NO. COA01-163

NORTH CAROLINA COURT OF APPEALS

Filed: 21 May 2002

STATE OF NORTH CAROLINA,

v. Cleveland County
No. 99 CRS 2858, 2859

DERRICK LAMONT DAVENPORT

Appeal by defendant from judgment entered 25 August 2000 by Judge Timothy L. Patti in Cleveland County Superior Court. Heard in the Court of Appeals 18 February 2002.

Attorney General Roy Cooper, by Assistant Attorney General R. Kirk Randleman, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Beth S. Posner, for defendant.

BIGGS, Judge.

Derrick Lamont Davenport (defendant) appeals his convictions of statutory rape of a fifteen-year old and indecent liberties with a child. For the reasons herein, we find no error.

The evidence at trial tended to show the following: that on 14 February 1999, B, then 15 years old, and a couple of friends, stopped by a friend's boyfriend's house for a visit. B and one of her friends were sitting on a couch in the living room when defendant approached and sat down beside them. Defendant made several sexual advances toward the girls, but they declined.

Some time later, B and her friend went to a back bedroom with defendant to smoke marijuana. Defendant continued to make sexual

advances, but the girls refused. After about twenty minutes, B and her friend returned to the living room.

Approximately fifteen to twenty minutes later, B decided to go to the bathroom. While B waited outside the bathroom door, defendant pulled her into an empty bedroom and locked the door. He squeezed B's mouth shut with his hands, pulled her by the hair, hit her three times across the jaw and side of her face, threw her onto the bed and told her to "[t]urn off the f[] lights, b[]." When B tried to fight back, defendant pulled a gun from beside the bed, held it to her head and threatened, "If I hear one peep out of you, that's it. No one knows where you are, no one will find you." Defendant then proceeded to take B's clothes off before pulling his pants down; all the while, keeping one hand over her mouth. Defendant, thereafter engaged in sexual intercourse with B.

Afterwards, defendant demanded that B perform fellatio, but she refused. Defendant pulled his pants up and left B, alone, in the bedroom. B got dressed, went to the kitchen to find her friend and asked her friend to take her to the hospital. Instead of going straight to the emergency room, B's friend drove her to another friend's house to call the police.

Once the police arrived at the friend's house, an officer took B to the hospital where a rape kit was administered. In the emergency room, Detective Deborah Garris, the lead investigator, took a statement from B, which disclosed the details of her sexual intercourse with defendant.

On 15 February 1999, defendant was arrested for first-degree

rape in violation of N.C.G.S. § 14-27.2 and first-degree kidnapping in violation of N.C.G.S. § 14-39. At the police station, defendant made a statement to a detective that he and B engaged in "consensual sex". On the following day, during an interview with Detective Garris, defendant made a statement that his birth date was 9 March 1974. This statement was made prior to defendant being advised of his *Miranda* rights.

On 15 March 1999, approximately one month after his arrest for first-degree rape and first-degree kidnapping, defendant was indicted for statutory rape in violation 14-27.7A and indecent liberties with a child in violation of N.C.G.S. § 14-202.1. The prosecutor dismissed the original rape and kidnapping charges on 25 May 1999.

On 25 August 2000, defendant was convicted of statutory rape of a fifteen-year old and indecent liberties with a child. The trial court sentenced defendant to 330 to 405 months for the statutory rape conviction, and 24 to 29 months for the conviction of indecent liberties with a child. From these convictions, defendant appeals.

I.

At the outset, we note that while defendant sets forth 29 assignments of error in the Record on Appeal, those assignments not addressed in his brief are deemed abandoned pursuant to Rule 28(b)(5) of the North Carolina Rules of Appellate Procedure.

Defendant argues first, that he is entitled to a new trial on both charges because the trial court erroneously and

unconstitutionally admitted evidence regarding his un*Mirandized* custodial statement about his age, in violation of *State v. Locklear*, 138 N.C. App. 549, 531 S.E.2d 853, *disc. review denied*, 352 N.C. 359, 544 S.E.2d 553 (2000). We disagree.

