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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-429

Filed 7 May 2025

Davidson County, Nos. 22CRS052679-280, 22CRS052714-280

STATE OF NORTH CAROLINA

v.

MARVIN DANIELS, III

Appeal by defendant from judgment entered 14 July 2023 by Judge Richard S. Gottlieb in Superior Court, Davidson County. Heard in the Court of Appeals 9 April 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Kellie E. Army, for the State.

Gilda C. Rodriguez, for defendant.

ARROWOOD, Judge.

Marvin Daniels, III (“defendant”) appeals from judgment following jury trial sentencing him to 96–128 months imprisonment for a charge of assault with a deadly weapon with intent to kill inflicting serious injury, 84–113 months imprisonment for one count of discharging a weapon into an occupied vehicle in operation, and 33–52 months imprisonment for two counts of assault with a deadly weapon with intent to

kill, all sentences to run consecutively. For the following reasons, we find no prejudicial error regarding defendant's trial, but we vacate the trial court's sentence and remand for a new sentencing hearing.

I. Factual Background

Kayleigh Todaro ("Ms. Todaro") was sitting in her car in the Lexington, North Carolina Walmart Super Center parking lot with two friends the night of 31 May 2022. She noticed a dark gray sedan sitting at a stop sign with its interior light on. Just before midnight, a white SUV with its windows down, driven by a man with a woman in the front passenger seat and a child in the back, pulled up quickly beside her, stopped for ten seconds, then pulled away quickly. The white SUV stopped again, further away from Ms. Todaro; she then heard gunshots, although she was not able to see any more vehicles. She and her friends called the police, and one of her friends gave a statement to the police.

That same night, Corporal Justin Eddins ("Corporal Eddins") of the Lexington Police Department was on patrol. While he was parked and performing a security check in the Walmart parking lot, an SUV pulled up to his patrol car at a high rate of speed, in which a woman was yelling that they had just been shot at. Upon inspecting the car, Corporal Eddins saw a bullet hole in the windshield and front seat, then found a six-year-old child ("Liam")¹ in the backseat with a bullet wound to the

¹ A pseudonym is used to protect the identity of the child.

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shoulder. He testified that Liam was in shock, “very scared,” and that while the blood was not gushing out of the wound, Liam’s whole shirt was soaked with blood. The adults in the vehicle were Liam’s parents, Ashley Daniels (“Ms. Daniels”) and Andreas Hoff, who was Ashley’s ex-husband.

Liam told Corporal Eddins that “Marvin” had shot him, and Ms. Daniels said she was being threatened by Marvin Daniels III, to whom she was married but separated. While Ms. Daniels was standing next to the SUV, her phone began to ring. She yelled that it was Marvin and said, “You shot my son,” when she picked up, to which the voice on the other end responded, “I did not shoot anyone.” EMS ultimately arrived and Liam was transported to the hospital.

At the hospital, Liam was seen by Dr. Ross Kuhner (“Dr. Kuhner”) at Wake Forest Brenner’s Children’s Hospital. He testified that Liam was a Level 2 trauma, which meant he needed to be seen within 15 minutes of arrival at the hospital. The bullet had passed through Liam’s shoulder, missing any major arteries as the bleeding was not pulsatile; his airway was clear and there were no fractures. On cross-examination, Dr. Kuhner stated that while there is always a concern for life-threatening injuries in cases of gunshot wounds, Liam had none. Liam was provided with pain medications and discharged that night.

Later during the night of the shooting, now 1 June 2022, at 4 a.m., Officer

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James Johansen (“Sergeant Johansen”)² of the Salisbury Police Department arrested defendant on South Lee Street in Salisbury, North Carolina, pursuant to a warrant. Officer Brandon Jones (“Officer Jones”) testified that there were two dark-colored Jeep style vehicles by the driveway. Defendant was sleeping, and a search revealed no contraband. He was subsequently transported to the Salisbury Police Department, where the Lexington Police Department took custody of him.

