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NO. COA05-1273

NORTH CAROLINA COURT OF APPEALS

Filed: 16 May 2006

STATE OF NORTH CAROLINA

v.

KENNETH DELWARD SHARPE

Guilford County

Nos. 02 CRS 024814 - 024817

02 CRS 091631 - 091657

Appeal by defendant from judgments entered 31 March 2005 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 19 April 2006.

Attorney General Roy Cooper, by Assistant Attorney General E. Clementine Peterson, for the State.

Mark Montgomery, for defendant-appellant.

TYSON, Judge.

Kenneth Delward Sharpe ("defendant") appeals from judgments entered after a jury found him to be guilty of three counts of first-degree rape and thirty-one counts of taking indecent liberties with a child. Defendant was sentenced to consecutive life sentences in consolidated judgment 02 CRS 024814, and in judgments 02 CRS 024815 and CRS 024816. We find no error.

I. Background

A. State's Evidence

The State's evidence tended to show defendant sexually abused Michaela Ann Flynt ("Michaela") and her brother Mike Flynt ("Mike")

between 1971 and 1978. Michaela and Mike are the natural born children of Rachel Bray Sharpe ("Rachel"). Defendant was Rachel's boyfriend and eventual husband.

1. Michaela Ann Flynt

Michaela met defendant in 1968, when she was five years old. Michaela testified she was attending third grade in Greensboro in 1971. Michaela, Mike, Rachel, and defendant traveled to the mountains for a camping trip. While Rachel and Mike went to a nearby store to purchase camping supplies, Michaela and defendant remained inside a camping trailer at the camp site.

Defendant showed Michaela a pornographic magazine and asked her to lay on her stomach on the bed. Defendant removed Michaela's pants and molested her. Defendant told Michaela "it would be our secret" and to not tell her mother. After Michaela, Mike, Rachel, and defendant returned to Greensboro, defendant repeatedly molested Michaela in her bedroom while her mother was outside the home.

On one occasion, defendant pulled up Michaela's night gown and put his mouth on her breast. Approximately three months after that incident, Michaela, her family, and defendant moved to another home in Greensboro. On numerous occasions, "nearly daily," defendant showed Michaela pornographic eight-millimeter films in his bedroom while both he and Michaela were naked. Defendant masturbated in front of Michaela, and made her perform oral sex on him. Defendant laid on top of Michaela and placed his penis on top of her vagina and moved up and down while on top of her.

During Summer 1972, Michaela was preparing to attend fourth grade. Defendant performed oral sex on her. Michaela testified defendant molested her on numerous occasions during the Summer 1972.

Michaela testified that defendant made her brother Mike remove his clothes and watch pornographic movies with Michaela and him. On two occasions, defendant told Mike to lay on top of his sister and simulate sexual intercourse while both Mike and Michaela were naked. Defendant stood beside them and masturbated. Defendant gave Michaela fifty cents to allow him to ejaculate inside her mouth after she performed oral sex on him.

Defendant physically abused Michaela and Mike. Michaela testified, "my brother many times was choked. Or held down with a pillow in his face. And generally we would get a belt with the buckle end on us."

Defendant made Michaela and Mike stand outside his bedroom window while he engaged in sexual intercourse with their mother. After the act, he would ask both of them separately to tell him the specific sexual positions he and their mother had taken. If they answered the question incorrectly, "he would take us and we had to - every time we were beaten, we had to pull our pants down to our ankles. And then he would prepare to hit us with the belt over and over." Defendant also took nude photographs of Michaela.

When Michaela was eleven years of age, she told her mother of defendant's abuses and assaults. Her mother departed the room, and

Michaela's maternal grandmother and aunt entered the room and questioned her about her allegations.

While Michaela was attending the eighth grade, Michaela, Mike, and their mother, Rachel, moved to Reidsville. Michaela had no contact with defendant. Defendant called Rachel and asked her to visit him. Rachel left Michaela and Mike at their aunt's house and traveled to South Carolina with defendant. Rachel and defendant were married while there.

Michaela, Mike, and Rachel moved into defendant's residence in Spring Brook. Defendant continued to abuse Michaela and Mike. Defendant attempted to insert his penis into Michaela's vagina when she was eleven years old.

In April 1976, when Michaela was thirteen years of age, defendant forcibly attempted engage in sexual intercourse with her, but stopped when he realized she was menstruating. Defendant told Michaela he would never do anything to her again.

