No. COA21-792 12TH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA )

 ) From Cumberland County

 v. ) No. 20 CRS 56732

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CHEITO CHARLES )

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DEFENDANT-APPELLANT’S BRIEF

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**INDEX**

TABLE OF CASES AND AUTHORITIES iii

ISSUES PRESENTED 1

STATEMENT OF THE CASE 2

STATEMENT OF GROUNDS FOR

APPELLATE REVIEW 2

STATEMENT OF THE FACTS 3

­­

ARGUMENT:

1. THE TRIAL COURT ERRED IN DENYING MR. CHARLES’ MOTION TO DISMISS FOR INSUFFICIENCY OF THE EVIDENCE ON THE CHARGE OF CRUELTY TO ANIMALS 9

1. STANDARD OF REVIEW 9

2. ARGUMENT 10

II. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT CRUELTY TO ANIMALS COULD BE PROVEN BY TRANSFERRED INTENT, SUCH THAT THE STATE HAD TO PROVE THAT THE DEFENDANT INTENTIONALLY AND MALICIOUSLY STARTED A FIRE THAT RESULTED IN THE DEATH OF AN ANIMAL, AS OPPOSED TO BEING REQUIRED TO PROVE THAT THEY INTENTIONALLY AND MALICIOUSLY KILLED THE ANIMAL 15

1. STANDARD OF REVIEW 15

2. ARGUMENT 1 6

1. THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION OVER THE CHARGE OF CRUELTY TO ANIMALS BECAUSE THE INDICTMENT WAS FATALLY DEFECTIVE IN THAT IT DID NOT ALLEGE TWO ESSENTIAL ELEMENTS OF THE CRIME

CHARGED 20

1. STANDARD OF REVIEW 20

2. ARGUMENT 2 1

CONCLUSION 24

CERTIFICATE OF COMPLIANCE 25

CERTIFICATE OF FILING AND SERVICE 26

# TABLE OF CASES AND AUTHORITIES

N.C. Department of Environment & Natural Resources v. Carroll, 358 N.C. 649, 599 S.E.2d 888 (2004) 9,10

State v. Barnette, 304 N.C. 447, 284 S.E.2d 298 (1981) 10

State v. Brock, 305 N.C. 532, 290 S.E.2d 566 (1982) 16

State v. Brown, 310 N.C. 563, 313 S.E.2d 585 (1984) 10

State v. Bullock, 154 N.C. App. 234, 574 S.E.2d 17 (2002) 22,23

State v. Coble, 163 N.C. App. 335, 593 S.E.2d 109 (2004) 14,15

State v. Covington, 267 N.C. 292, 148 S.E.2d 138 (1966) 22

State v. Crabtree, 286 N.C. 541, 212 S.E.2d 103 (1975) 21

State v. Davis, 349 N.C. 1, 506 S.E.2d 455 (1998) 18

State v. Fletcher, 125 N.C. App. 505, 481 S.E.2d 418 (1997) 18,19

State v. Fowler, 266 N.C. 528, 146 S.E.2d 418 (1966) 22

State v. Greenfield, 262 N.C. App. 631, 822 S.E.2d 477 (2018) 18

State v. Gerberding, 237 N.C. App. 502, 237 N.C. App. 502 (2014) 11,19

State v. Gregory, 223 N.C. 415, 27 S.E.2d 140 (1943) 21

State v. Harris, 219 N.C. App. 590, 724 S.E.2d 633 (2012) 20

State v. Kemmerlin, 356 N.C. 446, 573 S.E.2d 870 (2002) 10

State v. Lawrence, 365 N.C. 506, 723 S.E.2d 326 (2012) 16,20

State v. Loftin, 322 N.C. 375, 368 S.E.2d 613 (1988) 16

State v. Odom, 307 N.C. 655, 300 S.E.2d 375 (1983) 16

State v. Robbins, 309 N.C. 771, 309 S.E.2d 188 (1983) 23

State v. Simpson, 302 N.C. 613, 276 S.E.2d 361 (1981) 21

State v. Smith, 300 N.C. 71, 265 S.E.2d 164 (1980) 10

State v. Smith, 186 N.C. App. 57, 650 S.E.2d 29 (2007) 9

State v. Sturdivant, 304 N.C. 293, 283 S.E.2d 719 (1981) 21

State v. Wilson, 128 N.C. App. 688, 497 S.E.2d 416 (1998) 21

State v. Wilson, 251 N.C. App. 371, 794 S.E.2d 921 (2016) (unpublished) 11

State v. Wynn, 278 N.C. 513, 180 S.E.2d 135 (1971) 18

State v. Yarborough, 255 N.C. App. 216, 803 S.E.2d 216 (2017)