This Court in *State v. Locklear,* 138 N.C. App. 549, 551, 531 S.E.2d 853, 855 (2000) (citing *State v. Ladd*, 308 N.C. 272, 286, 302 S.E.2d 164, 173 (1983)), held that *Miranda* warnings do not apply generally, "to the gathering of biographical data necessary to complete the booking of a criminal suspect." However, *Miranda* does "apply to the gathering of biographical information necessary to complete the booking process, if the questions posited by the police are designed for the purpose of eliciting a response they know or should know is reasonably likely to be incriminating." *Id.* (citing *State v. Banks*, 322 N.C. 753, 760, 370 S.E.2d 398, 403 (1988)); *see also, Rhode Island v. Innis,* 446 U.S. 291, 301, 64 L. Ed.2d 297, 308 (1980) (holding that interrogation under *Miranda* consist of questions "the police should know are reasonably likely to elicit an incriminating response"). Our Supreme Court has held that "the prior knowledge of the police and the intent of the officer in questioning the defendant is highly relevant to whether the police should have known a response would be incriminating." *Ladd,* 138 N.C. at 287, 302 S.E.2d at 174. Moreover, our Supreme Court in *State v. Banks*, 322 N.C. 753, 761, 370 S.E.2d 398, 403 (1988), stated that the "focus must be on the time and circumstances under which it was obtained, not the use to which it was ultimately put. That the information [obtained] incidently

helped establish an essential element of the crimes for which defendant was booked does not make it more than routine at the time it was obtained."

In the present case, the critical facts are summarized as follows: at the time defendant was questioned by Detective Garris, he was charged with forcible rape and kidnapping; more than a month after defendant was questioned by Detective Garris, he was indicted for statutory rape and indecent liberties with a child. In addition, the Court specifically found that defendant's date of birth was elicited by Detective Garris in the process of gaining general information about the defendant, and not for the purpose of incriminating him. A trial court's findings of fact are conclusive and binding on the appellate courts if supported by competent evidence. *State v. Brooks*, 337 N.C. 132, 446 S.E.2d 579 (1994).

We hold that the evidence supports the trial court's conclusion that defendant's date of birth was necessary to complete the booking process and not a question "posited by the police [] designed for the purpose of eliciting a response they [knew or should known was] reasonably likely to be incriminating." Thus, *Miranda* warnings were not required. Accordingly, this assignment of error is overruled.

II.

Defendant next assigns as error the admission of evidence of force and violence and the prosecutor's repetitive arguments about force and violence throughout the trial. We note that defendant

has violated Rule 10 (c)(1)(2001) of the North Carolina Rules of Appellate Procedure which reads in pertinent part, "[e]ach assignment of error shall . . . be confined to a single issue of law; and shall state plainly, concisely . . . the legal basis upon which error is assigned." In this case, defendant contends first, that the trial court erred in admitting evidence of force and violence; and second, defendant argues prosecutorial misconduct. We will, however, exercise our discretion under Rule 2 of the North Carolina Rules of Appellate Procedure and review the merits of these arguments.

Defendant first contends that the trial court erred in admitting evidence during the trial regarding testimony of his force and violence against B. It is defendant's argument that neither force nor violence are essential elements of statutory rape or indecent liberties with a child and the admission of such evidence was error. We disagree.

As a general rule, relevant evidence is admissible, "if it has any logical tendency, however slight, to prove a fact in issue." *State v. Moore,* 335 N.C. 567, 601, 440 S.E.2d 797, 816 (1994). Similarly, evidence may be admissible where it is not directly probative of the crime charged if it pertains to the "'chain of events explaining the context, motive and set-up of the crime ... [and is] linked in time and circumstances with the charged crime, or [if it] forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury.'" *State v. Agee*, 326 N.C. 542, 548, 391 S.E.2d 171, 174

(1990) (quoting *United States v. Williford*, 764 F.2d 1493, 1499 (11th Cir.1985)).

In the case *sub judice*, the pertinent evidence can be summarized as follows: B had not yet reached her sixteenth birthday at the time of the incident which occurred on 14 February 1999, approximately seven months prior to B's birthday; defendant was almost 25 years old, approximately ten years older than B; defendant grabbed B while she waited outside the bathroom door; defendant pulled B into an empty bedroom and locked the door; defendant squeezed B's mouth shut with his hands, pulled her by the hair, hit her three times across the face and jaw and threw her onto the bed; when B tried to fight back, defendant pulled a gun from beside the bed, held it to her head, and threatened her; defendant took B's clothes off and forced her to have sexual intercourse with him; and that defendant then demanded that B perform fellatio.

While defendant is correct in stating that force and violence are not essential elements of the offenses for which he was charged, this evidence is significant in establishing the chain of events explaining the context of the crime and is so linked to the crimes that it is necessary to complete the account of what happened for the jury. We conclude that defendant's argument that this evidence should have been excluded is without merit.