In November 1978, when Michaela was fifteen years old, she and her family moved to San Antonio, Texas. In 1981, Michaela met her husband and moved into his residence. Michaela considered informing the police of defendant's abuses, but was told by family members to "get over it."

2. Mike Flynt

Mike was born on 12 May 1965. Mike testified he was repeatedly sexually and physically abused from 1974 until 1978.

The first time defendant sexually abused Mike was when he was seven years of age. Defendant required Mike to hold a ten pound

dumbbell with his hands while his arms were stretched out, and when Mike was unable to complete the task, defendant made Mike put defendant's penis into his mouth.

Mike testified to the incidents Michaela previously testified to: while both children were naked, defendant made Mike lay on top of Michaela and simulate sexual intercourse, while defendant stood next to them and masturbated. Mike was seven years old at that time. Defendant daily locked Mike into a room so defendant could be alone with Michaela.

When Mike was eight years of age, defendant made Mike view pornographic movies with him and masturbate. These events occurred approximately once or twice a week until 1978. In 1976, defendant had anal sex with Mike, who was then ten or eleven years of age. Mike stated he feared defendant would kill him.

In 2001, Mike's girlfriend delivered their baby daughter. Mike's girlfriend petitioned the court to forbid Mike from visiting his daughter. She alleged Mike had been sexually molested as a child and would likely sexually molest their daughter. Mike testified at that hearing to the sexual abuse he had faced as a child. The trial court did not enjoin Mike from visiting his daughter, but entered an order forbidding either parent to allow defendant to be around the child. Mike's testimony led Michaela to call the police on 31 December 2001 and inform them of the abuse she and Mike had suffered between 1971 and 1978.

3. Rachel Bray Sharpe

Rachel testified defendant beat her, threatened her, and put guns to her head. Defendant beat Michaela and Mike, and Rachel witnessed the beatings. In 1974, Michaela told Rachel that defendant had abused her. After defendant assured her he would no longer harm her children, Rachel married defendant in 1974.

Defendant took nude photographs of Rachel and engaged in sexual affairs with other women. Rachel discovered nude photographs of one of defendant's girlfriends.

In 2001, Michaela and Mike informed Rachel they were planning to seek charges against defendant for the physical and sexual abuse they had suffered. Defendant offered Michaela and Mike \$60,000.00 to not press charges against him.

4. Other Testimony

Several witnesses testified Michaela had told them of the abuse she suffered, including: (1) Mary Burroughs, Michaela's childhood friend; (2) Kimberly Pickard Graham, Michaela and Mike's cousin; (3) Linda Weavil, the children's aunt; (4) Thomas Bray, Sr., Rachel's brother; (5) Jacqueline Whicker and Pamela Capps, Linda's daughters; and (7) Phillip Hilliard, Michaela's husband.

District Court Judge Thomas Jarrell ("Judge Jarrell") testified he entered an order forbidding Mike and his ex-girlfriend from allowing defendant to be in the presence of their daughter.

B. Defendant's Evidence

1. Defendant's Testimony

Defendant was sixty-four years old at the time of trial. Defendant pled not guilty and testified "he has never done anything inappropriate with those children."

Defendant testified Michaela and Mike most likely brought charges against him due to their jealousy of his relationship with his two biological sons, Keith and Kenny. Defendant testified he was sexually abused as a child.

2. Other Testimony

Defendant's two nieces, one nephew, and two sons testified defendant never acted inappropriately with or toward them. The sons testified defendant was partial to them, and that Mike and Michaela were jealous of their relationships.

William Short, who drove a tractor-trailer with defendant from 1987 to 1994, testified he never knew defendant to engage in inappropriate sexual behavior with anyone.

The jury found defendant to be guilty of three counts of first-degree rape and thirty-one counts of taking indecent liberties with a child. Defendant appeals.

II. Issues

Defendant argues the trial court erred when it instructed the jury the incidents testified to by Michaela and Mike "actually happened." Defendant also contends the trial court committed plain error when it: (1) admitted into evidence testimony from a judge in an unrelated matter, who found the allegations against defendant to be credible; (2) permitted Rachel to testify to unrelated acts of alleged misconduct by defendant; (3) failed to instruct the jury

that defendant did not have the character trait of being abusive toward children; and (4) permitted the State to prosecute defendant for misdemeanor charges of taking indecent liberties with a minor after the statute of limitations had expired. In the alternative, defendant asserts he received ineffective assistance of counsel at trial.

Defendant also argues the prosecution of this case thirty years after the alleged incidents occurred violated defendant's constitutional rights to present a defense, to due process of law and his consecutive life sentences violate his right to be free from cruel and unusual punishment.

