut the left arm of his then-girlfriend, Blanca Nunez, with a 12-inch knife during an argument while the two were working in a grocery store kitchen. On 21 December 2019, law enforcement officers arrested Defendant.

¶ 3 Thereafter, on 17 February 2020, a Johnston County grand jury returned an indictment charging Defendant with one count of assault with a deadly weapon inflicting serious injury. On 26 October 2020, a Johnston County grand jury returned a superseding indictment, reindicting Defendant for the same offense.

¶ 4 This matter came on for trial in Johnston County Superior Court on 19 January 2021. Before the trial began, Defendant executed a written waiver of his right to trial by jury. Defendant's attorney thereafter informed the court of Defendant's intention, and the trial court conducted a colloquy with Defendant concerning his waiver:

THE COURT: All right. Now, sir, you are charged with the crime of assault with a deadly weapon inflicting serious injury. Do you understand the nature of that charge?

THE DEFENDANT: Yes.

THE COURT: And through your lawyer, you have entered

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a plea of not guilty to that charge. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Now, under the law, you have the absolute right under the U.S., or United States, Constitution and under the constitution of North Carolina to have a jury determine your guilt or innocence. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Now, under the law of North Carolina, you may waive your right to a trial by jury and have your guilt or innocence determined by me as the presiding judge. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Your lawyer has told me that in this case you have chosen to waive your right to trial by jury and you are willing to have your case tried before me as the judge. Is that correct?

THE DEFENDANT: Yes

THE COURT: And has your lawyer discussed this issue with you?

THE DEFENDANT: Yes.

THE COURT: And do you understand that regardless of your lawyer's advice, it is ultimately up to you to decide whether or not you want to waive your constitutional right to a trial by jury?

THE DEFENDANT: Yes, I understand.

THE COURT: Is it, in fact, sir, your desire to waive your right to trial by jury and to have your case tried by me as the judge?

THE DEFENDANT: Yes.

THE COURT: All right. Do you need any further time to discuss that decision with your lawyer?

THE DEFENDANT: No.

THE COURT: Do you have any questions about the things I've just asked you?

THE DEFENDANT: No.

THE COURT: All right. Thank you very much. You may be seated.

¶ 5

The trial proceeded, with the court acting as the factfinder in accordance with Defendant's waiver. At the charge conference, the trial judge, the assistant district attorney, and defense counsel discussed the applicable jury instructions:

THE COURT: All right. It would appear to me, but I want to ask if you folks disagree, that if this case were being tried to a jury of 12, that the appropriate pattern instruction that would be submitted to the trier of fact would be NCPI pattern number 208.15, assault with a deadly weapon inflicting serious injury, with the Court instructing on the lesser included offenses of assault inflicting serious injury, assault with a deadly weapon, and simple assault. Would the State agree with that?

[THE STATE]: Yes, the State would agree, Your Honor.

THE COURT: Would the [D]efendant agree with that?

[DEFENSE COUNSEL]: Yes, sir.

THE COURT: All right. I obviously would include the other instructions typically given to a jury regarding credibility of witnesses and weight of the evidence and burden of proof and reasonable doubt and so forth. And I certainly

understand and will apply those principles of law.

Defendant's counsel then confirmed with the trial court that the State must prove that Defendant intentionally assaulted Ms. Nunez, and the parties delivered their closing arguments.

¶ 6 On 25 January 2021, the trial court returned its verdict finding Defendant guilty of assault with a deadly weapon; the court did not supplement this verdict with findings of fact or conclusions of law. The trial court entered judgment upon its verdict and sentenced Defendant to a term of 60 days in the custody of the Johnston County Sheriff. Defendant timely filed written notice of appeal.

Discussion

¶ 7 On appeal, Defendant argues that the trial court committed plain error by not reading its jury instructions into the record and by not providing findings of fact and conclusions of law in support of its verdict. Alternatively, Defendant contends that the trial court erred by accepting his waiver of the right to a jury trial because his colloquy with the trial court was inadequate.