Defendant next argues that he was prejudiced by the trial court's failure to grant a mistrial based on alleged prosecutorial misconduct during the State's opening statement and closing

argument. Because defendant made no motion for a mistrial based on the opening or closing arguments, we must determine whether the trial court erred by failing to grant a mistrial *ex mero motu*. *State v. Hill*, 347 N.C. 275, 493 S.E.2d 264 (1997).

"The standard of review when a defendant fails to object at trial is whether the argument complained of was so grossly improper that the trial court erred in failing to intervene[.]" *State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998). "[T]he impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it." *State v. Hipps*, 348 N.C. 377, 411, 501 S.E.2d 625, 645 (1998) (quoting *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979)). "In determining whether the [statement] was grossly improper, [we] must examine . . . [the] context in which it was given and . . . the circumstances to which it refers." *State v. Tyler*, 346 N.C. 187, 205, 485 S.E.2d 599, 609 (1997); *State v. Alston*, 341 N.C. 198, 239, 461 S.E.2d 687, 709 (1995).

Furthermore, it is within the trial court's discretion to determine whether to grant a mistrial, and the trial court's decision is to be given great deference because the trial court is in the best position "to determine whether the degree of influence on the jury was irreparable." *State v. Williamson*, 333 N.C. 128, 138, 423 S.E.2d 766, 722 (1992). This is particularly true where, as in the present case, defendant did not move for a mistrial

during the trial as a result of the alleged improper opening statement and closing argument. *Id.*

As a general rule, "counsel [is allowed] wide latitude in the scope of jury arguments." *State v. Soyars*, 332 N.C. 47, 60, 418 S.E.2d 480, 487 (1992). Counsel is permitted to argue the facts which have been presented, as well as reasonable inferences which can be drawn therefrom. *State v. Williams*, 317 N.C. 474, 346 S.E.2d 405 (1986). During opening statements, "counsel are permitted a limited preview of the evidence and allowed to state the 'legal claim or defense in basic terms." *State v. Jaynes,* 342 N.C. 249, 282, 464 S.E.2d 448, 468 (1995) *citing State v. Paige,* 316 N.C. 630, 648, 343 S.E.2d 848, 859 (1986). Similarly, prosecutors may, in closing arguments, create a scenario of the crime committed as long as the record contains sufficient evidence from which the scenario is reasonably inferable. *State v. Ingle,* 336 N.C. 617, 645, 445 S.E.2d 880, 895 (1994).

In the case *sub judice*, defendant challenges the following opening statement:

> . . . [T]his is a case about a man who wouldn't take no for an answer, a man who the word, "don't" means nothing to him. . . . [S]omeone grabbed [B], pulled her into a bedroom. . .She tried to leave the room. He grabbed her by the hair , threw her on the bed and at that point she was hit in the face, threatened, had a gun shown to her with threats that it would be used and the she was raped.

In addition, defendant challenges the following closing argument:

> I told you in the opening . . . statement that

> this is a case about a man who wouldn't take no. . . No wasn't in his vocabulary. He was going to do what he wanted to do. . . [S]omeone grabbed her and pulled her into the bedroom. . .[S]he was dragged into the bedroom. . .He grabs the back of her head and her arm and jerks her from the bathroom door. . . [H]e made his request and once again she said no. And then he began, he hit her in he face. . .[A]fter he pushed her down on the bed and threatened her with [the gun], he threw it on the bed and it bounced up and hit her head. . . How hard was she hit? Hard enough to bruise her. You've seen these paraded to everybody just about that's come here [sic]. They're bruises. . .[B] after being hit and threatened with the gun, thrown onto the mattress and box springs there on the floor, -- she was scared.
>
> . . . .
>
> The State has presented you with ample evidence to show that the force and violence that [B] testified to occurred. There is no other explanation. No evidence has been shown to you that would contradict that she received those bruises exactly the way she said it. Did she hit herself on the way from 512 Dover Street back to LeGrande? Did she hit herself? Nobody testified seeing her being hit or hurt in any way that would cause those bruises.
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> . . . .

Upon our review of the entire record, we conclude that the State's opening statement did not go beyond the proper scope and function of an opening statement. We further conclude that there was sufficient evidence to support the scenario created by the State during its closing argument. Therefore, we hold that neither argument was grossly improper; thus, the trial court did not err by failing to intervene *ex mero motu.*

Accordingly, this assignment is overruled.

III.