 (unpublished) 12,19

1 Wayne R. LaFave, Substantive Criminal Law 350 & 458-60 18

N.C. Gen. Stat. § 7A-27 2

N.C. Gen. Stat. § 14-58 19

N.C. Gen. Stat. § 14-360 11,14,22,23

N.C. Gen. Stat. § 15A-1444 2

N.C. Const. Art. I, § 22 21

N.C.P.I. – Criminal 104.13 18

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CHEITO CHARLES )

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DEFENDANT-APPELLANT’S BRIEF

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# issueS Presented

1. **THE TRIAL COURT ERRED IN DENYING MR. CHARLES’ MOTION TO DISMISS FOR INSUFFICIENCY OF THE EVIDENCE OF THE CHARGE OF CRUELTY TO ANIMALS.**
2. **THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT CRUELTY TO ANIMALS COULD BE PROVEN BY TRANSFERRED INTENT, SUCH THAT THE STATE HAD TO PROVE THAT THE DEFENDANT INTENTIONALLY AND MALICIOUSLY STARTED A FIRE THAT RESULTED IN THE DEATH OF AN ANIMAL, AS OPPOSED TO BEING REQUIRED TO PROVE THAT THEY INTENTIONALLY AND MALICIOUSLY KILLED THE ANIMAL.**
3. **THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION OVER THE CHARGE OF CRUELTY TO ANIMALS BECAUSE THE INDICTMENT WAS FATALLY DEFECTIVE IN THAT IT DID NOT ALLEGE TWO ESSENTIAL ELEMENTS OF THE CRIME CHARGED.**

**STATEMENT OF THE CASE**

 Mr. Cheito Charles pleaded not guilty to second degree arson and felony cruelty to animals in Cumberland County on 29 June 2021. (R pp 119-122). The jury found Mr. Charles guilty on both charges and he was sentenced to 13-25 months for second degree arson and 6-17 months for cruelty to animals. (R pp 119-122). Mr. Charles gave oral notice of appeal on 1 July 2021. (T3 p 357; R pp 123-24;). The Office of the Appellate Defender was appointed to represent him on the same day. (R pp 125-26). The record on appeal was served on the State on 15 November 2021 and was settled by operation of Rule 11 of the North Carolina Rules of Appellate Procedure on 15 December 2021. (R p 129). The settled record on appeal was filed on 28 December 2021 and the certificates of filing and settlement were mailed to the State on the same day. (R p 132). This brief was filed on 27 January 2022.

**STATEMENT OF GROUNDS FOR APPELLATE REVIEW**

 Mr. Charles appeals pursuant to N.C. Gen. Stat. § 7A-27(b) and N.C. Gen. Stat. § 15A-1444(a) from a final judgment entered against him in the Superior Court of Cumberland County.

**STATEMENT OF THE FACTS**

Cheito Charles moved from Haiti to Florida when he was just nine or ten years old. (T2 pp 257-58) He graduated from high school and began college, but stopped his studies after he was kicked out. (T3 p 352). When he was in his thirties, he moved to North Carolina, and moved in with his mother in Fayetteville. (T2 pp 257-59). He worked at a construction job fixing houses, as he had done previously in Florida. (T2 pp 257-59). Mr. Charles had no criminal record, other than one decade-old, class 3 misdemeanor conviction from Florida. (T1 pp 117-18). Now, at 34 years old, he worked for a day labor service called People Ready, but found himself homeless, living out of his van for a four-to-five-month period. (T2 pp 258, 261). His sister, McKumba Charles, also lived out of the van with him. (T2 p 262). Some nights she stayed elsewhere; and on those nights he gathered she was staying over at the home of her boyfriend, Marcus Perry. (T2 p 262). During that period of homelessness, Mr. Charles felt stressed out and angry. (T2 p 284). Mr. Charles said he typically kept to himself, and that people had sometimes called him “kind of strange” and “a little weird”. (T3 p 352).

Marcus Perry described McKumba Charles as his live-in girlfriend who was suffering from alcoholism. (T2 p 140). Mr. Perry testified that his relationship with Mr. Charles, was “not good” because Mr. Charles was not happy that Mr. Perry was dating his sister and because Mr. Charles tended to get upset with him when his sister drank and went missing. (T2 pp 142, 156).

