IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-374

Filed: 7 November 2017

Iredell County, Nos. 13 CRS 50662-69

STATE OF NORTH CAROLINA

v.

DANIEL RAY HOLLIDAY

Appeal by defendant from judgments entered 3 October 2016 by Judge Julia Lynn Gullett in Iredell County Superior Court. Heard in the Court of Appeals 3 October 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Anne M. Middleton, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for defendant-appellant.

ARROWOOD, Judge.

Daniel Ray Holliday ("defendant") appeals from judgments entered upon his convictions of five counts of statutory rape and seventeen counts of statutory sexual offense. On appeal, defendant argues that the trial court erred by admitting into evidence as tacit admissions, several recorded conversations between defendant and

his wife while he was in jail awaiting trial. For the reasons stated herein, we dismiss defendant's appeal.

I. Background

On 11 March 2013, defendant was indicted for five counts of statutory rape of a person who is 13, 14, or 15 years old in violation of N.C. Gen. Stat. § 14-27.7A and seventeen counts of statutory sexual offense with a person who is 13, 14, or 15 years old in violation of N.C. Gen. Stat. § 14-27.7A.

On 20 September 2016, defendant filed a "Motion *In Limine* to Exclude Improper Argument[.]" Defendant moved the trial court to prohibit the State from arguing that defendant's silence in response to his wife's allegations that he engaged in vaginal intercourse or any other sex offense with the victim during their jail phone calls amounted to a tacit admission.

Defendant was tried at the 12 September 2016 criminal session of Iredell County Superior Court, the Honorable Julia Lynn Gullett presiding. The State's evidence tended to show that defendant was married to Stormey Holliday ("Stormey") and they had one daughter. Their daughter, K.H.[1], became good friends with the victim, N.G., when they were both in the 8th grade. N.G. spent a significant amount of time at defendant's residence.

[1] Initials are used throughout this opinion to protect the identities of the juveniles.

N.G. testified that defendant began behaving inappropriately towards her when she was fourteen years old. It began one day when N.G. was talking about a guy that she liked and defendant stated that he wished he was fifteen years old so that "him and I could be together." A day later, defendant, K.H., and N.G. were in the car when defendant touched N.G.'s leg and held her hand.

Defendant began sending text messages to N.G. Defendant texted that he wished they could be together and that any guy would be lucky to have N.G. Defendant and N.G. would meet in a field near N.G.'s house. Initially, they talked and defendant would give her letters he had written, and bring her breakfast or clothes. The two then began to kiss and touch each other. N.G. testified that one day, defendant had her perform oral sex on him. Defendant continued to have N.G. perform oral sex on him.

On 5 October 2015, defendant directed N.G. to meet him in the field and to only wear one of his work shirts, along with thigh-high stockings. N.G. complied with his requests. Defendant asked her to have sex with him for the first time and she agreed. Defendant used a condom and gave N.G. spermicide to use at home. N.G. testified that they continued to have sex; once more in the field; twice at her house; at a boat dock; at defendant's house; at defendant's brother's house; and at an elementary school's playground.

Stormey testified that she began to notice inappropriate contact between defendant and N.G. when she saw them hugging in the computer room. Stormey also recalled another incident where N.G. was sitting against a couch on the floor and defendant had his head between her legs.

In November 2012, N.G.'s mother was cleaning N.G.'s room when she found a box of condoms, lubricant, and an unsigned love letter. At the time, N.G. lied to her mother and told her that she and K.H. had found it while looking through defendant and Stormey's belongings. At trial, N.G. testified that she and defendant used the condoms and lubricant that were found in her room.

Around that same time, N.G. left her cell phone at defendant's home and Stormey read through her text messages. Stormey found a text message from N.G. to defendant that read, "I gotta go, lover. I love you with all of my heart, Forever and always." Stormey took a photograph of the text message and confronted defendant with it. She also sent a picture of the text message via Facebook to N.G.'s mother.

N.G.'s mother testified that she shared the information about the text message, along with the items she had found in N.G.'s room, with N.G.'s father. N.G.'s parents made arrangements to meet with defendant. The three met in a grocery parking lot and discussed whether or not defendant was having an inappropriate relationship with N.G. Although he denied having an inappropriate relationship with N.G., defendant admitted to writing the letter. Defendant explained that he wrote it

because N.G. "has low self-esteem . . . and I wanted to make her feel better." Defendant stated that the box of condoms and lubricant belonged to him. N.G.'s parents told defendant that they did not want N.G. seeing or being in contact with K.H. or defendant.

Nevertheless, defendant continued to meet and talk with N.G. He followed N.G.'s school bus home one day, gave her a prepaid cell phone, and instructed her to call him. It was not until early December that they stopped seeing each other.

On 23 December 2012, Stormey attempted suicide after having a conversation with defendant. Detective Sergeant Katie Harwell ("Detective Harwell") of the Iredell County Sheriff's Department responded to the scene. Stormey told Detective Harwell that she was upset because of suspicious behavior between N.G. and defendant. She also stated that defendant informed Stormey that he was in love with N.G. and wanted a divorce from Stormey. Detective Harwell contacted the Iredell County Sheriff's Office Special Victims Unit and notified them of the allegations concerning defendant's relationship with N.G.