Defendant argues next that he is entitled to a new trial because he was denied the effective assistance of counsel at trial. Specifically, he contends that defense counsel failed to object to certain State's evidence, as well as, its opening statement and closing argument.

Generally, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal. *See State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E.2d 719, 721 (1985) ("The accepted practice is to raise claims of ineffective assistance of counsel in post-conviction proceedings, rather than direct appeal."); *State v. Ware,* 125 N.C. App. 695, 697, 482 S.E.2d 14, 16 (1997) (dismissing defendant's appeal because issues could not be determined from the record on appeal and stating that to "properly advance these arguments defendant must move for appropriate relief pursuant to G.S. 15A-1415"). A motion for appropriate relief is preferable to direct appeal because in order to

> defend against ineffective assistance of counsel allegations, the State must rely on information provided by defendant to trial counsel, as well as defendant's thoughts, concerns, and demeanor. "[O]nly when all aspects of the relationship are explored can it be determined whether counsel was reasonably likely to render effective assistance." Thus, superior courts should assess the allegations in light of all the circumstances known to counsel at the time of representation.

State v. Buckner, 351 N.C. 401, 412, 527 S.E.2d 307, 314 (2000) (citations omitted). Our Supreme Court has instructed that "should the reviewing court determine that [ineffective assistance of

counsel] claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent [motion for appropriate relief] proceeding." *State v. Fair,* 354 N.C. 131, 167, 557 S.E.2d 500, 525. However, if the record reveals that "no further investigation is required" and that the claims can be decided on the merits based on the record, then the claims will be addressed through direct appeal. *Id.* at 166, 557 S.E.2d at 525. We conclude that this is such a case and, accordingly, review defendant's ineffective assistance of counsel claim on its merits. When a defendant attacks his conviction on the grounds of ineffective assistance of counsel, he must establish that his counsel's conduct fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 688, 80 L. Ed. 2d 674, 693 (1984). In order to meet this burden, defendant must satisfy a two-part test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687, 80 L. Ed.2d at 693; *see also, State v. Braswell,* 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985). Furthermore, the Court has held that defendant must overcome a presumption that counsel's conduct is reasonable. The U.S. Supreme Court in *Strickland* reasoned that due to the

> difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Strickland at 689, 80 L. Ed.2d at 694-95 (citations omitted).

In the case *sub judice*, defendant is unable to meet either of the prongs set out in *Strickland* and adopted by our Supreme Court in *Braswell*. Defendant argues that his trial counsel did not object to evidence concerning the repeated remarks concerning defendant's force and violence against B. In addition, it is defendant's argument that trial counsel failed to request limiting instructions regarding the repeated remarks.

Having concluded that the evidence of force and violence was properly admitted, this cannot serve as a basis for an ineffective assistance of counsel claim. Likewise, defendant's argument related to counsel's failure to object to the opening statement and closing argument also fails. We conclude that defendant has failed to demonstrate that his counsel's conduct fell below an objective standard of reasonableness, or that he has otherwise been prejudiced by the conduct of counsel. Accordingly, we overrule this assignment of error.

IV.

Finally, defendant argues that his conviction for statutory rape should be vacated because the penalty imposed is cruel and

unusual.

Defendant was sentenced to 27½ to 30¾ years for the statutory rape of B in violation of N.C.G.S. § 14-27.7(A). He argues that the punishment imposed for both first-degree rape and statutory rape is identical, and therefore violates the Eighth Amendment prohibition against cruel and unusual punishment. This assignment has no merit.

North Carolina courts have consistently held that when a punishment does not exceed the limits fixed by the statute, the punishment cannot be classified as cruel and unusual in a constitutional sense. *State v. Green*, 348 N.C. 588, 502 S.E.2d 819 (1998); *State v. Stinnent*, 129 N.C. App. 192, 497 S.E.2d 696, *disc. review denied* 348 N.C. 508, 510 S.E.2d 669 (1998) (citations omitted); *State v. White*, 129 N.C. App. 52, 496 S.E.2d 842 (1998), *aff'd in part*, 350 N.C. 302, 512 S.E.2d 424 (1999).

In the case *sub judice*, the trial court imposed a prison term within the presumptive range of sentences pursuant to N.C.G.S. § 15A-1340.17(c). We hold that the sentence imposed against defendant is not cruel and unusual punishment in that it did not exceed the limits fixed by the governing statute. Accordingly, this assignment is overruled.

No error.

Chief Judge EAGLES and Judge MCCULLOUGH concur.

Report per Rule 30(e).