IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-190

Filed: 17 October 2017

Durham County, No. 12 CRS 063056

STATE OF NORTH CAROLINA

v.

ZACHARY JOHN ROSE

Appeal by defendant from judgment entered 1 July 2016 and order entered 8 September 2016 by Judge Henry W. Hight, Jr. in Durham County Superior Court. Heard in the Court of Appeals 20 September 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General John F. Oates, Jr., for the State.

Tharrington Smith, L.L.P., by Douglas E. Kingsbery and Melissa H. Hill, for defendant-appellant.

CALABRIA, Judge.

Where the record contained substantial evidence of defendant's guilt, and the State's questions were isolated and limited, the trial court did not commit plain error in permitting the State to question defendant about his post-*Miranda* silence. Where defendant waived objection to the State's closing argument, and the State's comments

about defendant's post-*Miranda* silence were *de minimis*, the trial court did not err in declining to intervene *ex mero motu* in the State's closing argument. Where the trial court's findings were supported by evidence in the record, and in turn supported the trial court's conclusions, the trial court did not err in denying defendant's Motion for Appropriate Relief ("MAR"). Where the trial court issued an incorrect jury instruction unsupported by the evidence, it committed plain error, and the case is reversed and remanded for new trial on that offense.

I. Factual and Procedural Background

On 30 December 2012, Zachary John Rose ("defendant") was at the home of a friend for a party. This was a regular occurrence with this group of friends, who would drink and frequently spend the night. The night before, Brooke Aiken ("Aiken") and her boyfriend, attendees at the party, had engaged in sexual intercourse in one of the rooms in the home. Defendant slept across the hall. The following night, 30 December 2012, Aiken again went to bed, expecting her boyfriend to join her. At 2:00 a.m., she awoke to find herself engaged in intercourse with defendant. She urged defendant to stop, and physically shoved him away with her elbow. Defendant then resumed intercourse, this time from behind. Aiken and defendant then heard footsteps, and defendant left the bed to hide behind some furniture. When the footsteps passed, defendant asked Aiken for oral sex; she rejected him, and he left the room.

Defendant was indicted on the offenses of second-degree rape of a physically helpless victim, resulting from intercourse with Aiken while she slept; attempted second-degree sexual offense; and second-degree rape by force, resulting from forcible intercourse with Aiken after she awoke and shoved him away.

The matter proceeded to trial. During the State's cross-examination of defendant, defendant testified that he had not told his version of events to anybody other than his attorney. In response, the State asked whether defendant had told law enforcement his version of the events; defendant replied that he had not. During closing arguments, the State referred twice to this fact.

With respect to the first count, second-degree rape of a physically helpless victim, the trial court instructed the jury according to North Carolina Pattern Jury Instruction 207.20A, "Second Degree Rape – Forcible (Victim Asleep or Similarly Incapacitated)." Defendant sought to modify this instruction to exclude the "similarly incapacitated" language, but did not otherwise object to the instruction. The trial court denied this request.

The jury returned verdicts finding defendant not guilty of attempted second-degree rape, but guilty of second-degree rape of a helpless victim and second-degree rape by force. The trial court sentenced defendant to a minimum of 73 and a maximum of 148 months in the custody of the North Carolina Department of Adult Correction, on each of the two second-degree rape charges, to run consecutively.

On 11 July 2016, defendant filed an MAR, seeking to set aside the two convictions for second-degree rape. In his MAR, defendant alleged that the trial court committed plain error in permitting the State, absent objection from defendant, to question defendant about his decision not to tell his version of events to police prior to trial. Defendant further argued that the trial court erred in permitting the State to refer to that fact during its closing argument. On 8 September 2016, the trial court entered an order denying defendant's MAR.

Defendant appeals from the judgments entered upon his convictions. He also seeks review of the denial of his MAR via petition for writ of certiorari, which we, in our discretion, grant.

II. Post-*Miranda* Silence

In his first and third arguments, defendant contends that the trial court committed plain error in permitting the State to cross-examine defendant about his post-*Miranda* silence. We disagree.

A. Standard of Review

> [T]he plain error rule ... is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is 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. Lawrence, 365 N.C. 506, 516-17, 723 S.E.2d 326, 333 (2012) (quoting *State v. Odom,* 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). "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).