Detective Amy Dyson ("Detective Dyson") of the Iredell County Sheriff's Office Special Victims Unit contacted N.G.'s father about the allegations and referred N.G. to the Dove House Children's Advocacy Center to be interviewed. N.G. was interviewed on 10 January 2013 and 29 January 2013. At the first interview, N.G. did not disclose that defendant was having inappropriate sexual contact with her. It

was not until the second interview that she disclosed the inappropriate relationship with defendant. N.G. disclosed to the interviewer that she had sexual intercourse and oral sex with defendant on multiple occasions and at various locations. In the time between the two interviews, N.G. also disclosed to her father that she had engaged in sexual activity with defendant.

Defendant called Detective Dyson and Detective Brian Fink ("Detective Fink") of the Iredell County Sheriff's Office in his defense. They testified that they interviewed defendant on 11 January 2013. During the interview, the detectives told defendant that N.G. had made an allegation of forcible rape, that there was DNA evidence found on condoms and N.G.'s underwear, that defendant's fingerprints were found on the letter found in N.G.'s possession; and that there was video surveillance from the elementary school. Detective Fink testified that there was no video surveillance, DNA, or fingerprints; that this was merely an interview technique "[t]rying to get to the truth." Defendant also called his brother, two sisters, niece, and K.H.'s friend to the stand in his defense.

Defendant was arrested on 31 January 2013 and spent approximately six months in custody until he was released on bond. While he was in jail, defendant had several telephone conversations with his wife and daughter which were admitted into evidence. In some of those calls, the State offered evidence of hearsay statements made by Stormey about defendant having a sexual relationship with N.G., which

defendant did not deny. The trial court permitted the State to introduce those statement on the theory that they were adopted admissions because defendant remained silent and did not deny the accusations.

On 3 October 2016, a jury found defendant guilty on all counts. The trial court entered separate judgments on each of the twenty-two convictions. In each judgment, defendant was sentenced to consecutive sentences of 192 to 291 months. Defendant gave oral notice of appeal.

II. Discussion

The sole issue on appeal is whether the trial court erred by allowing into evidence statements as adoptive admissions, telephone conversations between defendant and his wife, while he was in jail. Because defendant failed to properly preserve this issue for appeal, we dismiss the appeal.

"In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991); *see also* N.C. R. App. P. 10(a)(1) (2017).

> When a *motion in limine* has been denied and when the contested evidence is then offered at trial, the party opposing admission of the evidence must renew his objection at trial to preserve the issue for appellate review. Even if the trial court allows the party a standing objection, the party is not relieved of his obligation to make a

> contemporaneous objection.

State v. Mays, 158 N.C. App. 563, 578, 582 S.E.2d 360, 370 (citation omitted), *disc. review denied*, 357 N.C. 510, 588 S.E.2d 379 (2003).

Here, on 20 September 2016, defendant filed a "Motion *In Limine* to Exclude Improper Argument[,]" moving the trial court to prohibit the State from arguing that by failing to deny allegations from Stormey that he engaged in a sexual relationship with N.G. during his phone calls from jail amounted to a tacit or adoptive admission. The trial court reviewed numerous phone calls and struck some portions, while allowing other portions into evidence and allowing the State to argue tacit admission.

On appeal, defendant challenges three conversations that were admitted into evidence: State's Exhibit 14; State's Exhibit 16; and State's Exhibit 17. At trial, however, when the State moved to admit the State's Exhibits 14, 16, and 17 into evidence and to publish them to the jury, defendant failed to object.

> [THE STATE]: Your Honor, I'll mark as State's Exhibit 14, transcript of a phone call entitled: Call 2.9.13 call to Stormey 10.45, move that into evidence at this time and ask that it be published to the jury so that they can follow along with the phone call.
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> THE COURT: Any objection?
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> [DEFENDANT]: No, Your Honor.
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> . . . .
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> [THE STATE]: Your Honor, I've marked as State's Exhibit 16 the transcript of a telephone call entitled: Call 2.16.13.

> 17.55 hours, move that into evidence and ask that it be published to the jury at this time.
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> THE COURT: Any objection?
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> [DEFENDANT]: No, Your Honor.
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> . . . .
>
> [THE STATE]: Your Honor, I would mark as State's Exhibit 17 a transcript entitled: Call 2.17.13 18.43 hours, and ask that it be published to the jury.
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> THE COURT: Any objection?
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> . . . .
>
> [DEFENDANT]: No objection, Your Honor.

Based on the foregoing, defendant has failed to properly preserve this issue for appellate review.

Where a defendant fails to preserve an issue for appeal, our review is limited to plain error. *See* N.C. R. App. P. 10(a)(4). "To receive plain error review, a defendant must *specifically and distinctly* allege plain error . . . and a failure to do so results in waiver of plain error review." *State v. McClary*, 157 N.C. App. 70, 74, 577 S.E.2d 690, 693 (internal quotation marks and citations omitted), *appeal dismissed and disc. review denied*, 357 N.C. 466, 586 S.E.2d 466 (2003). Defendant has failed to allege or argue plain error, and therefore, there are no issues preserved for appeal. Therefore, we are compelled to dismiss the appeal.

DISMISSED.

Judges BRYANT and MURPHY concur.

Report per Rule 30(e).