Defendant was indicted on 11 July 2022 on one count of assault with a deadly weapon with intent to kill inflicting serious injury, one count of discharging weapon into occupied vehicle in operation, and two counts of assault with a deadly weapon with intent to kill. On 25 January 2023, defendant requested that his court-appointed counsel be removed from his case, a request the trial court heard on 30 January. During that hearing, the trial court explained to defendant the charges he was facing and the maximum punishment those charges carried; inquired as to his mental capacity; explained that defendant would be required to follow the same rules as an attorney and would in essence be treated as such; and received defendant’s oral and written waiver of right to counsel.

Defendant’s trial began 10 July 2023 and lasted five days. During the jury charge, the trial court gave the jury an instruction on the elements of assault with a deadly weapon with intent to kill, inflicting serious injury, as well as two other

² By the time of trial, James Johansen had been promoted to Corporal.

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charges the jury could find if they were unable to find all the elements of the first offense: assault with a deadly weapon, inflicting serious injury, and assault with a deadly weapon. The jury returned guilty verdicts on all charges sought by the State.

Defendant was sentenced as a prior conviction Level III, with seven points: six points for an attempted first-degree murder conviction in Florida that was listed on the prior record level worksheet as substantially similar to North Carolina's attempted first-degree murder charge (a B2 felony carrying six points), and one point for the convicted offense occurring while defendant was on probation. Defendant was sentenced to consecutive terms of 96 months to 128 months, 84 months to 113 months, and 33 months to 52 months imprisonment. Defendant gave oral notice of appeal in open court.

II. Discussion

Defendant raises three issues on appeal: one, whether the trial court committed plain error when it failed to instruct the jury on a lesser included offense; two, whether the trial court erred by allowing defendant to waive his right to counsel without first advising him of the consequences and the maximum possible sentences; and three, whether the trial court erred in determining that defendant was a prior record Level III. We address each argument in turn.

A. Trial Court's Duty to Instruct on Lesser Included Offense

Defendant argues that the trial court plainly erred by not sua sponte instructing the jury of the lesser included offense of assault with a deadly weapon

with intent to kill. Specifically, defendant argues that he did not inflict serious injury, so the jury would have convicted him of the lesser offense had it been properly instructed.

In order to preserve an issue for appellate review, a defendant must make an objection before the trial court stating the grounds for their objection. N.C. R. App. P. Rule 10(a)(1). However, even if an issue is unpreserved, it may be raised before the appellate court on the basis that it constitutes plain error. *Id.* Rule 10(a)(4). Plain error is a fundamental error that occurred at trial such that the outcome would probably have been different absent that error. *State v. Lawrence*, 365 N.C. 506, 518 (2012). It is a standard to be applied cautiously. *Id.* Here, because defendant did not object to the jury instructions at trial, we review them for plain error.

A defendant is entitled to a lesser included offense instruction when two conditions are met: one, that the trial court determines as a matter of law that the lesser offense is included within the offense indicted; and two, that there is evidence, when taken in the light most favorable to the defendant, that would permit a conviction on the lesser included offense. *State v. Drew*, 162 N.C. App. 682, 685 (2004); *State v. Clark*, 201 N.C. App. 319, 323 (2009).

“The essential elements of assault with a deadly weapon with intent to kill inflicting serious injury are (1) an assault, (2) with a deadly weapon, (3) with intent to kill, (4) inflicting serious injury, (5) not resulting in death.” *State v. Liggons*, 194 N.C. App. 734, 742 (2009) (cleaned up). The elements of assault with a deadly weapon

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with intent to kill are “(1) an assault; (2) with a deadly weapon; (3) with intent to kill” *State v. Coria*, 131 N.C. App. 449, 456 (1998). The only difference between these offenses is whether the victim suffered a serious injury.

