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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-733

Filed 2 July 2024

Craven County, Nos. 19CRS50335, 19CRS50375-76, 20CRS582, 22CRS269-70

STATE OF NORTH CAROLINA

v.

JAMES CHRISTOPHER GIZZI

Appeal by defendant from judgment entered 7 October 2022 by Judge Joshua W. Willey, Jr., in Craven County Superior Court. Heard in the Court of Appeals 1 May 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General, Robert C. Ennis, for the State.

Joseph P. Lattimore, for the defendant-appellant.

TYSON, Judge.

James Christopher Gizzi (“Defendant”) appeals from his convictions of: larceny of a motor vehicle; first degree arson; cruelty to an animal; robbery with dangerous weapon; identity theft; financial card theft; and, concealment of death. Our review discerns no plain error.

I. Background

Marjorie “Maggie” Thompson (“Thompson”) lived in New Bern with her daughter, Jennifer Buck (“Buck”), and her grandson, Defendant. Buck is the adoptive mother of Defendant, who had adopted him along with two of his siblings.

Thompson and Buck began renting a two-bedroom modular home in December 2018. Although Buck kept the majority of her personal property at the modular home she had rented with Thompson, Buck spent most nights at her boyfriend’s house. Defendant and Thompson each had their own bedroom. Thompson’s dog, a miniature Dachshund named “Drac”, also lived inside the home.

The Craven County Emergency Services received a report the modular home Thompson and Buck rented was on fire around 2:15 a.m. on 4 February 2019. Law enforcement officers, firefighters, and other first responders immediately arrived upon the scene to control the fire and investigate the causes.

The owner of the modular home was alerted about the fire and contacted Buck between 2:00 and 2:30 a.m. Buck immediately drove to the house. She also texted and called Thompson and Defendant along the way, but did not receive a response. When Buck arrived at the scene, she noticed her white Toyota Camry vehicle was missing from the residence. The vehicle was titled in Buck’s name, but Thompson was the primary driver. Defendant was not permitted to drive the car due to his lack of a driver’s license.

Craven County Emergency Services Assistant Director Ira Whitford (“Whitford”) responded to the scene. He spoke to the fire chief, who instructed him

to determine the origin and cause of the fire. He started by completing a walk around the entire perimeter of the home. Based upon his initial assessment of the burn patterns, Whitford spoke with Craven County Sheriff's Sergeant Lee about contacting the North Carolina State Bureau of Investigation's ("SBI") Arson Squad. Sergeant Lee approved Whitford's request to seek SBI assistance.

While waiting for the SBI to arrive, Whitford searched the interior of the home. He found Thompson deceased and buried underneath debris. He also discovered her dog, Drac's body, located near Thomspen.

Dr. Karen Kelly, an Associate Professor at East Carolina University's Brody School of Medicine and a forensic pathologist, conducted the autopsy on Thompson. Dr. Kelly conducted an x-ray, which is used to locate any identifying features such as a hip or knee replacement and also to determine if any foul play contributed to the cause of death. The x-ray revealed Thompson had been shot in the head prior to being burned during the fire. She also determined the dog, Drac, was alive at the time of the fire, but had died from smoke inhalation, as evidenced by the soot observed in his trachea.

Department of Insurance Chief State Electrical Engineer Joseph Starling was asked to examine whether the fire could have been the result of an electrical failure. Nothing throughout the course of his investigation led him to conclude the fire was caused by an electrical malfunction. Vincent Morgan, an arson investigator with the SBI, classified the fire as "incendiary caused by human hand upon unknown open

flame to the ignitable vapors of an accelerant.”

Given Defendant’s absence from the scene of the crime, the Craven County Sheriff’s Office applied for search warrants for Defendant’s phone. Sergeant Sawyer received a tip Defendant might be located in Columbus, Mississippi, with his brother. Sawyer researched Defendant’s brother and found a potential address. He contacted the Lowndes County Mississippi Sheriff’s Department, who located Defendant after he returned to his brother’s residence driving Buck’s white Toyota Camry at around 10:00 p.m. that evening. Defendant was taken into custody, and the vehicle was seized.

The next day, Defendant’s brother’s roommate provided the Lowndes County Sheriff’s Department with a bag containing Defendant’s clothes and two handguns. It was later confirmed by Buck that the silver revolver belonged to Thompson, the other handgun belonged to Buck, and both guns had been stored inside Thompson’s home.

The data extracted from Defendant’s cell phone revealed Defendant had approximately 90 missed calls or texts during the night of the fire. Defendant’s first outgoing call was to his big brother, John Gizzi, at around 11:20 a.m. on 4 February 2019. His brother subsequently texted Defendant his address for his residence in Mississippi. Defendant’s cell phone data also revealed he had made several searches for “Jasper N.C. fire last night.”