Mr. Perry’s three-bedroom, two-bathroom rental home, located at 6334 Ginger Circle, in Fayetteville, burned down on 19 July 2020. (R p 24; T2 pp 138, 178). Anthony Boykin, a neighbor living across the street, described the home as a place where visitors came by all day long, almost every day. (T1 p 41). He also testified that there tended to be a lot of debris around Mr. Perry’s house and on his porch because Mr. Perry stored goods outside that he sold at flea markets. (T1 p 45). Mr. Perry testified that he also stored his important paperwork on the front porch. (T2 p 178).

Mr. Perry testified that he had been dating Ms. Charles for two years at the time of the fire but had only known Mr. Charles for 6-12 months. (T2 pp 140-41). Mr. Perry testified that Ms. Charles lived with him; but Mr. Charles testified that she lived in the van with him and sometimes slept at Mr. Perry’s home. (T2 pp 140, 262). During the 6–12-month period that the two men knew each other, Mr. Charles had been to Mr. Perry’s house five to seven times. (T2 p 155). About one month before the fire, the relationship between the two men became “not good”. (T2 pp 140-41). About one month before the fire, the two men talked three to four times about Mr. Charles’ concerns over the dating relationship between his sister and Mr. Perry. (T2 pp 140-41). At the time of the fire, Mr. Perry’s new dog had lived with the homeowner for only about one month. (T2 pp 145-46). Thus, the relationship between the two men turned sour around the same time frame that Mr. Perry got a new dog. (T2 pp 140-146). Mr. Charles testified that he had never seen a dog at Mr. Perry’s house and was not aware that Mr. Perry had any pets. (T2 p 271).

Marcus Perry testified that the day before the fire, McKumba Charles had been drinking heavily. (T2 pp 142-43). His testimony vacillated between reporting there was no conflict that evening between the couple, and admitting that there was a disagreement. (T2 pp 143-44). He said that Ms. Charles wanted him to go buy her a drink that evening, and he did not want to, which became the source of a disagreement between them. (T2 pp 143-44). He said that she was still home with him around 11:30pm that evening, but that when he awoke in the morning around 9:30am, she was gone. (T2 p 144).

That morning, after discovering his girlfriend missing, Mr. Perry drove ten minutes down the road to a gas station parking lot to sell shoes. (T2 pp 156, 170). Mr. Perry testified that at around 10:30am or 11:00am, Mr. Charles came up to him while he was selling shoes. (T2 p 157). He testified that Mr. Charles was wrapped in a hospital sheet and had a sword with him, which he always carried. (T2 pp 158, 169).

 According to Mr. Perry, Mr. Charles asked him: “Where’s my sister?” (T2 p 159) Mr. Perry answered: “I don’t know, she left.” (T2 p 159) Mr. Charles responded: “Oh, I ain’t forget, I’ll be back, I’ll be back, I’ll be back.” (T2 p 158). As promised, Mr. Charles returned on his bicycle thirty to forty minutes later, so as late as 11:30am. (T2 p 159). According to Mr. Perry, Mr. Charles rode by on his bicycle and gave him a mean look; but they did not speak during this second encounter. (T2 p 159). Mr. Perry continued selling shoes, and when he was done selling, he went to his mom’s house where his daughter informed him his house was on fire. (T2 p 159).

Mr. Boykin, the neighbor living in a house across the street from Mr. Perry, testified at trial that he saw Mr. Charles’ van pull up to Marcus Perry’s house. (T1 pp 24-25). According to Mr. Boykin, after the van had been there for about five minutes, he noticed a fire, and saw Mr. Charles, who he said was clad in a blue hospital gown, get back into the van and leave. (T1 pp 28, 30, 32). He asked his daughter to call 911. (T1 p 30). However, on the day of the fire, Lieutenant Young from the City of Fayetteville Fire Department interviewed Mr. Boykin. (T1 p 118). During the interview, Mr. Boykin did not mention seeing a person approaching the house or Mr. Charles’ name. (T1 p 118).

Mr. Charles testified that on the morning of 19 July 2020, he went to Mr. Perry’s house to search for his sister. (T2 pp 264-66). When he got there, he saw a white male who had on a protective mask and a hat and was smoking. (T2 pp 265-66). He recognized him but did not know him. He asked if his sister was there, the man shook his head to indicate no, and since Mr. Charles felt uncomfortable, he went back to his van and left. (T2 pp 265-66).

Mr. Charles testified he remembered riding by Mr. Perry on his bike after that. (T2 p 267). Mr. Charles recalled going to smoke with someone else, and waiving at Mr. Perry while he was selling shoes. (T2 p 267). He says he told Mr. Perry that he was going to come back later, and he was not going to forget. (T2 p 267). He testified that he had to use a high-volume voice because they were a good distance away from each other. (T2 p 267). Mr. Charles recalled that he had a sword with him that day that he was trying to sell and that he succeeded in selling it. (T2 pp 267-68). Mr. Charles testified that the rest of the day he was hanging out with people, walking around the neighborhood, riding his bike, and “trying to hustle up some money”. (T2 p 269).

