NO. COA11-8
NORTH CAROLINA COURT OF APPEALS

Filed: 15 November 2011

STATE OF NORTH CAROLINA

v. Onslow County
No. 07 CRS 61485

BRADLEY EMERSON MCDONALD,
Defendant.

Appeal by defendant from judgments entered 2 September 2010 by Judge Benjamin G. Alford in Onslow County Superior Court. Heard in the Court of Appeals 8 June 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert M. Curran, for the State.

M. Alexander Charns for defendant-appellant.

GEER, Judge.

Defendant Bradley Emerson McDonald appeals from his conviction of first degree rape and robbery with a dangerous weapon. Defendant primarily argues that there was insufficient evidence of penetration to support the charge of first degree rape. We hold that the court properly denied the motion to dismiss based on the State's evidence that swabs taken from

inside the victim's vagina contained defendant's sperm. Since defendant's remaining arguments are also unpersuasive, we find no error.

Facts

The State's evidence tended to show the following facts. "Anne"[1] was awakened by an intruder in her Jacksonville home at approximately 4:00 a.m. on 10 August 2006. She emerged from her bedroom and was hit in the face by the intruder, later identified as defendant. At the time, Anne could not see defendant because she was shielding her face from defendant's blows, and defendant had covered her face with her t-shirt. Defendant pushed Anne onto her bed, wrapped the cord from a clock radio around her neck, and threatened to kill her.

Anne testified that he forced her legs open, but she was not sure if defendant penetrated her vaginally. She recalled feeling his hand and "something down there." Anne testified that defendant was thrusting for five to 10 minutes as if he was having intercourse with her. After defendant stopped thrusting, he asked for her purse or her money. When Anne told him where her purse was, he began rummaging through it. When he did not find any money, he put it on the bed for her to find the money. Anne gave him about $100.00 in cash.

[1]The pseudonym "Anne" is used throughout this opinion to maintain her privacy and for ease of reading.

Anne subsequently called the police. She told Officer Kim Carnes of the Jacksonville Police Department that she was not sure whether defendant had penetrated her vaginally because defendant was beating her at the time. Anne was then taken to Onslow Memorial Hospital. A nurse spoke with her regarding the assault and wrote in the hospital report: "No penile penetration. Assailant was trying to insert penis." On the report, the nurse checked the box next to "attempted" for penetration. Swabs were taken from the interior of Anne's vagina. The SBI analyzed the samples and found sperm. DNA analysis subsequently matched the sperm to defendant.

On 13 August 2007, Detective W.L. Condry of the Jacksonville Police Department received a phone call from the SBI informing him that defendant was a suspect in the sexual assault on Anne based on DNA evidence. When Detective Condry informed Anne that defendant was suspected of being the man who raped her, Anne indicated that she was familiar with defendant. She provided a physical description of defendant that Detective Condry verified with a photograph of defendant. Anne also identified defendant from a photograph presented to her by Detective Condry.

Detective Condry subsequently conducted a videotaped interview of defendant at the Jacksonville Police Department.

Detective Condry advised defendant of his *Miranda* rights, and defendant agreed in writing to speak with Detective Condry without an attorney being present. Defendant told Detective Condry that he went to Anne's home to retrieve marijuana he had left there. He knocked on the front door but there was no answer. Defendant entered the home through an already broken window. He was attempting to make a phone call using the cordless phone when he heard a noise in the house. Anne came out of her bedroom, and defendant hit her with the cordless phone. Defendant claimed he did not know who he was attacking at the time.

Defendant admitted to threatening Anne whom he subsequently recognized. Defendant reported using drugs and alcohol that night, which he said made it difficult for him to achieve an erection. He also attributed this difficulty to knowing that it was his child's grandmother whom he had attacked. Defendant did not recall taking his penis out of his pants. He believed that any sperm found at the scene could have been from urination. Detective Condry collected a cheek swab of defendant's DNA during the booking process.