"Constitutional questions not raised and passed upon at trial will not be considered on appeal." *State v. Call*, 353 N.C. 400, 421, 545 S.E.2d 190, 204 (2001).

B. Analysis

At trial, defendant testified on direct examination that, upon discovering that law enforcement officers were looking for him, defendant turned himself into their custody. On cross-examination, the State engaged in the following exchange with defendant:

> Q. This testimony that you gave today, this statement, your account of what happened, who have you ever told that to before?
>
> A. My lawyers. I can't say that I have told anybody other than that my whole story.
>
> Q. You said you went and turned yourself in, correct?
>
> A. Yes, ma'am, I did.
>
> Q. You didn't tell police [your version of events],

though, right?

A. No, ma'am, I didn't.

On appeal, defendant contends that this was an impermissible question about defendant's exercise of his right to remain silent. Because defendant failed to object to this at trial, we review this argument only for plain error. *See State v. Richardson*, 226 N.C. App. 292, 300, 741 S.E.2d 434, 440 (2013) (holding that, where defendant did not raise a constitutional objection at trial, our review was limited solely to plain error).

Defendant contends that the State's inquiry as to his exercise of his right to remain silent was impermissible. Defendant acknowledges that there is a "narrow exception to the general rule prohibiting evidence of a defendant's post-*Miranda* silence[,]" but argues that this rule was inapplicable to the instant case.

The rule to which defendant refers, and upon which the State relied in its response to defendant's MAR below, provides that, although the State may not generally comment on a defendant's post-arrest silence,

> It goes almost without saying that the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest. In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest.

Doyle v. Ohio, 426 U.S. 610, 620 fn. 11, 49 L. Ed. 2d 91, 98 fn. 11 (1976).

In its response to defendant's MAR below, the State argued that, in testifying that he cooperated with law enforcement, defendant opened the door to the State challenging just how cooperative defendant really was, by asking him what he did and did not disclose to officers.

Even assuming *arguendo* that the State was incorrect, and that this elicited testimony did not satisfy the exception outlined in *Doyle*, we recognize that our review is limited to plain error. We have previously held that:

> [T]he following factors, none of which should be deemed determinative, must be considered in ascertaining whether a prosecutorial comment concerning a defendant's post-arrest silence constitutes plain error: (1) whether the prosecutor directly elicited the improper testimony or explicitly made an improper comment; (2) whether the record contained substantial evidence of the defendant's guilt; (3) whether the defendant's credibility was successfully attacked in other ways in addition to the impermissible comment upon his or her decision to exercise his or her constitutional right to remain silent; and (4) the extent to which the prosecutor emphasized or capitalized on the improper testimony by, for example, engaging in extensive cross-examination concerning the defendant's post-arrest silence or attacking the defendant's credibility in closing argument based on his decision to refrain from making a statement to investigating officers.

Richardson, 226 N.C. App. at 302, 741 S.E.2d at 441-42.

In the instant case, while the State did elicit the improper statement, the State made no further improper comment aside from its closing statements (discussed at greater length in a separate argument, below). The record contained substantial

evidence of defendant's guilt, including the testimony of the alleged victim, the SANE nurse who treated her, and a police forensic specialist. Much of the State's cross-examination of defendant, in addition to the lone impermissible question, was an attack on defendant's credibility, specifically on his assertion that the sex was consensual. And lastly, the lone question hardly rose to the level of "extensive cross-examination[;]" it was a single question, buried among over twenty pages of cross- and recross-examination.

Reviewing this lone question in the context of its limited scope, the substantial evidence against the defendant, the other means by which defendant's credibility was permissibly attacked, and the question's insignificance as compared to the extensive remainder of cross-examination, we hold that the trial court's failure to intervene did not rise to the level of plain error. Even assuming *arguendo* that the question was impermissible, on review, the trial court's inaction was not plain error.

III. Closing Arguments

In his second argument, defendant contends that the trial court erred in permitting the State to comment on defendant's post-*Miranda* silence in closing arguments. We disagree.