The question of whether an injury is serious depends on the facts and is for the jury to decide. *State v. Allen*, 233 N.C. App. 507, 513 (2014). “Relevant factors in determining whether serious injury has been inflicted include, but are not limited to: (1) pain and suffering; (2) loss of blood; (3) hospitalization; and (4) time lost from work. Evidence that the victim was hospitalized, however, is not necessary for proof of serious injury.” *State v. Morgan*, 164 N.C. App. 298, 303 (2004) (citations omitted). The evidence in this case tended to show that Liam was shot in his shoulder, resulting in a shirt soaked with blood; he also complained of pain and was treated at the hospital as a Level 2 trauma case. These facts are not in dispute. It is also not lost on the court that Liam was a mere six years old at the time he received this injury. While fortunately the bullet missed any vital organs it entered and exited his body, an injury of this nature, under these circumstances, could not be considered anything but serious. Given these facts, especially in light of our standard of review for plain error, we cannot find that the trial court committed plain error in failing to offer a jury instruction for a lesser-included offense.

B. Waiver of Counsel

Defendant contends that the trial court erred in failing to conduct a proper inquiry pursuant to N.C.G.S. § 15A-1242(2)–(3) prior to his waiver of counsel.

Defendant alleges that there were two errors: one, the trial court erred in failing to inform defendant of the appropriate maximum punishment he faced; two, the trial court erred in failing to inform defendant of the practical consequences of waiver of counsel.

Cases involving waiver of counsel are reviewed *de novo*. *State v. Lindsey*, 271 N.C. App. 118, 124 (2020). When reviewing a matter *de novo*, we freely substitute our own judgment for that of the trial court. *Id.*

“[W]here the defendant has executed a written waiver of counsel which is certified by the trial court, a presumption arises that the waiver by the defendant was knowing, intelligent and voluntary.” *State v. Evans*, 153 N.C. App. 313, 315 (2002) (citation omitted). However, the trial court is still required to ensure that the conditions of § 15A-1242 have been fulfilled; the presumption of the waiver may be rebutted if the record indicates that they were not. *Id.* The conditions are that defendant (1) was “clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled; (2) understands and appreciates the consequences of this decision; and (3) comprehends the nature of the charges and proceedings and the range of permissible punishments.” N.C.G.S. § 15A-1242 (2024) (cleaned up).

In order to satisfy subsection (3), the trial court must “specifically advise a defendant of the possible maximum punishment” *Lindsey*, 271 N.C. App. at 127 (citation omitted). However, a failure to indicate the precise maximum number of

months for which a defendant could be incarcerated is not a *per se* violation of § 15A-1242, but is only a violation if there is reasonable likelihood the defendant would have chosen differently absent the mistake. *State v. Gentry*, 227 N.C. App. 583, 599–600 (2013).

Defendant indicated to the court his desire to proceed *pro se* at a pre-trial hearing on 30 January 2023. At that hearing, the trial court advised defendant,

So, Mr. Daniels, you've got a number of charges that are currently pending against you. The most serious one is a Class C felony. I don't know your prior record level, but I need to tell you that the maximum punishment you could possibly receive for that is 230 months. You also have two Class E felonies. Those both have a maximum punishment of 88 months. And you have a Class D felony, which has a possible punishment of 204 months. So what you are facing is extremely serious and it has a potential to have a lot of jail time.

The trial court incorrectly summarized defendant's charges, as he had actually been charged with two Class C felonies and two class E felonies. Defendant contends that this inaccuracy, as well the court's failure to inform him that these sentences could run consecutively, prejudiced him. We do not agree.

Defendant correctly notes that the difference in months between a maximum sentence for Class D and Class C is 27 months. However, under the trial court's incorrect tally, the maximum total sentence would be 610 months, or 50 years and 10 months; under the correct tally, the maximum sentence would be 53 years and 1 month, meaning that defendant would leave prison at roughly age 80 instead of age

77. There is no indication that this difference reasonably affected defendant's decision to represent himself.

Defendant also notes that the trial court failed to inform him that these sentences could run consecutively, yet we do not find this dispositive. While the trial court did not state explicitly that these charges could run consecutively, neither did it indicate that they would run concurrently. The court treated each class of felony disjunctively, indicating that the maximum punishment was tied only to that charge, rather than all charges as a whole. The court underscored that the charges had the "potential to have a lot of jail time." We also find that our case law does not support a requirement that the trial court explicitly state that all charges could run consecutively. Therefore, we cannot hold that the trial court's error materially affected defendant's decision to proceed *pro se*.