Defendant was indicted for first degree rape, first degree burglary, robbery with a dangerous weapon, and possession of

stolen goods.[2] Defendant testified in his own defense, generally recounting what he told Detective Condry during the interview. The jury found defendant guilty of first degree rape and robbery with a dangerous weapon but not guilty of first degree burglary. The trial court sentenced defendant within the presumptive range to consecutive terms of 384 to 470 months and 117 to 150 months imprisonment. Defendant timely appealed to this Court.

I

Defendant argues that the trial court committed plain error by admitting evidence regarding defendant's DNA when that DNA was obtained without a search warrant, a court order, or written waiver. Since defendant did not object at trial to the admission of the DNA evidence, he asserts plain error in his appeal. In order to demonstrate plain error, the defendant must show "(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997).

At trial, defendant did not move to suppress the DNA evidence. On direct examination, Detective Condry testified without objection that when he requested a DNA sample from

[2]The trial court ultimately dismissed the charge of possession of stolen goods.

defendant after the interview, defendant "did not decline" and "wasn't forced" to give the sample. Detective Condry collected defendant's DNA during the booking process. Agent Michelle Hannon with the SBI later testified, again without objection by defendant, that the DNA sample taken from defendant matched the sperm found inside Anne's vagina.

Consent, if proven, is an exception to the warrant requirement. *See* N.C. Gen. Stat. § 15A-221(a) (2009) ("Subject to the limitations in the other provisions of this Article, a law-enforcement officer may conduct a search and make seizures, without a search warrant or other authorization, if consent to the search is given."). North Carolina law requires the State to prove that consent was "freely and intelligently given, without coercion, duress or fraud." *State v. Vestal*, 278 N.C. 561, 578-79, 180 S.E.2d 755, 767 (1971).

In *In re W.R.*, 363 N.C. 244, 675 S.E.2d 342 (2009), a juvenile contended for the first time on appeal that the trial court erred in admitting his statements because they were elicited in violation of *Miranda* and were made involuntarily due to the presence of a school resource officer while he was being questioned by school officials. *Id.* at 246-47, 675 S.E.2d at 343. As was true in this case, the juvenile had not moved to

suppress those statements and did not object during testimony regarding those statements. *Id.*, 675 S.E.2d at 344.

In refusing to find plain error in the admission of the statements, the Supreme Court noted that "[i]nasmuch as no motion to suppress was made, no evidence was presented and no findings were made as to either the school resource officer's actual participation in the questioning of [the juvenile] or the custodial or noncustodial nature of the interrogation. Nor were any findings made as to whether the statements were freely and voluntarily made." *Id.* at 248, 675 S.E.2d at 344.

As a result, the Court was "not prepared based on the limited record before [it] to conclude that the presence and participation of the school resource officer at the request of school administrators conducting the investigation rendered the questioning of respondent juvenile a 'custodial interrogation,' requiring Miranda warnings and the protections of N.C.G.S. § 7B-2101." *Id.* The Court explained further: "No conflicting evidence having been presented, the trial court, sitting as judge and jury, was not required to make findings of fact and conclusions of law as to the voluntariness of the statement." *Id.* at 248-49, 675 S.E.2d at 344-45. The Court concluded that "[u]nder these circumstances, the trial court did not err in

admitting, without objection, respondent's statement . . . ." *Id.* at 249, 675 S.E.2d at 345.

Here, similarly, because of the lack of a motion to suppress and because defendant did not testify regarding the request for his DNA, the record is inadequate to determine whether defendant voluntarily consented to giving a DNA sample. Because Detective Condry's testimony did not preclude the sample's being obtained by consent and defendant made no contention otherwise, no reason existed for the trial court to address that issue. As was true for the Supreme Court in *In re W.R.*, under these circumstances, we cannot conclude that the trial court committed plain error in admitting the DNA evidence.