A. Standard of Review

"Where a defendant fails to object to the closing arguments at trial, defendant must establish that the remarks were so grossly improper that the trial court abused

its discretion by failing to intervene *ex mero motu*." *State v. Roache*, 358 N.C. 243, 296-97, 595 S.E.2d 381, 415 (2004) (citation omitted).

B. Analysis

In its closing argument, the State made two separate remarks with respect to defendant's exercise of his right to remain silent. First, the State argued:

> You saw that [defendant's friend] was one of the people who went to the police the next day and gave a statement. If his best friend had told him that he was about to go upstairs and have some consensual sexual activity based upon Brooke's flirty invitation, then somehow he found out that she was now accusing him of rape, don't you think [defendant] would have said something about that, he would have explained that to his friends, look, this doesn't make sense, here is what really happened.
>
> He didn't tell that to his friends, *he didn't tell that to police*, because that didn't happen. Brooke didn't invite him up there.

(Emphasis added.) Defendant did not object to this statement. Later, the State argued:

> Now, that was basically the defendant's testimony that you heard yesterday. And if you were impressed by his ability to tell that story calmly and provide the details that he did, then I do want you to remember that unlike Brooke, *yesterday was the first time he ever told that story to anybody other than his lawyers*.

(Emphasis added.) Defendant objected to this statement, and the trial court overruled the objection.

"Where evidence is admitted over objection and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *State v. Alford*, 339 N.C. 562, 570, 453 S.E.2d 512, 516 (1995). Thus, although defendant raised a subsequent objection to the State's argument, his failure to object initially waived his subsequent objection. We therefore review this closing argument as we would one which failed to provoke timely objection. Further, because this issue was not properly preserved, defendant cannot raise a constitutional argument with respect to it. *See Call*, 353 N.C. at 421, 545 S.E.2d at 204.

The question, then, is whether the State's two comments in its closing argument "strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord[.]" Defendant argues that the trial court should have intervened, and that the State should have been precluded from commenting on defendant's silence during closing arguments. In support of this position, defendant cites our decision in *State v. Adu*, 195 N.C. App. 269, 672 S.E.2d 84 (2009).

In *Adu*, the State observed, in its closing arguments:

> If [Defendant] didn't do anything, why didn't he tell [Ms. Adu] that when she first told him? Remember, she said he didn't deny it? He didn't really fully admit it, but he didn't deny it. And when he went to Pastor Longobardo, he didn't say, "I absolutely did not do this." When he saw Sheronda Harris, he didn't say, "I did not do this." Why didn't he go and talk to Detective Hines when she offered him the opportunity to tell his side of the story?

Adu, 195 N.C. App. at 275, 672 S.E.2d at 88. The defendant objected to this comment, but the objection was overruled. After comparing that case with several others, we held that "the State's comments during its closing argument violated [the] Defendant's Fifth Amendment right against self-incrimination." *Id*. at 277, 672 S.E.2d at 89. However, we then held "that the trial court's error was harmless beyond a reasonable doubt." *Id*. We noted the abundance of evidence of the defendant's guilt, along with the fact that the State mentioned "[the] Defendant's silence to law enforcement briefly on two occasions during the trial but these references were *de minimis*[,]" and that "it [did] not appear from the record or the transcript that the State attempted to capitalize on [the] Defendant's silence." *Id*. at 277-78, 672 S.E.2d at 90.

In the instant case, defendant waived objection to the State's comments. As in *Adu*, there was an abundance of evidence of defendant's guilt. The State made only two references to defendant's silence, and these references were *de minimis*. Moreover, it does not appear from the record that the State attempted to capitalize on defendant's silence, instead merely referring to it.

If, in *Adu*, we held that such conduct was harmless beyond a reasonable doubt, a much higher standard, then certainly in the instant case it was sufficiently harmless that the trial court did not abuse its discretion in failing to intervene *ex*

mero motu. We hold, therefore, that the trial court did not err in declining to intervene regarding the State's comments in its closing argument.

IV. Motion for Appropriate Relief

In his fourth argument, defendant contends that the trial court erred in summarily denying defendant's motion for appropriate relief. We disagree.

