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NO. COA01-1024

NORTH CAROLINA COURT OF APPEALS

Filed: 16 July 2002

STATE OF NORTH CAROLINA

v.

VERGIL FLOWERS

Cleveland County
Nos. 97 CRS 3039,
97CRS7538-40

Appeal by defendant from judgments entered 24 August 1999 by Judge Timothy L. Patti in Superior Court, Cleveland County. Heard in the Court of Appeals 5 June 2002.

Attorney General Roy Cooper, by Assistant Attorney General Chris Z. Sinha, for the State.

Jerry M. Trammell, for the defendant-appellant.

WYNN, Judge.

Defendant was convicted in August 1999 of first-degree sexual offense under N.C. Gen. Stat. § 14-27.4 (2001) (97 CRS 7538) and taking indecent liberties with a child under N.C. Gen. Stat. § 14-202.1 (2001) (97 CRS 7539), and judgments on these convictions were entered by Judge Timothy L. Patti on 24 August 1999. No appeal from these convictions was taken within the prescribed time; however, on 14 November 2000 this Court granted defendant's petition for *writ of certiorari* to review the convictions in 97 CRS 7538 and 7539.

The record on appeal was filed with this Court on 10 August 2001, and the printed record was apparently mailed from this Court on 27 August 2001; however, defendant failed to timely file his brief by 26 September 2001. On 30 October 2001, the State filed a motion to dismiss defendant's appeal under N.C.R. App. P. 13(c) for failure to comply with N.C.R. App. P. 13(a)(1). Also on 30 October 2001, defendant filed a motion to extend the time within which to serve his brief under Rule 13(a)(1) until 2 November 2001. Subsequently, defendant filed his brief with this Court on 14 November 2001 (twelve days after defendant's own requested extended deadline). On 15 November 2001, defendant filed a motion to amend his previously-filed motion to extend time under Rule 13(a)(1) seeking to amend the requested deadline for filing his brief to read "14 November 2001" instead of "2 November 2001." Alternatively, defendant sought to suspend the Rules of Appellate Procedure under N.C.R. App. P. 2 to allow defendant's brief and consider it timely filed. The above motions were referred to this panel for disposition. We hereby deny all of defendant's motions, as well as the State's motion to dismiss; nonetheless, we elect to treat defendant's appeal as a petition for *writ of certiorari* under N.C.R. App. P. 21 (2002), and grant that petition. See *State v. Jarman*, 140 N.C. App. 198, 535 S.E.2d 875 (2000).

Defendant first argues that the trial court erred by proceeding to trial pursuant to a flawed arraignment, thereby prejudicing defendant. In October 1998, defendant was indicted for commission of (1) a first-degree sex offense with a juvenile female

in 97 CRS 7538, (2) one count of taking indecent liberties with the same juvenile female in 97 CRS 7539, and (3) one separate count of taking indecent liberties with a juvenile male in 97 CRS 7540. On 16 August 1999, the district attorney announced that the State was calling for trial cases "97 CRS 7540 and 97 CRS 7538." In preliminary instructions to prospective jurors, the trial court named the juvenile female as the alleged victim of the first-degree sexual offense charge, and incorrectly named the juvenile male as the alleged victim of the indecent liberties charge. At the conclusion of the preliminary instructions and prior to actual *voir dire*, the trial court held a bench conference, following which it instructed the prospective jurors that the juvenile female was the alleged victim in each instance; ultimately, verdicts of guilty were returned in cases 97 CRS 7538 and 7539 (both involving the juvenile female).

Defendant acknowledges that no objection to the arraignment was made at trial, nor was any objection raised concerning the trial court's preliminary jury instructions. Defendant thus contends that this Court should consider these errors under plain error analysis. However, defendant failed to assert plain error in his assignment of error, thereby waiving even plain error review. See N.C.R. App. P. 10(c)(4) (2002); see also *State v. Moore*, 132 N.C. App. 197, 511 S.E.2d 22 (1999). Furthermore, we note that plain error analysis is generally reserved for errors in jury instructions or the admissibility of evidence. See N.C.R. App. P. 10(b)(1) and 10(b)(2) (2002); see also *State v. Steen*, 352 N.C.

227, 536 S.E.2d 1 (2000), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001). Nonetheless, we have considered defendant's argument and find it to be wholly without merit, as there is no indication that, absent the alleged error, the jury probably would have reached a different verdict. See *State v. Robinson*, 330 N.C. 1, 409 S.E.2d 288 (1991). Defendant's first assignment of error is overruled.

Defendant next argues that the trial court erred in admitting evidence under N.C. Gen. Stat. § 8C-1, Rule 404(b) (2001) of similar prior bad acts involving another juvenile female. Defendant urges this Court to adopt the reasoning of Chief Justice Exum in a dissenting opinion in *State v. Bagley*, 321 N.C. 201, 362 S.E.2d 244 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988). However, it is axiomatic that this Court is bound by the decisions of our Supreme Court. See, e.g., *Dunn v. Pate*, 334 N.C. 115, 431 S.E.2d 178 (1993). Nonetheless, we have reviewed defendant's argument and find it to be without merit, as defendant has failed to show that the trial court abused its discretion in admitting the prior bad acts evidence. See, e.g., *State v. Beckham*, 145 N.C. App. 119, 550 S.E.2d 231 (2001).

Defendant next contends that the trial court erred in admitting certain testimony, by the juvenile victim's treating physician, regarding the victim's statements concerning a prior instance of abuse perpetrated upon her by defendant. Defendant concedes that no objection to this testimony was made at trial, but argues that the trial court's admission of this evidence

constituted plain error. However, defendant failed to allege plain error in his assignments of error, thereby waiving even plain error review. See N.C.R. App. P. 10(c)(4); see also *Moore*. Furthermore, defendant has failed to demonstrate that absent the error, the jury likely would have reached a different verdict. See *Robinson*. This argument is without merit.

Lastly, defendant argues that the trial court committed plain error in failing to give an adequate limiting instruction to the jury concerning the prior bad acts evidence admitted by the trial court pursuant to Rule 404(b). Defendant did not request such an instruction at trial; furthermore, defendant failed to allege plain error in his assignment of error, waiving even plain error review. See N.C.R. App. P. 10(c)(4); see also *Moore*. Finally, defendant has not shown that absent the error, the jury probably would have reached a different verdict. See *Robinson*. Accordingly, this assignment of error is overruled.

No error.

Judges HUNTER and THOMAS concur.

Report per Rule 30(e).