II

Defendant next argues that the trial court erred in admitting the DVD of Detective Condry's interview with defendant when the DVD included statements by Detective Condry about defendant's criminal history, his opinion as to defendant's guilt, and the fact that defendant's DNA was in the felon database. The record does not specifically indicate whether the entire DVD of the interview was played for the jury including the portions that defendant challenges on appeal. It is, however, undisputed that defendant did not object at trial; he,

therefore, argues that admission of the DVD constituted plain error. *See* N.C.R. App. P. 10(a)(4).

Although the State argues that this issue should not be considered even under the plain error standard because the record does not specifically show that the entire DVD was played, the entire DVD was admitted into evidence. From this fact, we must assume that the entirety of the DVD was played for the jury. *See State v. Robinson*, 339 N.C. 263, 277, 451 S.E.2d 196, 205 (1994) ("[W]e will presume that the contents of the entire exhibit were made known to the jury."); *State v. Spillars*, 280 N.C. 341, 352, 185 S.E.2d 881, 888 (1972) (stating "that when documentary evidence is regularly admitted, it is presumed that its contents are made known to the jury").

Nevertheless, we note that it would be the better practice for appellate defense counsel to clarify for this Court whether all or part of the DVD was played either through N.C.R. App. P. 9(c) (narration) or through a stipulation. While defendant asserts on appeal that "[a]ppellate defense counsel was not the defense counsel at trial," counsel can -- and should -- confer with trial counsel to determine precisely what occurred at trial when any ambiguity arises.

Turning to the merits of the issue, with respect to the detective's statements about defendant's criminal record,

defendant has failed to show that in the absence of those statements the jury probably would have reached a different verdict. *See State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986) ("Before deciding that an error by the trial court amounts to 'plain error,' the appellate court must be convinced that absent the error the jury probably would have reached a different verdict."). Defendant himself testified in detail regarding his past criminal convictions, and defendant does not contend that he would not have testified but for the mention of his criminal history in the DVD. *See, e.g., State v. Henderson*, 182 N.C. App. 406, 416, 642 S.E.2d 509, 515 (2007) (holding that admission of nurse's testimony was harmless error when it substantially reiterated another witness' testimony that was not challenged on appeal).

Similarly, we cannot find plain error regarding the admission -- through the DVD -- of Detective Condry's statement that defendant's DNA was in the felon database. On cross-examination, defendant acknowledged that his DNA was in the DNA database because he was a convicted felon. The jury, therefore, would have heard this information even if the DVD had been excluded.

Finally, defendant argues that admission of the DVD improperly placed before the jury Detective Condry's opinion

that the presence of defendant's DNA inside the victim proved defendant's guilt. At trial, however, defendant admitted that he climbed into Anne's house through a window and that he struggled with Anne. Although he denied penetrating Anne with his penis, he did not dispute the presence of his DNA, attributing it to his having urinated on himself. The State, however, presented evidence of vaginal swabs taken from inside Anne's vagina that had defendant's sperm and, therefore, his DNA on them. Given this evidence, we cannot conclude that the jury would probably have reached a different verdict had this portion of the DVD been excluded. *See State v. Elkins*, ___ N.C. App. ___, ___, 707 S.E.2d 744, 755 (2011) (holding that trial court erred in admitting officer's opinion that defendant was guilty but finding no plain error given "plenary evidence" of defendant's guilt).

III

Defendant further argues that there was insufficient evidence of penetration to support a charge of first degree rape and, therefore, the trial court erred in denying his motion to dismiss the rape charge. In reviewing the denial of a motion to dismiss, the task for this Court is to "determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of

the offense." *State v. Montgomery*, 341 N.C. 553, 560, 461 S.E.2d 732, 735 (1995). In making this determination,

> [t]he evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.

State v. Mercer, 317 N.C. 87, 96, 343 S.E.2d 885, 891 (1986).

The elements of first degree rape are (1) "engag[ing] in vaginal intercourse" (2) "[w]ith another person by force and against the will of the other person," and (3) "[e]mploy[ing] or display[ing] a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon[,] or [i]nflict[ing] serious personal injury upon the victim or another person." N.C. Gen. Stat. § 14-27.2(a)(2) (2009). Defendant argues only that the State failed to present sufficient evidence of vaginal intercourse.

