NO. COA06-670

NORTH CAROLINA COURT OF APPEALS

Filed: 1 May 2007

STATE OF NORTH CAROLINA

v. Edgecombe County
No. 04 CRS 54361

WAYMON ARLINGTON GODWYN,
Defendant.

Appeal by defendant from judgment entered 6 December 2005 by Judge Milton F. Fitch, Jr. in Edgecombe County Superior Court. Heard in the Court of Appeals 16 April 2007.

Attorney General Roy Cooper, by Assistant Attorney General Belinda A. Smith, for the State.

Nora Henry Hargrove for defendant-appellant.

GEER, Judge.

Defendant Waymon Arlington Godwyn appeals from his conviction for statutory rape of a 15 year old under N.C. Gen. Stat. § 14-27.7A(a) (2005). Although defendant argues on appeal that the admission of evidence of forcible rape constituted plain error, the evidence presented at trial was such that, even assuming error occurred, defendant cannot demonstrate that the jury would probably have reached a different result. Defendant further challenges the sentence imposed by the trial judge. Because the sentence was within the presumptive range, and the record contains no indication that the trial judge considered improper or irrelevant material, we

find no error.

At trial, the State presented evidence that in June 2004, L.R., who was born in May 1989, was forced to have sex with defendant at gunpoint. On 21 December 2004, L.R. gave birth to a son who was later determined to be defendant's child by genetic testing. Defendant admitted in his own testimony that he had sexual intercourse with L.R., but asserted that the act was consensual. He also acknowledged paternity of the baby born to L.R. Defendant, whose date of birth is 12 March 1979, was 25 years old at the time of the intercourse and was, therefore, almost 10 years older than L.R.

Defendant was indicted for statutory rape of a person who is 15 years old. Following a jury verdict finding him guilty, the trial court determined that defendant was a prior record level II. The court then sentenced defendant to a presumptive range sentence of 230 to 285 months imprisonment. Defendant timely appealed to this Court.

Discussion

With respect to the trial, defendant argues that the trial court committed plain error by admitting evidence of forcible rape when defendant was charged only with statutory rape. According to the plain error rule, a defendant must demonstrate "'not only that there was error, but that absent the error, the jury probably would have reached a different result.'" *State v. Roseboro*, 351 N.C. 536, 553, 528 S.E.2d 1, 12 (quoting *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993)), *cert. denied*, 531 U.S. 1019, 148

L. Ed. 2d 498, 121 S. Ct. 582 (2000).

Assuming, without deciding, that the evidence of forcible rape was improperly admitted, defendant has failed to demonstrate that a different result was probable if the evidence had been excluded. N.C. Gen. Stat. § 14-27.7A(a) provides that "[a] defendant is guilty of a Class B1 felony if the defendant engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is at least six years older than the person, except when the defendant is lawfully married to the person." The evidence was undisputed as to each of the elements of the crime. Defendant's contention that the sexual intercourse was consensual was beside the point. *State v. Anthony*, 351 N.C. 611, 616, 528 S.E.2d 321, 323 (2000). In short, the evidence of force could not have resulted in the jury's verdict.[1]

Defendant, however, suggests that the evidence may have influenced the trial court's exercise of discretion in sentencing defendant. He acknowledges that he "has not found legal authority for the proposition that the plain error compromised the decision of the sentencing judge and is therefore reviewable by this Court."

It is well established that "[w]hen a sentence is within the statutory limit it will be presumed regular and valid unless 'the record discloses that the court considered irrelevant and improper matter in determining the severity of the sentence.'" *State v.*

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[1]We decline to address defendant's argument that this testimony deprived him of due process because "a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal." *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982).

Davis, 167 N.C. App. 770, 775, 607 S.E.2d 5, 9 (2005) (quoting *State v. Johnson*, 320 N.C. 746, 753, 360 S.E.2d 676, 681 (1987)). In this case, not only did the trial court impose a sentence within the correct statutory presumptive range, but it imposed the *lowest* sentence within that range. Further, the trial court specifically declined to find any aggravating circumstances. In short, the record contains no indication that the trial court considered any improper matter in imposing defendant's sentence.

For the same reason, we find unpersuasive defendant's argument regarding the trial judge's statement that defendant had "been found guilty of a B1 felony maximum punishment is life without parole." Defendant reads this statement as indicating that the judge was confused about the maximum punishment for defendant's crime and that this confusion may have influenced the trial court to select a longer sentence than it might have imposed otherwise.

The trial judge's statement was correct as a general matter. While defendant personally would not have been subject to a life sentence given his prior record level of II, the maximum punishment for a B1 felony in the aggravated range for the highest prior record level is indeed life without parole. *See* N.C. Gen. Stat. § 15A-1340.17(c), (e) (2005). Moreover, our review of the record reveals no confusion by the trial judge. He stated: "You [defendant] are a record level II for the basis of judgment. I found no factors in aggravation. And I find no factors in mitigation. The sentence that I will impose is within the presumptive range." Considering that the trial court properly

calculated and articulated defendant's sentence, we conclude that the trial judge's reference to the absolute maximum punishment available for a B1 felony did not reflect any confusion that adversely impacted defendant's ultimate sentence.

Finally, defendant argues that the trial judge erred in failing to find a mitigating factor when determining his sentence. Because the trial judge sentenced defendant within the presumptive range, defendant is not entitled to appeal this issue as a matter of right. N.C. Gen. Stat. § 15A-1444(a1) (2005); *see State v. Hill*, __ N.C. App. __, __, 632 S.E.2d 777, 792 (2006) (when defendant argued that trial court erred in failing to find mitigating factors, holding that "[d]efendant was sentenced in the presumptive range, and therefore, has no statutory right to appeal his sentence"). As defendant has not petitioned this Court for a writ of certiorari, this argument is not properly before the Court. *Id.*

Even if we were to treat defendant's appeal as a petition for writ of certiorari, we would be required to reject defendant's contention. A trial court "has the discretion to impose the presumptive sentence even where there is evidence of mitigating factors." *Hill*, __ N.C. App. at __ n.3, 632 S.E.2d at 793 n.3; *see also State v. Chavis*, 141 N.C. App. 553, 568, 540 S.E.2d 404, 415 (2000) ("[T]he trial court is required to take 'into account factors in aggravation and mitigation *only* when deviating from the presumptive range in sentencing.'" (quoting *State v. Caldwell*, 125 N.C. App. 161, 162, 479 S.E.2d 282, 283 (1997))). This assignment of error is, therefore, overruled.

No error.

Judges WYNN and ELMORE concur.

Report per Rule 30(e).