Mr. Charles testified that he did not set a fire or see a fire. (T2 pp 265). Ms. Charles testified that she was also not involved in setting the fire and did not know anything else about the fire. (T2 p 187). Officer Rice, a patrol officer with the City of Fayetteville testified that at the scene of the fire, Marcus Perry was in a “hysterical state” and told him that he thought McKumba Charles set the fire. (T2 p 255). Mr. Perry testified that he did not recall telling law enforcement that his girlfriend burned down the house but says he could have made that statement. (T2 pp 176-77). Ms. Charles and Mr. Perry testified that they were currently living together and had been for months at the time of the trial. (T2 pp 187-88).

Sarah Finch, a forensic road technician with the Fayetteville Police Department testified that she took photos and collected evidence from the home after the fire. (T1 pp 48-51). Diane Bettis, a police specialist with the City of Fayetteville, testified that she brought her canine to the house and that he alerted near the remnant of a red plastic gas can. (T1 pp. 76-80).

Donald Wallace, a deputy fire marshal with the City of Fayetteville Fire Department testified that the fire was classified as an incendiary fire, that it originated from the left side of the front porch in the area that a red plastic gas can was found, and that the fire was a human hand-set fire that originated when an open flame ignited vapors from residual gasoline. (T2 p 204). Grady Young, a lieutenant with the City of Fayetteville Fire Department, testified that, in his opinion, the fire was incendiary in nature, started with an accelerant of gasoline and an ignition source that was removed from the property. (T1 p 82). He also testified to his opinion that the red plastic object was in fact a remanent of a gas container and that the state lab tested it and determined that there was residual “medium heavy distal resembling gasoline” on it. (T1 pp 118-19). Kristen Crawford, a forensic scientist with the North Carolina State Crime Laboratory also testified that the melted piece of plastic revealed the presence of residual gasoline. (T2 p 195). Lieutenant Young testified that he found Mr. Perry’s deceased dog in the kitchen after searching the home. (T1 p 103).

Stephanie Rivera, a police officer with the Fayetteville Police Department, testified that she arrested Mr. Charles for second degree arson and felony cruelty to animals and had a body camera video and police car footage from the arrest. (T2 p 216).

Mr. Charles pleaded not guilty to both second degree arson and felony cruelty to animals, but was convicted of both charges at trial. The trial court sentenced Mr. Charles to serve 13-25 months for second degree arson and 6-17 months for cruelty to animals in the Division of Adult Correction. (R pp 119-122).

**ARGUMENT**

1. **THE TRIAL COURT ERRED IN DENYING MR. CHARLES’ MOTION TO DISMISS FOR INSUFFICIENCY OF THE EVIDENCE ON THE CHARGE OF CRUELTY TO ANIMALS.**
2. **Standard of Review**

Whether the trial court erred in denying a motion to dismiss is reviewed de novo. State v. Smith, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). “Under the de novo standard, the reviewing court ‘considers the matter anew and freely substitutes its own judgment for that of the [lower court].’ ” N.C. Department of Environment & Natural Resources v. Carroll, 358 N.C. 649, 660, 599 S.E.2d 888, 895 (2004) (citations omitted).

1. **Argument**

The trial court erred in denying Mr. Charles’ motion to dismiss for insufficiency of the evidence on the charge of felony cruelty to animals. In considering a motion to dismiss, the trial judge must decide whether there is substantial evidence of each element of the offense charged. State v. Brown, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). “Evidence is ‘substantial’ if a reasonable person would consider it sufficient to support the conclusion that the essential element in question exists.” State v. Barnette, 304 N.C. 447, 458, 284 S.E.2d 298, 305 (1981). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” State v. Smith, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). In ruling on a motion to dismiss, “the trial court is required to view the evidence in the light most favorable to the State, making all reasonable inferences from the evidence in favor of the State. State v. Kemmerlin, 356 N.C. 446, 473, 573 S.E.2d 870, 889 (2002).