A. Standard of Review

"A trial 'court's ruling on a motion for appropriate relief pursuant to G.S. 15A-1415 is subject to review . . . [i]f the time for appeal has expired and no appeal is pending, by writ of certiorari.' " *State v. Morgan*, 118 N.C. App. 461, 463, 455 S.E.2d 490, 491 (1995) (quoting N.C. Gen. Stat. § 15A-1422(c)(3) (1988)).

"When a trial court's findings on a motion for appropriate relief are reviewed, these findings are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion. However, the trial court's conclusions are fully reviewable on appeal." *State v. Wilkins*, 131 N.C. App. 220, 223, 506 S.E.2d 274, 276 (1998) (citations omitted).

B. Analysis

Defendant's MAR alleges, in essence, the same arguments he now raises on appeal. Specifically, it alleges that the trial court erred in permitting the State to question defendant with respect to his silence, and in permitting the State to remark on that silence, in passing, in its closing arguments. Inasmuch as we have already

held that this was not plain error (in the case of the former) and not an abuse of discretion (in the case of the latter), we reaffirm those holdings.

Defendant also makes arguments with respect to the weight given by the trial court to the evidence. However,

> The trial court determines the credibility of the witnesses who testify, weighs the evidence, and determines the reasonable inferences to be drawn therefrom. If different inferences may be drawn from the evidence, the trial court decides which inferences to draw and which to reject. Appellate courts are bound by the trial court's findings if there is some evidence to support them, and may not substitute their own judgment for that of the trial court even when there is evidence which could sustain findings to the contrary.

State v. Icard, 363 N.C. 303, 312, 677 S.E.2d 822, 828-29 (2009) (citations omitted). It is not the place of this Court to reconsider the weight or credibility of the evidence before the trial court.

Upon review of the trial court's order, we find that its findings are supported by evidence in the record. Defendant's arguments notwithstanding, these findings in turn support the trial court's conclusions. Accordingly, we hold that the trial court did not err in denying defendant's MAR.

V. Jury Instructions

In his fifth argument, defendant contends that the trial court erred in failing to instruct the jury on all essential elements of the offense of second-degree rape of a physically helpless victim. We agree.

A. Standard of Review

The North Carolina Supreme Court "has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996).

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is 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."

Lawrence, 365 N.C. at 516-17, 723 S.E.2d at 333 (quoting *Odom,* 307 N.C. at 660, 300 S.E.2d at 378). "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." *Jordan*, 333 N.C. at 440, 426 S.E.2d at 697.

B. Analysis

The trial court instructed the jury on second-degree rape by force, and second-degree rape of a helpless victim. On appeal, defendant contends that the trial court failed to instruct the jury on a key element of second-degree rape of a helpless victim.

Defendant did not object to the jury instruction at trial, and we therefore review it for plain error.

The charge of second-degree forcible rape provides:

> A person is guilty of second-degree forcible rape if the person engages in vaginal intercourse with another person:
>
> (1) By force and against the will of the other person; or
>
> (2) Who is mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally disabled, mentally incapacitated, or physically helpless.

N.C. Gen. Stat. § 14-27.22(a) (2015).[1] Defendant was specifically charged under N.C. Gen. Stat. § 14-27.22(a)(2), dealing with a physically helpless victim. Defendant contends that the trial court's jury instruction omitted the third element of the offense, namely that defendant "knows or should reasonably know the other person is . . . physically helpless[,]" i.e. asleep. *See State v. Moorman*, 82 N.C. App. 594, 598, 347 S.E.2d 857, 859 (1986) (holding that "[a] person who is asleep is 'physically helpless' within the meaning of the statute"), *rev'd on other grounds,* 320 N.C. 387, 358 S.E.2d 502 (1987).

The trial court instructed the jury on this charge as follows:

> Count number one. The defendant has been charged with second degree rape. For you to find the defendant guilty of

[1] At the time of trial, the charge at issue was codified at N.C. Gen. Stat. § 14-27.3(a). That statute has since been recodified at N.C. Gen. Stat. § 14-27.22. N.C. Sess. Laws. 2015-181, § 4(a) (2015). We will refer to the statute in its current form.