I. Jury Instructions and General Verdict

¶ 8 Defendant first argues that the trial court plainly erred by not “putting all the jury instructions it would rely upon in the record,” an error compounded by the court's lack of findings and conclusions in support of its verdict. He asserts that these actions

prejudiced him by infringing upon his “fundamental right to appeal almost any issue related to the jury instructions.” We disagree.

¶ 9 Section 15A-1201 of our General Statutes provides, in relevant part, that “[w]hen a defendant waives the right to trial by jury under this section, the jury is dispensed with as provided by law, and the whole matter of law and fact . . . shall be heard and judgment given by the court.” N.C. Gen. Stat. § 15A-1201(b) (2021).

¶ 10 In criminal bench trials, “the trial court is not required to set forth the law it will follow in the form of jury instructions or to make detailed findings of fact and conclusions of law. The trial court may enter a general verdict, just as a jury would in a jury trial.” *State v. Cheeks*, 267 N.C. App. 579, 592, 833 S.E.2d 660, 670 (2019), *aff’d*, 377 N.C. 528, 2021-NCSC-69. “Bench trials differ from jury trials since there are no jury instructions and no verdict sheet to show exactly what the trial court considered, but we also presume that the trial court knows and follows the applicable law unless an appellant shows otherwise.” *State v. Jones*, 260 N.C. App. 104, 108, 816 S.E.2d 921, 924 (2018), *appeal dismissed and disc. rev. denied*, 372 N.C. 710, 831 S.E.2d 90 (2019). We further “presume the trial court has followed ‘basic rules of procedure’ in bench trials.” *Id.* at 109, 816 S.E.2d at 925 (citation omitted).

¶ 11 In the instant case, the trial court did not err by declining to read the jury instructions into the record or to supplement its verdict with findings of fact and conclusions of law. Despite the fact that “the trial court [wa]s not required to set forth

the law it w[ould] follow in the form of jury instructions[.]” *Cheeks*, 267 N.C. App. at 592, 833 S.E.2d at 670, the court nonetheless articulated which instructions it would apply, stating that it would use “NCPI pattern number 208.15, assault with a deadly weapon inflicting serious injury, . . . instructing on the lesser included offenses of assault inflicting serious injury, assault with a deadly weapon, and simple assault.” The court also stated that it would “include the other instructions typically given to a jury regarding credibility of witnesses and weight of the evidence and burden of proof and reasonable doubt and so forth.” Additionally, the trial court was free to “enter a general verdict, just as a jury would in a jury trial”; as factfinder, the court was not required “to make detailed findings of fact and conclusions of law.” *Id.*

¶ 12 Defendant does not argue that the trial court erroneously considered an incorrect instruction; he only asserts that the trial court infringed on his right to appeal by neither explicitly reading the instructions into the record nor providing findings and conclusions in support of its verdict. “[P]resum[ing] that the trial court kn[ew] and follow[ed] the applicable law[.]” *Jones*, 260 N.C. App. at 108, 816 S.E.2d at 924, we discern no error.

II. Waiver of Right to Jury Trial

¶ 13 Defendant next argues that the trial court erred by accepting his waiver of the right to a jury trial because the court conducted an inadequate colloquy, rendering his waiver neither knowing nor voluntary. Specifically, Defendant maintains that the

trial court was required to inform him that “he would not be able to appeal whether the jury instructions were correct or that the trial court would not make findings of fact and conclusions of law to support the verdict in lieu of putting the jury instructions on the record.” Again, we disagree.

A. Standard of Review

¶ 14 Preliminarily, we note that Defendant did not object below to the trial court’s colloquy regarding his waiver of the right to a jury trial; we also note that this Court generally will not address an issue that has not yet been considered and ruled upon by the trial court. *See* N.C.R. App. P. 10(a)(1). Thus, although Defendant argues on appeal that the trial court violated his constitutional right to a jury trial, we solely examine this argument under the statutory framework of N.C. Gen. Stat. § 15A-1201(d)(1). *See State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982) (“[A] constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal.”).