In order to prove the offense of felony cruelty to animals, the State must present evidence that 1) defendant did torture, mutilate, maim, cruelly beat, disfigure, poison, or kill, or cause or procure to be tortured, mutilated, maimed, cruelly beaten, disfigured, poisoned, or killed, any animal; 2) defendant acted intentionally (knowingly and without excuse or justification); and 3) defendant acted maliciously (intentionally and with malice). N.C. Gen. Stat. § 14-360(b). In order to prove felony cruelty to animals, the State must prove that a defendant acted both “maliciously” and “intentionally”. State v. Gerberding, 237 N.C. App. 502, 507, 237 N.C. App. 502, 507 (2014). Misdemeanor cruelty to animals is a lesser included offense of felony cruelty to animals, requiring that the defendant acted intentionally but not maliciously. N.C. Gen. Stat. § 14-360(b). So, misdemeanor cruelty to animals occurs when a person intentionally but without malice injures an animal; and felony cruelty to animals occurs when a person intentionally and maliciously injures an animal, and neither offense occurs when a person unintentionally injures an animal.” State v. Wilson, 251 N.C. App. 371, 794 S.E.2d 921 (2016)(unpublished). Thus, both offenses require that the defendant’s act of cruelty was committed knowingly. In order to prove that the cruelty to animals was committed knowingly, the State would have had to present evidence that Mr. Charles had knowledge that the animal existed and was present at the home. The State presented no evidence that the alleged act of animal cruelty was committed intentionally (knowingly) or maliciously (knowingly and with malice).

At the close of the State’s evidence, Mr. Charles’ trial counsel made a motion to dismiss for insufficiency of the evidence. (T2 pp 244-45). He argued that the State presented no evidence that Mr. Charles ever had knowledge of the animal. (T2 pp 224-25). He renewed the motion at the close of all evidence. (T3 pp 294, 322). The trial court denied each of his motions.

This Court reviewed a similar case to determine if there was sufficient evidence presented as to knowledge. State v. Yarborough, 255 N.C. App. 216, 803 S.E.2d 216 (2017)(unpublished). In Yarborough, the defendant was also charged with second degree arson and felony cruelty to animals when he allegedly set fire to a home that caused the death of a dog. Id. There, the defendant did not dispute the second-degree arson conviction, but did argue that there was insufficient evidence of cruelty to animals because the State presented insufficient evidence that he knew the dog was inside the home at the time of the alleged arson. Id. This Court confirmed that knowledge that the animal was inside the home at the time of the arson was required in order to show the knowledge required for intent and malice. Id. This Court found that there was evidence presented that the defendant had been to the home seven to nine times, that the dog always growled at him when he came inside, that the owner left the dog home free to wander around the house on the day of the fire, and that when he returned after the arson, the dog’s body was found locked inside the bathroom. Id. The jury could have reasonably deduced that the dog growled when the defendant entered the home and that he locked the dog in the bathroom before starting the fire. Id.

In contrast, in Mr. Charles’ case, there was insufficient evidence of both felony and misdemeanor cruelty to animals because, viewing the evidence in the light most favorable to the State, and assuming only for the sake of argument Mr. Charles burned the house, there was insufficient evidence he knew there was an animal in the home at the time he allegedly set a fire or that an animal resided there ever. The State’s evidence was as follows: Mr. Charles testified that he was not aware that Mr. Perry had any pets and that he had never seen a dog at Mr. Perry’s house. (T2 p 271). The chronology of events presented at trial support Mr. Charles’ testimony; and Mr. Perry did not provide any testimony that would contract Mr. Charles’ lack of knowledge of the dog’s existence. There was no evidence that Mr. Charles was in the home during the month prior to the fire when the dog came to live with the homeowner. There was no evidence that the dog ever barked at Mr. Charles or Mr. Perry’s neighbor or at anyone.

Mr. Perry testified that he had known Mr. Charles for approximately 6-12 months before the fire. (T2 p 141). During that time, Mr. Charles had been to the house five to seven times. (T2 p 155). About one month before the fire, the relationship between the two men became “not good”. (T2 pp 140-41). About one month before the fire, the two men talked three to four times about Mr. Charles’ concerns over the dating relationship between his sister and Mr. Perry that caused their relationship to sour. (T2 pp 140-41). At the time of the fire, Mr. Perry’s new dog had lived with him for only about one month. (T2 pp 145-46). Thus, the relationship between the two men turned sour around the same time that Mr. Perry got a dog. (T2 pp 140-146). Further, Mr. Perry testified that on the day of the fire, Mr. Charles saw him selling shoes at a gas station parking lot located a ten-minute drive away from his house at 10:30am or 11:00am on the day of the fire, and again as late as 11:40am. (T2 pp 156-59). Mr. Boykin, the neighbor, testified that he first saw the fire at “noonish” and saw Mr. Charles’ van pull up to the house about five minutes prior to that. (T1 p 23). Therefore, the State presented no evidence whatsoever that Mr. Charles had any knowledge of the dog. Further, assuming arguendo that Mr. Charles set the fire, the evidence tended to show that Mr. Charles confirmed that the home was not occupied when he saw the homeowner ten minutes away from the home minutes before the fire.