III. Judicial Opinion

Defendant argues the trial court erred when it instructed the jury the incidents testified to by Michaela and Mike "actually happened."

_____Defendant argues the trial court prejudicially referred to Michaela and Mike as "victims" and the allegations as "incidents that took place." The trial court instructed the jury on the elements of first-degree rape and stated, "[f]irst, that the defendant engaged in vaginal intercourse with the victim, Michaela Ann Flynt Hilliard." The trial court also instructed, "Now, ladies and gentlemen, you will see on these verdict sheets - there will be a date as to when the offenses took place."

This Court has stated:

A trial judge occupies an esteemed position whereby jurors entertain great respect for [a judge's] opinion, and are easily influenced by any suggestion coming from him. As a

consequence, he must abstain from conduct or language which tends to discredit or prejudice any litigant in his courtroom. Nevertheless, this Court has recognized that not every improper remark made by the trial judge requires a new trial. When considering an improper remark in light of the circumstances under which it was made, the underlying result may manifest mere harmless error. In other words, whether the accused was deprived of a fair trial by the challenged remarks [of the court] must be determined by what was said and its probable effect upon the jury in light of all attendant circumstances, the burden of showing prejudice being upon the appellant.

State v. Brinkley, 159 N.C. App. 446, 447-48, 583 S.E.2d 335, 337 (2003) (internal quotations and citations omitted). This Court has stated:

The charge to the jury must be read as a whole and not in detached parts. When the charge presents the law fairly and clearly to the jury, it will afford no ground for reversing the judgment, although some of the expressions, when standing alone, might be regarded as erroneous.

State v. Robinson, 13 N.C. App. 200, 201, 184 S.E.2d 888, 890 (1971).

_____ Here, the trial court instructed the jury "it is now your duty to decide from this evidence what the facts are. You must then apply the law which I'm about to give to you to those facts." The court provided the jury unbiased jury instructions and instructed the jury, "you should consider all the evidence in the case. And if you're not convinced of the guilt of the defendant beyond a reasonable doubt, you must find him not guilty." The trial judge's reference to Michaela and Mike as "victims" did not prejudice defendant. The court was explaining to the jury the elements they

must find to convict defendant of first-degree rape. The trial court was hardly "suggesting to the jury that, as far as the court was concerned, the incidents testified to by Mike and Michaela actually happened," as asserted by defendant. The court did not "discredit or prejudice any litigant in his courtroom." *Id.* This assignment of error is overruled.

IV. Plain Error

Defendant argues the trial court committed plain error when it: (1) admitted into evidence testimony from a judge in an unrelated matter, who found the allegations against defendant to be credible; (2) permitted Rachel to testify to unrelated acts of alleged misconduct by defendant; (3) failed to instruct the jury defendant did not have the character trait of being abusive toward children; and (4) permitted the State to prosecute defendant for misdemeanor charges of taking indecent liberties with a minor after the statute of limitations.

A. Standard of Review

This Court has stated:

Because defense counsel did not object to the testimony now assigned as error our review is limited to a consideration of plain error. See N.C.R. App. P. 10(b)(1) (2004); N.C.R. App. P. 10(c)(4) (2004). "Defendant is entitled to a new trial only if the error was so fundamental that, *absent the error, the jury probably would have reached a different result.*"

State v. Carillo, 164 N.C. App. 204, 209, 595 S.E.2d 219, 223 (2004) (quoting *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97,

103 (2002)) (emphasis supplied), *disc. rev. denied*, ___ N.C. ___, 610 S.E.2d 710 (2005).

B. Analysis

1. Judge's Testimony

Defendant argues the trial court committed plain error by allowing a district court judge to testify that he had found the allegations against defendant to be credible in an unrelated matter. Defendant's trial counsel failed to object to the admission of this testimony at trial.

Judge Jarrell testified he entered an order forbidding Mike and his ex-girlfriend from allowing defendant to be in the presence of their daughter. Judge Jarrell also testified he told Mike he would report the allegations to the authorities. Judge Jarrell testified: "I informed [Mike] there was no statute of limitations for felonies in North Carolina, and that that was something that I would have to report as a district court judge, and that he would certainly have the right to pursue a criminal action against his stepfather." Defendant argues this evidence "unfairly prejudiced [defendant] by suggesting to the jury that Judge Jarrell believed Mike's allegations against [defendant]."