> this charge, or this offense, the State must prove three things beyond a reasonable doubt.
>
> First, that the defendant engaged in vaginal intercourse with Brooke Aiken. Vaginal intercourse is penetration.
>
> [Interruption omitted.]
>
> Vaginal intercourse is penetration, however slight, of the female sex organ by the male sex organ. The actual emission of semen is not necessary.
>
> Second, that at this time Brooke Aiken was asleep or similarly incapacitated.
>
> And third, that Brooke Aiken did not consent and it was against her will.
>
> So I charge that as to count number one that if you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant engaged in vaginal intercourse with Brooke Aiken, that at that time Brooke Aiken was asleep, or similarly incapacitated, and that Brooke Aiken did not consent and it was against her will, it would be your duty to return a verdict of guilty.

This instruction parallels North Carolina Pattern Jury Instruction 207.20A almost verbatim. However, that instruction is titled "Second Degree Rape – Forcible (Victim Asleep or Similarly Incapacitated)." This instruction applies to N.C. Gen. Stat. § 14-27.22(a)(1), which deals with rape "[b]y force and against the will of the other person[.]" Defendant was charged with second-degree rape of a physically helpless victim, pursuant to N.C. Gen. Stat. § 14-27.22(a)(2), which contains the element of "knows or should reasonably know," and there is an entirely separate Pattern

Instruction on that charge. Specifically, Pattern Instruction 207.25, titled "Second Degree Rape – Victim Mentally Defective, Mentally Incapacitated *or Physically Helpless*" (emphasis added) includes the following clause:

> And Third, that the defendant knew or should reasonably have known that the victim was [mentally disabled] [mentally incapacitated] [physically helpless.]

N.C.P.I. 207.25. Even assuming *arguendo* that it was not plain error for the trial court to offer a Pattern Instruction, it is apparent that the trial court offered the *wrong* Pattern Instruction. The Pattern Instruction given by the court dealt with second-degree rape based on N.C. Gen. Stat. § 14-27.22(a)(1), not (a)(2), which was the offense with which defendant was charged. Accordingly, it is clear that the trial court erred by giving the wrong instruction.

Our Supreme Court has held that "it would be difficult to say that permitting a jury to convict a defendant on a theory not legally available to the state because it is not charged in the indictment or not supported by the evidence is not plain error even under the stringent test required to invoke that doctrine." *State v. Tucker*, 317 N.C. 532, 540, 346 S.E.2d 417, 422 (1986). This Court has further held that "it is plain error to allow a jury to convict a defendant upon a theory not supported by the evidence." *State v. Jordan*, 186 N.C. App. 576, 584, 651 S.E.2d 917, 922 (2007).

Under the correct instruction, the State would have had the burden of demonstrating that defendant knew or should have known of Aiken's incapacity.

However, the State failed to elicit evidence regarding defendant's knowledge, or that he should have known, that Aiken was asleep. In fact, defendant's testimony suggests that he believed her to be awake. The State presented evidence to suggest that Aiken was actually asleep, but the offense also required evidence that would allow the jury to find that defendant knew or should have known this.

It is clear, then, that the trial court's instruction was not supported by the evidence, inasmuch as the State failed to produce evidence of defendant's knowledge. Pursuant to our holding in *Jordan*, that was plain error. We therefore hold that the trial court's error in issuing the erroneous instruction rose to the level of plain error. We reverse the trial court's judgment, and remand for a new trial. *See Barber v. Constien*, 130 N.C. App. 380, 385, 502 S.E.2d 912, 915 (1998) (holding that "a new trial may be necessary if a pattern instruction misstates the law").

VI. Conclusion

The trial court did not commit plain error in permitting the State to ask defendant about his exercise of his right to remain silent, nor did it err in declining to intervene *ex mero motu* in the State's argument. Likewise, the trial court did not err in denying defendant's MAR. However, the trial court's instruction on the charge of second-degree rape of a helpless victim constituted plain error. Accordingly, we reverse the trial court's judgment on that one charge, and remand for a new trial on the charge of second-degree rape of a helpless victim.

NO PLAIN ERROR IN PART, NO ERROR IN PART, REVERSED AND REMANDED IN PART.

Judge ZACHARY concurs.

Judge MURPHY concurs in the result only.

Report per Rule 30(e).