This Court also discussed the required element of knowledge of the animal’s presence in State v. Coble, 163 N.C. App. 335, 338-39, 593 S.E.2d 109, 112 (2004). This Court emphasized that under N.C. Gen. Stat. §14-360, the word ‘intentionally’ refers to an act committed knowingly and without justifiable excuse. And, thus, both the misdemeanor and felony offenses require that the defendant’s act of cruelty was committed knowingly. This Court held that the evidence presented tended to show that defendant knew the dogs were at her house, as well as the condition they were in, played an active role in their care, and did not feed or water them. Id. Thus, there was sufficient evidence that defendant acted intentionally under the cruelty to animals statute. Again, in contrast, there was no evidence presented as to Mr. Charles’ knowledge. There was no evidence that Mr. Charles knew the homeowner owned a dog or that a dog was present in the home. The evidence implies that when Mr. Charles had been at Mr. Perry’s house, there were no pets living there.

The trial court erred in denying Mr. Charles’ motion to dismiss on the charge of felony cruelty to animals. Accordingly, Mr. Charles respectfully requests that the conviction for felony cruelty to animals be vacated.

1. **THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT CRUELTY TO ANIMALS COULD BE PROVEN BY TRANSFERRED INTENT, SUCH THAT THE STATE HAD TO PROVE THAT THE DEFENDANT INTENTIONALLY AND MALICIOUSLY STARTED A FIRE THAT RESULTED IN THE DEATH OF AN ANIMAL, AS OPPOSED TO BEING REQUIRED TO PROVE THAT THEY INTENTIONALLY AND MALICIOUSLY KILLED THE ANIMAL.**
2. **Standard of Review**

Mr. Charles’s trial attorney did not explicitly object to the jury instruction; but he did tell the trial court that, “I don’t think saying that the defendant acted knowingly in starting the house fire automatically transfers the intent to harm one – to the animal.” (T3 p 309). If this Court determines that his statement did not constitute a proper objection, then, the issue is an unpreserved instructional error; and the plain error standard of review applies. State v. Lawrence, 365 N.C. 506, 723 S.E.2d 326 (2012). Establishing plain error requires proof that the error was fundamental and had a probable impact on the jury's guilty verdict. State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). For plain error to be found, it must be probable, not just possible, that absent the instructional error, the jury would have returned a different verdict. Lawrence, 365 N.C. at 518, 723 S.E.2d at 334.

1. **Argument**

The trial court erred in instructing the jury that felony cruelty to animals could be proven by transferred intent, such that the State had to prove that the defendant intentionally and maliciously started a fire that resulted in the death of an animal, as opposed to being required to prove that they intentionally and maliciously killed the animal.

Our Supreme Court has repeatedly held that it is the duty of the trial court to instruct the jury on all of the substantive features of a case. State v. Brock, 305 N.C. 532, 540, 290 S.E.2d 566, 572 (1982); State v. Ferrell, 300 N.C. 157, 163, 265 S.E.2d 210, 214 (1980). “This is a duty which arises notwithstanding the absence of a request by one of the parties for a particular instruction.” State v. Loftin, 322 N.C. 375, 381, 368 S.E.2d 613, 617 (1988) (citations omitted).

Here, the trial court initially considered giving the jury a transferred intent instruction, but ultimately decided to weave application of the doctrine of transferred intent into the “troublesome” substantive jury instruction on cruelty to animals. (T pp 296, 307-310, 314).

The defendant has also been charged with felonious cruelty to an animal. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt. First, that the defendant caused to be killed a four-month-old puppy in a house fire; second, ***that the defendant acted intentionally; that is knowingly, starting the house fire***; and third, that the defendant acted maliciously. To act maliciously means to act with intent and with malice or other bad motive. As used herein to act with malice or other bad motive is to possess a sense of personal ill will that activated or incited the defendant to perform the act and to undertake the conduct that resulted in the harm to the animal. ***It also means the conduct of the mind which prompts a person to intentionally start a house fire which proximately results in the injury or death to the animal.*** You may consider this along with all other facts and circumstances in determining whether the defendant’s act was unlawful and whether it was done with malice and/or a bad motive.

So, I instruct you and I charge you, if you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant intentionally and maliciously caused to be killed a four-month-old puppy by setting fire to a dwelling house, it would be your duty to return a verdict of guilty. If you do no so find or have a reasonable doubt as to one or more of these things it would be your duty to return a verdict of not guilty.