¶ 15 “When a trial court acts contrary to a statutory mandate, the defendant’s right to appeal is preserved despite the defendant’s failure to object during trial.” *State v. Braxton*, 352 N.C. 158, 177, 531 S.E.2d 428, 439 (2000) (citation omitted), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001). “Whether the trial court violated a statutory mandate is a question of law, which we review de novo on appeal.” *State v. Hamer*,

272 N.C. App. 116, 120, 845 S.E.2d 846, 850 (2020), *aff'd*, 377 N.C. 502, 2021-NCSC-67, *reh'g denied*, 379 N.C. 152, 863 S.E.2d 619 (2021).

B. Analysis

¶ 16 “In order to prove that the trial court erred by accepting his waiver of the right to a jury trial, Defendant must show (1) that the trial court violated the waiver requirements set forth in N.C. Gen. Stat. § 15A-1201, and (2) that Defendant was prejudiced by the error.” *Id.* at 119, 845 S.E.2d at 849.

¶ 17 A defendant must “knowingly and voluntarily” waive the right to a trial by jury. N.C. Gen. Stat. § 15A-1201(b). “Before consenting to a defendant’s waiver of the right to a trial by jury, the trial judge shall . . . [a]ddress the defendant personally and determine whether the defendant fully understands and appreciates the consequences of the defendant’s decision to waive the right to trial by jury.” *Id.* § 15A-1201(d)(1).

¶ 18 “Neither N.C. Gen. Stat. § 15A-1201(d)(1) nor applicable case law has established a script for the colloquy that should occur between a superior court judge and a defendant seeking to exercise his right to waive a jury trial.” *State v. Rutledge*, 267 N.C. App. 91, 97, 832 S.E.2d 745, 748 (2019). “Beyond that which is expressly prescribed by statute, no specific inquiries are required for the trial court to determine whether the defendant understands and appreciates the consequences of the decision to waive a jury trial.” *Hamer*, 272 N.C. App. at 125, 845 S.E.2d at 852

(citation and internal quotation marks omitted). “This Court will not read such further specifications into law.” *Id.* (citation omitted).

¶ 19 In the case at bar, the trial court’s colloquy with Defendant regarding his waiver satisfied the requirements of N.C. Gen. Stat. § 15A-1201. During the colloquy, the trial court described Defendant’s charge to him; informed Defendant that he had “the absolute right” to a jury trial; explained to Defendant that the court would substitute for the jury as factfinder if Defendant waived his right; asked Defendant whether he understood that “regardless of [his] lawyer’s advice, it is ultimately up to [Defendant] to decide whether or not [he] want[s] to waive” his right; and confirmed with Defendant personally that he desired to waive his right. The trial court thus sufficiently determined that Defendant “underst[ood] and appreciate[d] the consequences of [his] decision to waive the right to trial by jury[,]” pursuant to § 15A-1201. N.C. Gen. Stat. § 15A-1201(d)(1).

¶ 20 In that “[n]either N.C. Gen. Stat. § 15A-1201(d)(1) nor applicable case law has established a script for the colloquy[,]” *Rutledge*, 267 N.C. App. at 97, 832 S.E.2d at 748, we “will not read such further specifications into law” here, *Hamer*, 272 N.C. App. at 125, 845 S.E.2d at 852 (citation omitted). We conclude that the trial court’s colloquy with Defendant was adequate to evidence Defendant’s knowing and voluntary waiver of his right to a trial by jury.

Conclusion

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¶ 21 Accordingly, we conclude that Defendant received a fair trial, and affirm the trial court's judgment.

AFFIRMED.

Judges MURPHY and HAMPSON concur.

Report per Rule 30(e).