NO. COA06-1235

NORTH CAROLINA COURT OF APPEALS

Filed: 21 August 2007

STATE OF NORTH CAROLINA

v. Lincoln County
Nos. 04 CRS 53646
06 CRS 00748

DARRYL EUGENE MCSWAIN

Appeal by defendant from judgment entered 12 May 2006 by Judge Forrest D. Bridges in Superior Court, Lincoln County. Heard in the Court of Appeals 24 April 2007.

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

William B. Gibson, for defendant-appellant.

WYNN, Judge.

Defendant Darryl Eugene McSwain appeals from his convictions for attempted statutory rape and taking indecent liberties, alleging insufficient evidence, ineffective assistance of counsel, and plain error in jury instructions. After a careful review of the record before us, we find no error and uphold Defendant's convictions.

At trial, the State presented evidence that tended to show that Defendant, forty-two years old at the time of the incident in question, was married to Joanne McSwain and the stepfather of a thirteen-year-old female ("the stepdaughter). On 23 December 2004,

the stepdaughter had a friend, a fourteen-year-old female, over to the home to spend the night. The fourteen-year-old female testified that she and the stepdaughter played video games that evening, and Defendant "kept coming in and out of the room, making jokes and wrestling and stuff." The fourteen-year-old female told the jury that during this play, Defendant pushed her on her chest, making her feel uncomfortable.

The fourteen-year-old female slept in the stepdaughter's room that night, with the fourteen-year-old female in the single bed and the stepdaughter on the floor. The fourteen-year-old female testified that, after going to sleep, the next thing she remembered was "waking up in [Defendant's and his wife's] room" because she "felt something inside of me . . . his penis . . . in my vagina." She stated that she "pushed him off of me and he threw me my body shorts and I put them on and he said 'Go back to sleep. You had a bad dream.'" The fourteen-year-old female further testified that Defendant did not put any fingers inside her, nor did she know how long a period of time his penis had been inside her or whether he had ejaculated. After going back to the stepdaughter's room, the fourteen-year-old female sent her mother a text message stating, "Please help. [Defendant] just raped me." The fourteen-year-old female's parents then went to Defendant's house, soon followed by the police, and the fourteen-year-old female was subsequently taken to the hospital, where she underwent an interview and rape kit examination and gave a statement to the police.

Defendant did not testify at trial, but Sergeant Lee Caskey of

the Lincoln County Sheriff's Office read the statement that Defendant had made to the police after turning himself in on 24 December 2004. In his statement, Defendant stated that the fourteen-year-old female had approached him in his bedroom, pulled him on top of her, and attempted to seduce him into having sex with her. Defendant said that he had rejected the fourteen-year-old female's advances and that she then "got up and ran down the hall and made a scene like it was all my fault." Defendant denied having penetrated the fourteen-year-old female's vagina during the incident.

Nevertheless, Detective Sally Dellinger of the Lincoln County Sheriff's Office testified that Defendant had told her that he was concerned whether any semen was found on the fourteen-year-old female and admitted to touching the inside of her vagina with his finger. The State also offered testimony from the fourteen-year-old female's mother concerning changes in the fourteen-year-old female's personality since the incident, as well as from a professional counselor who had been meeting regularly with the fourteen-year-old female. Defendant and the State both stipulated to the results of testing on items collected from Defendant and the fourteen-year-old female that failed to reveal the presence of sperm, semen, blood, or saliva.

At the conclusion of the trial, the jury found Defendant guilty of attempted statutory rape and of taking indecent liberties, but not guilty of statutory sexual offense. The trial court sentenced Defendant to two hundred seventeen to two hundred seventy months'

imprisonment for attempted statutory rape, and to a consecutive sentence of twenty to twenty-four months' imprisonment for taking indecent liberties. Defendant now appeals, arguing (I) the trial court erred by denying his motions to dismiss on both charges, as there was insufficient evidence presented to prove each element of the two crimes; (II) he is entitled to a new trial because he had ineffective assistance of counsel; and (III) the trial court committed plain error by allegedly coercing the guilty verdicts by instructing jurors that they must reach a unanimous verdict.

I.

First, Defendant argues that the trial court erred by denying his motions to dismiss on both charges, as there was insufficient evidence presented to prove each element of the two offenses. Defendant alleges that the State failed to prove that he attempted to rape the fourteen-year-old female, or that he took indecent liberties with the fourteen-year-old female.

Under our appellate rules,

> A defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action . . . at trial. If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, his motion for dismissal . . . made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.
>
> A defendant may make a motion to dismiss the action . . . at the conclusion of all the evidence, irrespective of whether he made an earlier such motion. . . . However, if a defendant fails to move to dismiss the action

> . . . at the close of all the evidence, he may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

N.C. R. App. P. 10(b)(3); *see also State v. Stocks*, 319 N.C. 437, 439, 355 S.E.2d 492, 492 (1987) (holding that "a defendant who fails to make a motion to dismiss at the close of all the evidence may not attack on appeal the sufficiency of the evidence at trial.").

The record before us shows that defense counsel made a motion to dismiss at the close of the State's evidence. However, although the transcript shows an off-the-record bench conference between defense counsel and the trial court at the close of all evidence, the transcript does not contain a record of either a motion made by defense counsel to dismiss at that time, nor of the trial court's denial of such a motion. As such, we are precluded from reviewing the merits of Defendant's argument. *See* N.C. R. App. P. 10(b)(3). Accordingly, these assignments of error are dismissed.

II.

Next, Defendant asserts that he is entitled to a new trial because he was provided ineffective assistance of counsel at trial. Defendant specifically contends that his defense counsel was ineffective by (1) failing to record a motion to dismiss at the close of all evidence; (2) failing to object to the submission of attempted statutory rape as a possible verdict; and (3) failing to request the trial court to include a parenthetical portion of the jury pattern instruction as to the necessity of a unanimous verdict. We disagree.