(T3 pp 330-331)(emphasis added).

In general, an intention to cause one type of harm cannot serve as a substitute for a requirement of intention as to another type of harm. 1 Wayne R. LaFave, Substantive Criminal Law 350 & 458-60. There is an exception under the doctrine of transferred intent, which says that if a defendant intended to harm one person but instead harmed a different person, the legal effect would be the same as if the defendant had harmed the intended victim. See See e.g. State v. Wynn, 278 N.C. 513, 519, 180 S.E.2d 135, 139 (1971); State v. Davis, 349 N.C. 1, 506 S.E.2d 455 (1998); State v. Fletcher, 125 N.C. App. 505, 481 S.E.2d 418 (1997); State v. Greenfield, 262 N.C. App. 631, 822 S.E.2d 477 (2018), aff’d in part, rev’d in part, State v. Greenfield, 375 N.C. 434, 847 S.E.2d 749 (2020); see N.C.P.I. – Criminal 104.13. These exceptions derive from statutory definitions like the felony murder rule. N.C. Gen. Stat. § 14-17.

The doctrine has only been expanded in ways that do not logically apply here. So, for example, in State v. Fletcher, 125 N.C. App. 505, 481 S.E.2d 418 (1997), a defendant intended to shoot a victim after raping her. When he fired shots, one bullet struck her; and one bullet entered an occupied home but did not injure anyone. Id. 125 N.C. App. at 423; 481 S.E.2d at 513. This Court held that the intent to shoot her could transfer to intent to shoot into the occupied home, thereby fulfilling the intentional element of discharging a firearm into an occupied property. Id. In approving this application of the doctrine of transferred intent in that instance, this Court emphasized that 1) discharging a weapon into an occupied property is a general intent crime; and 2) discharging a weapon into an occupied property is an offense against the person, not against property. Id.

In contrast, neither of these two prerequisites to application of the transferred intent doctrine are present in Mr. Charles’ case. First, cruelty to animals is a specific intent crime, not a general intent crime. This Court’s analysis in State v. Yarborough, 255 N.C. App. 216, 803 S.E.2d 216 (2017)(unpublished) demonstrates that knowledge of the dog is required to prove the intentional act. Second, the second-degree arson charge is a crime against property. First degree arson might be a crime against the person. But the distinction between first- and second-degree arson is whether the home is occupied. N.C. Gen. Stat. § 14-58. Mr. Charles was charged only with second-degree arson, as the home was unoccupied. (R p 24) While second degree arson is a crime against property, cruelty to animals is not a property crime; it’s an animal protection crime. So, intent would not transfer per this Court’s review of the doctrine and per reason.

Just as “intentionally” refers to intent to kill the dog, not start a fire, maliciously refers to malice in killing the dog, not starting the fire. See State v. Gerberding, 237 N.C. App. 502, 767 S.E.2d 334 (2014)(finding malice where defendant attacked the dog with a knife, admittedly stabbing to death a dog that had no history of violent behavior after it bit her when she tried to grab a hamburger out of its mouth).

 The trial court erred in instructing the jury that felony cruelty to animals could be proven by transferred intent. For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice that, after examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings. Lawrence, 365 N.C. at 518, 723 S.E.2d at 334. Here, the trial court’s error in instructing the jury on transferred intent was the difference between a guilty or not guilty verdict. Accordingly, Mr. Charles respectfully requests that the judgment for felony cruelty to animals be vacated.

1. **THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION OVER THE CHARGE OF CRUELTY TO ANIMALS BECAUSE THE INDICTMENT DID NOT ALLEGE TWO ESSENTIAL ELEMENTS OF THE CRIME CHARGED.**
2. **Standard of Review**

This Court reviews the sufficiency of an indictment de novo. State v. Harris, 219 N.C. App. 590, 593, 724 S.E.2d 633, 636 (2012).