Judge Jarrell's testimony tended to explain why Mike and Michaela had waited thirty years to bring charges against defendant. Mike informed Judge Jarrell that he had not sought charges because he believed the statute of limitations had passed. Judge Jarrell clarified Mike's misconception. Following Mike's testimony and Judge Jarrell's statements, after the custody hearing

in district court, Mike and Michaela decided to contact law enforcement officers and inform them of the physical and sexual abuse they had suffered. While a sitting judge testifying in an unrelated matter is not common, defendant has failed to show under plain error review that without this admission of testimony "the jury would probably have reached a different result" to warrant a new trial. *Id.* This assignment of error is overruled.

2. Rachel's Testimony

Defendant argues the trial court committed plain error when it permitted Rachel to testify to unrelated acts of alleged misconduct by defendant. Defendant's trial counsel failed to object to the admission of this evidence at trial.

Defendant contends Rachel's testimony that defendant had extra-marital affairs and took nude photographs of Rachel and of the women with whom he had affairs "had such a fundamental effect on the verdict that its introduction constituted plain error."

Defendant fails to acknowledge he also testified that he took nude photographs of Rachel and of other women he dated. Presuming, without deciding Rachel's testimony was prejudicial to defendant, defendant testified to and admitted the same acts during his direct examination.

Michaela's and Mike's testimonies provided the jury with numerous and repeated instances of physical and sexual abuse. The State presented substantial evidence from which the jury could have found defendant to be guilty regardless of Rachel's testimony.

Defendant has failed to show the jury would have probably reached a different result. *Id.* This assignment of error is overruled.

3. Defendant's Character Traits

Defendant argues the trial court committed plain error when it failed to instruct the jury that defendant did not have the character trait of being abusive to children. Defendant's trial counsel failed to request an instruction on this "character trait" at trial.

Defendant presented testimony he did not have "the character trait" of being abusive toward children. This Court has not found this to be a "character trait." Defendant was presumed to be innocent of the charges and was presumed to obey the laws. Even if not being abusive to children is a "character trait," our Supreme Court has stated:

When a defendant offers evidence of a pertinent character trait, he is entitled to have the jury consider this evidence as substantive evidence bearing directly upon the issue of his guilt or innocence. *A court is not required to charge on this feature of the case, however, unless defendant requests it.*

State v. Bogle, 324 N.C. 190, 199, 376 S.E.2d 745, 750 (1989) (emphasis supplied) (internal citations omitted). The trial court did instruct the jury that defendant was presumed to be innocent and placed the burden of proof on the State to prove his guilt beyond a reasonable doubt.

Defendant's trial counsel failed to request such an instruction. The omission of such an instruction by the trial

court *ex mero moto* does not amount to plain error. This assignment of error is overruled.

4. Misdemeanor Charges

Defendant argues the trial court committed plain error when it permitted the State to prosecute him for misdemeanor charges of taking indecent liberties with a minor long after the statute of limitations had expired. Defendant's trial counsel did not move to dismiss and failed to object to the prosecution of these misdemeanors at trial.

Prior to 1 October 1975, taking indecent liberties with a child was a misdemeanor. After 1 October 1975, the crime became a felony. See N.C. Gen. Stat. § 14-202.1. Defendant asserts, "twenty-three of the charges against Kenneth were thus misdemeanors," and "were tried long after the two-year statute of limitations" had expired.

Our Supreme Court has stated:

The defendant, however, contends that the charge should have been given because it was not shown that the sale was in the county, nor within two years. But objection to venue is waived unless objection is taken in apt time by plea in abatement. So, *if the statute of limitations was relied on, it should have been specifically brought to the attention of the court by plea or a request to charge*; the object being in both cases that if the offense was in fact committed in the county, and within two years, the judge should, upon either being put in issue, allow evidence to be introduced, that there should not be a defect in the administration of justice by an inadvertent failure to prove venue or date, when neither had been questioned.

State v. Holder, 133 N.C. 709, 711-12, 45 S.E. 862, 863 (1903)
(internal citation omitted) (emphasis supplied).

The Court has also stated:

The bill charged that the defendant did unlawfully and wilfully barter, sell . . . intoxicating liquors. There was evidence of several sales but the exact time of some of them is not disclosed. The defendant did not plead the statute, C.S., 4512, or in apt time call it to the attention of the court. Nor did he, by cross-examination of the witnesses for the State or by independent evidence, undertake to show that such sales were not recently made within the two-year period. The defendant cannot now complain either that the language of the court was too general or that it failed to confine its charge to the evidence of the sale to Brinkley.

State v. Colson, 222 N.C. 28, 30, 21 S.E.2d 808, 809 (1942)
(internal quotations and citation omitted).