Defendant also argues that the colloquy in which the trial court engaged prior to the start of trial did not properly inform him of the maximum possible sentence, nor the consequences of proceeding *pro se*. However, we have already determined that defendant was properly informed of the maximum possible sentence, and defendant makes no contention that the colloquy at the pre-trial hearing did not properly inform him of the consequences of proceeding *pro se*. Therefore, the trial court's second colloquy did not implicate defendant's constitutional right to counsel in any way.

C. Prior Record Level Point Calculation

Finally, defendant contends that the trial court erred in assigning him six points for an out-of-state felony without undertaking the proper inquiry as to whether this felony was substantially similar to North Carolina's B2 felony class. We agree.

We review the trial court's determination of a defendant's prior record level *de novo*. *State v. Braswell*, 269 N.C. App. 309, 312 (2020). Even in the absence of an objection before the trial court, arguments that a sentence was invalid as a matter of law are deemed automatically preserved. N.C.G.S. § 15A-1446(d)(18) (2023). The question of whether the trial court properly calculated a defendant's prior record level points is subject to harmless error analysis. *State v. Posner*, 277 N.C. App. 117, 123 (2021).

Generally, a conviction occurring in another jurisdiction, defined by that jurisdiction as a felony, will be considered a Class I felony for the purposes of setting a defendant's prior record level. N.C.G.S. § 15A-1340.14(e) (2023). However, the out-of-state felony may be considered in a higher class if the State, through the preponderance of the evidence, proves that it is substantially similar to a North Carolina felony in that class. *Id.*

Although an in-state conviction may be proved by a stipulation of the parties, *id.* § 15A-1340.14(f), a stipulation may not be used to prove an out-of-state conviction is substantially similar to an in-state felony. *State v. Black*, 276 N.C. App. 15, 18 (2021). In the case *sub judice*, it does not appear from the record that the State satisfied its burden in any way. The extent of the sentencing colloquy between

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defendant, the State, and the trial court regarding defendant's prior record level was the presentation of the prior record level worksheet to the trial court, and defendant's stipulation to being a Prior Record Level III; the trial court never engaged in any analysis of defendant's Florida conviction.

Additionally, the trial court added one prior record point to defendant's worksheet for the commission of an offense that occurred while defendant was on "probation, parole, or post-release supervision." However, the State must provide a defendant with written notice 30 days before trial that they are seeking to prove the existence of this point. N.C.G.S. § 15A-1340.16(a6) (2023). There is no indication in the record that defendant received this notice, the trial court did not determine whether this requirement was met, nor is there any indication that defendant waived notice. *See State v. Snelling*, 231 N.C. App. 676, 682 (2014). It was therefore error for the trial court to include this point on defendant's worksheet.

The errors in calculating defendant's prior record level were not harmless. In order to be sentenced at Level III, a defendant must have at least 6 prior record level points. N.C.G.S. § 15A-1340.14(c)(3) (2023). A Class B2 felony receives 6 points, while a Class I receives 2. *Id.* §§ 15A-1340.14(b)(2), (4). Had defendant been sentenced with a single Class I felony, he would have a prior record level II, rather than III, significantly altering the range of punishments available to the trial court. Given defendant's record, and the point ranges within each level, it does not appear that the erroneous inclusion of the point for an offense while on probation was or

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would be prejudicial, although we caution the trial court to ensure that defendant is provided appropriate notice should the State seek to prove this point on remand. Given this error, we remand this matter to the trial court to conduct a new sentencing hearing consistent with the requirements of the statute.

III. Conclusion

For the foregoing reasons, we hold that defendant received a fair trial free of prejudicial error. However, we also hold that defendant was prejudiced during sentencing by the trial court's failure to properly calculate his prior record level points. Consequently, we vacate defendant's sentence and remand to the trial court for a new sentencing hearing.

NO ERROR IN PART, VACATED AND REMANDED IN PART.

Judges WOOD and FREEMAN concur.

Report per Rule 30(e).