1. **Argument**

The trial court lacked subject matter jurisdiction over the charge of felony cruelty to animals because the indictment did not allege two essential elements: that Mr. Charles acted intentionally and that he acted maliciously. (R p 24). The purpose of an indictment is to inform the defendant of the charge against him with sufficient certainty to enable him to prepare a defense. See State v. Gregory, 223 N.C. 415, 27 S.E.2d 140 (1943). An indictment is insufficient if it fails to allege the essential elements of the crime charged as required by Article I, Section 22 of the North Carolina Constitution and our legislature in N.C. Gen. Stat. § 15–144. When an indictment fails to allege the essential elements of the crime charged, the trial court lacks subject matter jurisdiction, and the reviewing court must arrest judgment. See State v. Sturdivant, 304 N.C. 293, 307–08, 283 S.E.2d 719, 729 (1981) (citing N.C. Const. Art. I, § 22; State v. Simpson, 302 N.C. 613, 276 S.E.2d 361 (1981); State v. Crabtree, 286 N.C. 541, 212 S.E.2d 103 (1975)). A challenge to the sufficiency of an indictment may be made for the first time on appeal. Sturdivant, 304 N.C. at 308, 283 S.E.2d at 729 (citing N.C. Gen. Stat. §§ 15A–1441, 1442(2)(b), 1446(d)(1) and (4)); see also State v. Wilson, 128 N.C. App. 688, 497 S.E.2d 416 (1998).

 The elements of felony cruelty to animals are 1) defendant did torture, mutilate, maim, cruelly beat, disfigure, poison, or kill, or cause or procure to be tortured, mutilated, maimed, cruelly beaten, disfigured, poisoned, or killed, any animal; 2) defendant acted intentionally (knowingly and without excuse or justification); and 3) defendant acted maliciously (intentionally and with malice). N.C. Gen. Stat. § 14-360(c).

 The indictment, in charging felony cruelty to animals, stated:

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 19th day of July, 20~~19~~ 20, in the County named above the defendant named above unlawfully, willfully and feloniously did kill an animal, a four month old puppy, by using an accelerator to light the residence on fire with the dog inside the home. This act was in violation of North Carolina General Statutes Section 14-360(b).”

(R p 24).

The indictment for felony cruelty to animals failed to allege the two essential elements of acting intentionally and maliciously. (R p 24). N.C. Gen. Stat. § 14-360. Accordingly, the trial court lacked subject matter jurisdiction, and the judgment for cruelty to animals must be vacated. See State v. Bullock, 154 N.C. App. 234, 244, 574 S.E.2d 17, 24 (2002) (holding that the indictment failed to allege the essential element of “malice aforethought” in charging first degree murder, and arresting judgment and remanding for entry of judgment and sentencing on the lesser included offense of voluntary manslaughter, which does not require malice.) See also State v. Fowler, 266 N.C. 528, 531, 146 S.E.2d 418, 420 (1966); State v. Covington, 267 N.C. 292, 148 S.E.2d 138 (1966).

Where the indictment does sufficiently allege a lesser-included offense, the appellate court may remand for sentencing and entry of judgment thereon but only if there was sufficient evidence presented of the lesser included offense. See State v. Bullock, 154 N.C. App. at 245, 574 S.E.2d at 24 (2002); State v. Robbins, 309 N.C. 771, 777, 309 S.E.2d 188, 191 (1983).

Here, the indictment also does not sufficiently allege the lesser included offense, and even if it had, insufficient evidence was presented of misdemeanor cruelty to animals. N.C. Gen. Stat. § 14-360(a). As set forth above, misdemeanor cruelty to animals is a lesser included offense of felony cruelty to animals, requiring that the defendant acted intentionally but not maliciously. N.C. Gen. Stat. § 14-360(a). Thus, both offenses require that the defendant’s act of cruelty was committed knowingly. In order to prove that the cruelty to animals was committed knowingly, to prove even the misdemeanor offense, the State would have had to present evidence that Mr. Charles had knowledge that the animal existed and was present at the home. The State presented no such evidence. Accordingly, Mr. Charles respectfully requests that the judgment for cruelty to animals be vacated.

# Conclusion

 For all the foregoing reasons, Mr. Charles respectfully asks this Court to vacate the judgment for felony cruelty to animals.

Respectfully submitted this the 27th day of January, 2022.

 /s/ ELECTRONICALLY SUBMITTED

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**CERTIFICATE OF COMPLIANCE**

Undersigned counsel hereby certifies that this brief complies with N.C. R. App. P. 28(j)(2), in that it is printed in 13-point Century Schoolbook, a

proportionally-spaced font with serifs, and contains no more than 8,750 words in the body of the brief, footnotes and citations included, as indicated by the word-processing program used to prepare the brief.

 This the 27th day of January, 2022.

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**CERTIFICATE OF FILING AND SERVICE**

 I hereby certify that the original Defendant-Appellant’s Brief has been filed by uploading a copy of the same to the Court of Appeals electronic filing website.

 I further hereby certify that a copy of the above and foregoing Defendant-Appellant’s Brief has been duly served upon Haley A. Cooper, Assistant Attorney General, Department of Justice, P.O. Box 629, Raleigh, NC 27602 at hcooper@ncdoj.gov.

 This the 27th day of January, 2022.

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