In *State v. Braswell*, our state Supreme Court adopted the two-

part test for determining whether a criminal defendant received effective assistance of counsel, as articulated by our federal Supreme Court:

> 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 error were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)). "Thus, if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *Id.* at 563, 324 S.E.2d at 249. Moreover, our Supreme Court has also held that "counsel is given wide latitude in matters of strategy, and the burden to show that counsel's performance fell short of the required standard is a heavy one for defendant to bear." *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 550 (2001), *cert. denied*, 537 U.S. 846, 154 L. Ed. 2d 73 (2002).

Here, in light of the evidence offered against Defendant, we conclude that, even absent the alleged errors made by defense counsel, there is no reasonable probability that the result of the proceeding would have been different. First, had defense counsel

properly preserved for appeal Defendant's motion to dismiss for insufficient evidence, we find that the State presented sufficient evidence as to each element of both attempted statutory rape and taking indecent liberties. *See State v. Garcia*, 358 N.C. 382, 412, 597 S.E.2d 724, 746 (2004) (holding that, when considering a motion to dismiss, "substantial evidence" is "relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion." (citations omitted)), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005).

The fourteen-year-old female testified against Defendant, recounting the events of 23 December, including that Defendant had pushed her chest while wrestling and that she remembered "waking up in [Defendant's and his wife's] room" because she "felt something inside of me . . . his penis . . . in my vagina." Although Defendant did not testify, the jury heard the statement that he made to police that he had not penetrated the fourteen-year-old female, as well as from another police officer that he had admitted to touching the inside of her vagina with his finger. This testimony constituted sufficient evidence as to each element of both attempted statutory rape and taking indecent liberties, and Defendant's motion to dismiss was properly denied.

Second, as conceded by Defendant in his brief, defense counsel's failure to object to the submission of attempted statutory rape as a possible verdict was likely "reluctance to go 'double or nothing . . . that is, to limit the jury to the option of returning a guilty verdict to a B1 felony or a not-guilty verdict on that

charge." Such a decision is unquestionably one of trial strategy, and we decline to engage in the sort of second guessing requested by Defendant here. *See State v. Mason*, 337 N.C. 165, 177-78, 446 S.E.2d 58, 65 (1994) ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight . . . Because of 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." (internal citation and quotation omitted)). Defense counsel's strategy at trial, while perhaps ultimately ill advised given the outcome, does not rise to the level of ineffective assistance of counsel.

Third, the parenthetical portion of the jury pattern instruction that Defendant asserts should have been included follows the sentence, "You may not render a verdict by majority vote" and reads:

> You all have a duty to consult with one another, and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. In the course of deliberations, each of you should not hesitate to re-examine your own views and change your opinion if it is erroneous. But none of you should surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

N.C.P.I.–Crim. 101.35. However, the trial court instead told the jury only that "a verdict is not a verdict until all twelve of you

have agreed unanimously as to what your verdict shall be. You may not and you shall not render a verdict by majority vote."

Defendant has given us no reason to believe that the failure of defense counsel to request this parenthetical portion deprived Defendant of a fair trial, "a trial whose result is reliable." *Braswell*, 312 N.C. at 566, 324 S.E.2d at 248 (quotation and citation omitted). Following the verdict, the trial court polled the jury, and all twelve jurors indicated that they agreed with the verdicts returned. Moreover, the trial court did not instruct the jury that a verdict was mandatory; rather, he informed them that, in order to have a verdict, it must be unanimous. His instructions were proper and accurate; under such circumstances, it was not ineffective assistance of counsel to fail to request the parenthetical portion cited above.

We, further, note the trial court's comments on the record to defense counsel at the conclusion of Defendant's trial:

> . . . I just want to say to you, again, I think you know the kind of regard for your acumen and accomplishments as an attorney. I just want to say to you that I think you did as good a job trying this case as I've ever seen in a case like this. I can't imagine how you could have done anything differently to possibly have represented your client any better in this case. I commend you on the services you've provided to [Defendant] and to his family. I think you ought to be commended for it.

These assignments of error are overruled.

III.

Finally, Defendant contends that the trial court committed plain error by allegedly coercing the guilty verdicts by instructing

jurors that they must reach a unanimous verdict. We disagree.

The plain error rule "is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record," the error is found to have been "so basic, so prejudicial, so lacking in its elements that justice cannot have been done" or that it had "a probable impact on the jury's finding that the defendant was guilty." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (internal citation and quotation omitted). In *State v. Parker*, we held that where the jury instruction "is susceptible of the interpretation that when a vote is taken and there is a majority – either for conviction or acquittal – the minority must then cast their vote with the majority and make the verdict unanimous, before returning the verdict in open court[,]" there is prejudicial error. 29 N.C. App. 413, 414, 224 S.E.2d 280, 281 (1976); *see also State v. Flemming*, 171 N.C. App. 413, 414-17, 615 S.E.2d 310, 311-13 (2005).

Here, the trial court made clear that the jury's verdict must be unanimous in order to be considered a verdict; contrary to Defendant's assertions, his instruction did not "coerce" guilty verdicts. Indeed, the fact that the jury also returned a verdict of not guilty on the charge of statutory sexual offense illustrates that they were well aware that a guilty verdict was not required. Moreover, the trial court's instructions that "a verdict is not a verdict" until it is unanimous is accurate and not misleading; he did not inform the jurors that a verdict was required. Accordingly, this assignment of error is overruled.

No error.

Judges TYSON and CALABRIA concur.

Report per Rule 30(e).