On 6 February 2019, Craven County Sheriff’s investigators, David Moore,

George Martinez, and Joshua Dowdy traveled to Mississippi. The seized Toyota Camry was searched upon their arrival in Lowndes County. Recovered from inside the vehicle were, *inter alia*, Thompson's purse and her credit card, as well as two outdoor grill-style butane lighters, boxes of ammunition, various snacks, drink containers, plastic cereal containers, receipts, and clothes. Thompson was known to keep her purse on a specific chest inside her bedroom with the key fob to the car inside of her purse.

After Defendant waived his *Miranda* rights, Investigators Moore and Dowdy conducted a video-recorded, custodial interview of Defendant. Defendant eventually confessed that, after fatally shooting Thompson when he shot through his bedroom wall, he "started a fire" by pouring an entire mason jar full of moonshine onto the floor and igniting it with a butane lighter. A grand jury indicted Defendant for first-degree murder, first-degree arson, robbery with a dangerous weapon, concealment of a human death, identity theft, financial card theft, cruelty to an animal, and larceny of a motor vehicle.

Following a trial, the jury found Defendant guilty of larceny of a motor vehicle, first-degree arson, cruelty to an animal, robbery with a dangerous weapon, identity theft, financial card theft, and concealment of a human death. The jury acquitted Defendant of first-degree murder and the lesser included charge of second-degree murder on 23 September 2022.

Defendant received the following terms of imprisonment to run concurrently

for each of the following convictions: 64 months to 89 months for first degree arson; 64 to 89 months for robbery with a dangerous weapon; 64 to 89 months for concealment of death; 13 to 25 months for identity theft; and 6 to 17 months for cruelty to animals. Judgment was arrested for his larceny of a motor vehicle and financial card theft convictions.

Defendant entered oral notice of appeal in open court.

II. Jurisdiction

Jurisdiction lies with this court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2023).

III. Issues

Defendant argues the trial court erred by omitting certain jury instructions related to the defense of accident. He also argues he received ineffective assistance of counsel (“IAC”).

IV. Jury Instructions

Defendant argues the trial court erred by only instructing the jury on accident as a defense to Defendant’s first-degree murder charge and omitting the accident defense instruction for all remaining charges.

During the jury charge conference, Defendant requested pattern jury instruction 307.10, pertaining to the defense of accident to first-degree murder by premeditation and deliberation, be added at the end of all substantive charges, as opposed to giving the instruction immediately following the first-degree murder

charge. Defendant did not request the accident defense instruction under 307.11, which concerns the defense of accident in cases other than homicide, as a defense to Defendant's remaining charges. Defendant also failed to suggest any changes to the pattern instruction.

Defendant now asserts the trial court's refusal to move pattern jury instruction 307.10 to the end of all substantive offenses amounted to a denial of the additional 307.11 pattern instruction, which was never addressed during the charge conference.

A. Standard of Review

"In order to preserve an issue for appellate review, the appellant must have raised that specific issue before the trial court to allow it to make a ruling on that issue." *Regions Bank v. Baxley Com. Props., LLC*, 206 N.C. App. 293, 298-99, 697 S.E.2d 417, 421 (2010) (citing N.C. R. App. P. 10(a)(1)). "The specific grounds for objection raised before the trial court must be the theory argued on appeal because 'the law does not permit parties to swap horses between courts in order to get a better mount in the [appellate court].'" *State v. Harris*, 253 N.C. App. 322, 327, 800 S.E.2d 676, 680 (2017) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)).

In criminal cases, this Court may review unobjected-to instructional and evidentiary errors for plain error. *State v. Lawrence*, 365 N.C. 506, 512-16, 723 S.E.2d 326, 330-33 (2012) (explaining "[u]npreserved error in criminal cases, on the other hand, is reviewed only for plain error" and "plain error review in North Carolina is normally limited to instructional and evidentiary error" (citations omitted)).

Plain error is defined as:

a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial[,] or where the error is such as to seriously affect the fairness, integrity[,] or public reputation of judicial proceedings[,] or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citations, quotation marks, and alterations omitted). “To show that an error was fundamental, a defendant must establish prejudice.” *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

“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). Furthermore, a Defendant must “specifically and distinctly” argue “an issue that was not preserved by objection . . . amount[ed] to plain error.” N.C. R. App. P. 10(a)(4).

Failure to allege plain error as to an unpreserved issue waives all appellate review. *State v. Benner*, 380 N.C. 621, 638, 869 S.E.2d 199, 210 (2022); *Davignon v. Davignon*, 245 N.C. App. 358, 361, 782 S.E.2d 391, 394 (2016) (“It is well-settled that arguments not presented in an appellant’s brief are deemed abandoned on appeal.” (citing N.C. R. App. P. 28(b)(6))).

B. Analysis

At the charge conference, the trial court agreed to instruct on the defense of accident using Pattern Instruction 307.10 Accident (Defense to Homicide Charge, Except Homicide Committed during Perpetration of a Felony) which states in part:

Where evidence is offered that tends to show the decedent's death was accidental and you find that the killing was in fact accidental, the defendant would not be guilty of any crime, even though his acts were responsible for decedent's death. A killing is accidental if it is unintentional, occurs during the course of lawful conduct, and does not involve culpable negligence.