Regarding plain error review, our Supreme Court has stated:

This 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.

This specific error alleged by defendant involves neither jury instructions nor a ruling on the admissibility of evidence. Moreover, since defendant did not object at trial or allege plain error, he has failed to properly preserve this issue for appeal.

State v. Gregory, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996)
(internal citations omitted), *cert. denied*, 525 U.S. 952, 142 L. Ed. 2d 315 (1998).

Presuming *arguendo*, the trial court erred in allowing the State to prosecute defendant for the misdemeanor charges, after the statute of limitations for some charges had expired, defendant's

overall sentence would be unaffected if this Court overturned those convictions.

Defendant concedes he did not raise the statute of limitations issue at trial. This assignment of error is dismissed.

5. Ineffective Assistance of Counsel

In the alternative, defendant argues he received ineffective assistance of counsel "to the extent trial counsel did not properly preserve [these] issue[s] for review."

The United States Supreme Court provided a two-prong test for a defendant to establish ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). The test requires:

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.

Counsel are afforded wide latitude in arguing hotly contested cases, and the scope of this latitude lies within the sound discretion of the trial court. A prosecutor's arguments are not to be reviewed in isolation; rather, consideration must be given to the context of the remarks and to the overall factual circumstances.

State v. Bell, 359 N.C. 1, 20, 603 S.E.2d 93, 107 (2004) (internal quotations and citations omitted), *cert. denied*, ___ U.S. ___, 161 L. Ed. 2d 1094 (2005).

Defendant fails to argue "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693. The transcript shows that defense counsel offered into evidence the testimonies of several defense witnesses who testified that defendant "is not the kind of person to have committed the acts Michaela and Mike accused him of." Defense counsel cross-examined the State's witnesses and objected to the State's trial tactics and admission of some of the State's evidence. This assignment of error is dismissed.

V. Constitutional Rights

Defendant argues the prosecution of this case thirty years after the alleged incidents occurred violated defendant's constitutional rights to present a defense, to due process of law and to be free from cruel and unusual punishment. Defendant failed to raise this issue at trial and has failed to preserve this issue for review on appeal.

This Court has stated, "[i]t is well settled that an error, even one of constitutional magnitude, that defendant does not bring to the trial court's attention is waived and will not be considered on appeal." *Id.* at 28, 603 S.E.2d at 112 (internal quotations and citation omitted).

Defendant concedes no North Carolina statute of limitations exists to bar prosecution of felonies. *State v. Johnson*, 275 N.C. 264, 271, 167 S.E.2d 274, 279 (1969) ("In this State no statute of

limitations bars the prosecution of a felony.") Our Supreme Court has stated:

It has generally been held that federal and state constitutional guarantees of a speedy trial were *inapplicable to delays in commencing a prosecution*; prior to the time a defendant was actually charged he was not an "accused", and the right to a speedy trial arose only after a formal complaint had been lodged. The federal courts have held an accused's right to have a prosecution dismissed because of a delay between the date of the offense and commencement of criminal prosecution is controlled by the applicable statute of limitations and not by the Sixth Amendment.

Id. at 270, 167 S.E.2d at 278 (emphasis supplied) (internal citations omitted).

The State argues, "as a result of the complained of delay, defendant escaped thirty years of mandatory imprisonment." This assignment of error is dismissed.

VI. Conclusion

The trial court did not err when it instructed the jury. The trial court told the jury "if you're not convinced of the guilt of the defendant beyond a reasonable doubt, you must find him not guilty." Defendant has failed to show "the jury would probably have reached a different result" to warrant a new trial under plain error review. *Carillo*, 164 N.C. App. at 209, 595 S.E.2d at 223.

The trial court did not commit plain error when it: (1) admitted Judge Jarrell's testimony; (2) permitted Rachel to testify to unrelated acts of alleged misconduct by defendant; (3) failed *ex mero moto* to instruct the jury that defendant did not have the character trait of being abusive toward children; and (4) permitted

the State to prosecute defendant for misdemeanor charges of taking indecent liberties with a minor in the absence of any assertion of statute of limitations by defendant.

Defendant failed to prove he received ineffective assistance of counsel. Without a statute of limitations for felonies, defendant's prosecution thirty years after the alleged incidents occurred did not violate defendant's constitutional rights. Defendant received a fair trial, free from the prejudicial errors he preserved, assigned, and argued. We find no error.

No error.

Judges GEER and JACKSON concur.

Report per Rule 30(e).