Vaginal intercourse is proven if there is "evidence of the *slightest* penetration of the female sex organ by the male sex organ." *State v. Brown*, 312 N.C. 237, 244-45, 321 S.E.2d 856, 861 (1984). Penetration of the labia satisfies this standard. *See State v. Bellamy*, 172 N.C. App. 649, 657-58, 617 S.E.2d 81,

88 (2005) (finding sufficient evidence of penetration where prosecuting witness testified that "she felt the barrel of the gun on the *inside* of her labia").

Here, the State presented evidence that defendant's sperm was collected from inside Anne's vagina. Defendant, however, points to Anne's testimony and the testimony of people she spoke to that, because of his striking her, she could not be sure whether defendant had in fact penetrated her.

In *State v. Sloan*, 316 N.C. 714, 343 S.E.2d 527 (1986), the defendant likewise argued that the lack of evidence of penetration of the victim's rectum precluded his sexual assault conviction. The prosecuting witness was unconscious during the sexual assault and could not testify as to whether anal penetration occurred. *Id.* at 716, 343 S.E.2d at 529. Our Supreme Court concluded, however, that the motion to dismiss was properly denied based on evidence that the defendant's sperm was collected on swabs from one centimeter deep in the prosecuting witness's rectum. *Id.* at 726, 343 S.E.2d at 535.

Similarly, in this case, sperm consistent with defendant's DNA was found inside Anne's vagina. Further, while the prosecuting witness in *Sloan* was completely unable to testify regarding penetration, Anne testified that defendant "was trying to put his penis in" her and was "thrusting" for five to 10

minutes as if engaging in sexual intercourse. However, she "couldn't tell if he got it in or not." Since this evidence exceeds the amount of evidence found sufficient in *Sloan*, we hold that the trial court properly denied the motion to dismiss. *See also State v. Person*, 187 N.C. App. 512, 524-25, 653 S.E.2d 560, 568 (2007) (describing an anal swab collected from victim as "unequivocal evidence of penetration" even though victim had only testified that defendant struggled in engaging in anal intercourse), *rev'd in part per curiam on other grounds*, 362 N.C. 340, 663 S.E.2d 311 (2008).

IV

Finally, defendant argues that the trial court should have dismissed the charge of robbery with a dangerous weapon because the indictment, alleging defendant strangled Anne with a phone cord, fatally varied from the evidence at trial that showed a clock radio cord was actually used. It is, however, well established that "[a] variance between the offense alleged in the indictment and the evidence presented at trial is not always fatal." *State v. Langley*, 173 N.C. App. 194, 197, 618 S.E.2d 253, 255 (2005). A defendant "must show a variance with respect to an essential element of the offense." *Id.*

The essential elements of robbery with a dangerous weapon are:

> "(1) an unlawful taking or an attempt to take personal property from the person or in the presence of another; (2) by use or threatened use of a firearm or other dangerous weapon; (3) whereby the life of a person is endangered or threatened."

State v. Gwynn, 362 N.C. 334, 337, 661 S.E.2d 706, 707-08 (2008) (quoting *State v. Haselden*, 357 N.C. 1, 17, 577 S.E.2d 594, 605 (2003)). This Court has previously found no fatal variance as to the deadly weapon element when an indictment alleged use of a "revolver" while the evidence at trial described the weapon as a "handgun," "firearm," or "pistol," because the allegation regarding a "revolver" was sufficient to place the defendant on notice that he was accused of using a handheld weapon in committing the crime. *State v. Hussey*, 194 N.C. App. 516, 520, 669 S.E.2d 864, 866 (2008).

Here, defendant was on notice that he was accused of using the cord of a small appliance in committing the robbery. It is not material that the cord was attached to a clock radio rather than to a phone. As in *Hussey*, we hold that there was no fatal variance requiring dismissal of the robbery charge.

No error.

Judges BRYANT and BEASLEY concur.

Report per Rule 30(e).