N.C.P.I. – Crim. 307.10. (May 2023). The transcript records the discussion of the Accident instruction:

[DEFENSE COUNSEL]: I think it's appropriate to insert it at the conclusion of all of the offenses, all of the substantive offenses.

THE COURT: And why is that? Because it only applies to the premeditation, deliberation, doesn't it?

[DEFENSE COUNSEL]: Well, it only applies to that directly, Judge, but indirectly if the jury – and I'm sorry, Your Honor. If the jury is considering whether accident is in fact a defense, um, I think after all of the instructions are given, you you – we're getting into an area where we've now got three different theories that one of which was not present when we had the pretrial motions hearing on that. So we've now got three different theories, um, that we're going to ask the jury to consider on murder.

I just think that the logical way, when they're dealing with this, is they need to have all the substantive offenses before we talk about the accident defense. And I don't think it needs to be broken up into talking about all of the

substantive offenses and then talking about the murder first, and then the accident. I just think logically that should come after all of the offenses.

THE COURT: Well, I guess, at least my initial thought is if it doesn't come directly after premeditation, deliberation, it might be confusing as to what offenses it does apply to. I mean, the pattern instruction itself does not say this only applies to murder by premeditation and deliberation. Why I don't know, but it doesn't – it doesn't say that, so it could end up – I see risk of the jurors thinking, Well, gosh, you know, it was – it was – I mean, I don't know how you have accidental robbery but, I mean, it might be confusing to them if it's separated from the offense to which it directly applies.

[DEFENSE COUNSEL]: Yeah. I would still interpose the objection, Judge, as to it being given at that point in time. I've stated my reasons.

Defendant failed to preserve his argument asserting the trial court should have *sua sponte* included the defense of accident pattern jury instruction 307.11. N.C. R. App. P. 10(a)(1); *Regions Bank*, 206 N.C. App. at 298-99, 697 S.E.2d at 421; *Harris*, 253 N.C. App. at 327, 800 S.E.2d at 680. Defendant also failed to “specifically and distinctly” contend the issue he raised on appeal “amount[ed] to plain error.” N.C. R. App. P. 10(a)(4). Defendant’s argument regarding this issue is waived. *Benner*, 380 N.C. at 638, 869 S.E.2d at 210; *Davignon*, 245 N.C. App. at 361, 782 S.E.2d at 394; N.C. R. App. P. 28(b)(6).

V. Assistance of Counsel

Defendant argues he received IAC because his attorney failed to address his statements made at the time of his arrest in Mississippi in a pre-trial Motion to

Suppress. He asserts there was a high probability these statements would have been suppressed had they been specifically raised at the time of the Motion to Suppress, instead of unsuccessfully during trial.

A. Standard of Review

The defendant must demonstrate his “counsel’s conduct fell below an objective standard of reasonableness” to obtain relief for IAC. *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985) (citation omitted). Defendant is required to show: (1) “counsel’s performance was deficient;” and, (2) that the “deficient performance prejudiced [his] defense.” *Id.* at 562; 324 S.E.2d at 248.

“An appellate court must ‘indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.’” *State v. Hole*, 240 N.C. App. 537, 542, 770 S.E.2d 760, 764 (2015) (internal citation omitted). Our Supreme Court has stated “we ordinarily do not consider it to be the function of an appellate court to second-guess counsel’s tactical decisions.” *State v. Warren*, 244 N.C. App. 134, 143, 780 S.E.2d 835, 841 (2015).

B. Analysis

This Court can only speculate whether defense counsel’s failure to request a pre-trial motion to suppress, instead of moving to suppress the statements during trial, constituted IAC or was a reasonable trial strategy. In such cases, “[IAC] claim[s] should be asserted through the filing and litigation of a motion for appropriate relief, during the course of which an adequate factual record can be

developed, rather than during the course of a direct appeal.” *State v. Pemberton*, 228 N.C. App. 234, 242, 743 S.E.2d 719, 725 (2013). We dismiss Defendant’s IAC claim, without prejudice to Defendant’s right to appropriately assert the claim in the trial court.

VI. Conclusion

Defendant has failed to show appellate review is warranted in light of his waiver. He also has failed to demonstrate the trial court committed plain error in failing to *sua sponte* instruct the jury on the defense of accident for the additional charges other than first-degree murder based on premeditation and deliberation. Defendant has not demonstrated the jury would have reached a different conclusion if the instruction had been given later in the sequence of instructions, as unartfully requested.

Defendant’s IAC claim is dismissed without prejudice to Defendant’s right to properly assert the claim in the trial court.

NO ERROR IN PART, DISMISSED IN PART.

Judges ARROWOOD and CARPENTER concur.

Report per Rule 30(e).