NO. COA06-753

NORTH CAROLINA COURT OF APPEALS

Filed: 20 March 2007

STATE OF NORTH CAROLINA

v.

Wake County
Nos. 03 CRS 24203
03 CRS 24205 ROBERT S. HILL

Appeal by defendant from judgment entered 16 May 2005 by Judge James C. Spencer, Jr. in Wake County Superior Court. Heard in the Court of Appeals 8 February 2007.

Attorney General Roy Cooper, by Assistant Attorney General David L. Elliott, for the State.

Russell J. Hollers, III, for defendant-appellant.

CALABRIA, Judge.

Robert S. Hill ("defendant") appeals from a judgment entered upon jury verdicts finding him guilty of statutory rape and taking indecent liberties with a child. We find no prejudicial error.

At trial, the State presented evidence that in November of 2002 the defendant and H.E.U. ("the victim"), then a 15-year-old female, left the victim's residence in Maryland and traveled to Raleigh. When they stopped at a Harris Teeter grocery store to find a place to stay, a man named Daryl Williams ("Williams") overheard them calling shelters and offered them a room in an apartment he shared with his girlfriend, Pamela Davis ("Davis").

Defendant and the victim stayed with Williams and Davis from 21 November 2002 until 11 December 2002.

The victim testified that she met defendant during a devotional service at a shelter where she was residing along with her mother and her two brothers. The victim befriended defendant and she and her family, all of whom were mentally handicapped, moved into a home with defendant in Salisbury, Maryland. In November, defendant and the victim decided to leave the residence. The victim stated, ". . . I was tired of taking care of my family, and I knew that if I didn't leave I would be stuck with them for the rest of my life, taking care of them and I would never get anywhere." The victim testified that she became romantically involved with the defendant and they planned to get married and have children. Defendant stated that while she resided with defendant in Davis' home in Raleigh, she and the defendant had sex "almost every day."

Davis testified that she first met the defendant and victim on 21 November 2002 when her boyfriend brought them to her home. Since the two claimed they were married and told Davis they planned to stay in Raleigh to find employment, she allowed them to spend the night. Later Davis agreed to let them stay in her son's bedroom until they could find employment and housing. Davis testified that during the time the defendant and victim stayed in her house, she heard "moaning and groaning" coming from her son's bedroom, and believed the sounds were sounds associated with sexual acts. After defendant was arrested and D.S.S. picked up the

victim, Davis discovered the plastic cover had been removed from her son's mattress and noticed a semen stain on the mattress. Davis' son, Lorandall House ("Lorandall"), testified that he too heard sexual noises approximately three to four times a week during the time the defendant and the victim resided at Davis' home.

Defendant was arrested following a traffic stop on 11 December 2002. Zeke Morse ("Officer Morse"), a detective with the Raleigh Police Department, testified that he stopped defendant for avoiding a traffic control device and discovered he was not wearing a seat belt. When Officer Morse asked for defendant's address, defendant gave Officer Morse Davis' address as his residence. The registration tags on defendant's vehicle were not registered for that vehicle, prompting Officer Morse to check the vehicle identification number ("VIN"). Officer Morse checked defendant's VIN and learned that the Salisbury, Maryland Police Department wanted the vehicle in connection with a missing juvenile. Two officers were dispatched to the address defendant gave Officer Morse and located the victim.

On 16 May 2005, the jury returned verdicts finding defendant guilty of statutory rape of a 15-year-old and taking indecent liberties with a minor. Superior Court Judge James C. Spencer, Jr., then entered judgment upon the jury verdicts, sentencing defendant as a Level II offender. Judge Spencer sentenced defendant to a minimum of 288 months and a maximum of 355 months in the North Carolina Department of Correction. From that judgment, defendant appeals.

Defendant initially argues the trial court erred by allowing Bill Gush ("Gush"), a social worker with the Wake County Department of Social Services, to testify regarding statements made by the victim. Defendant did not preserve this issue for appellate review by objecting at trial, and thus our review of this matter is limited to a plain error analysis.

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake 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) (citation and quotation marks omitted).

This Court has held that it is plain error to admit expert testimony stating that a sexual assault victim is credible where there is no evidence of the crime other than the victim's testimony.

> It is fundamental to a fair trial that the credibility of the witnesses be determined by the jury. *Holloway*, 82 N.C. App. at 587, 347 S.E.2d at 73-74. Our Courts have held numerous times that an expert's opinion to the effect that a witness is credible, believable, or truthful is inadmissible.

State v. Hannon, 118 N.C. App. 448, 451, 455 S.E.2d 494, 496 (1995). However, *Hannon* presented a case in which there was no evidence of sexual abuse other than the victim's testimony. It is clear from the Court's holding that this distinction was critical.

> In this case there was no evidence of sexual intercourse other than the prosecuting witness's testimony. Therefore, her credibility was of critical importance. Under these circumstances, Dr. Matteson's testimony was unduly prejudicial to defendant because of the influence it had over the jury's determination of credibility.

Id. The *Hannon* decision follows the reasoning set forth in *State v. Holloway*, 82 N.C. App. 586, 347 S.E.2d 72 (1986). Like *Hannon*, *Holloway* involved an allegation of sexual abuse where the State's evidence was limited to the victim's testimony. In *Holloway*, this Court held it was plain error to allow two experts to testify that, in their opinion, the victim was being truthful. *Id.*

The case *sub judice* is distinguishable from *Hannon* and *Holloway* in that here there was evidence beyond the victim's testimony supporting the sexual abuse allegations. In addition to the victim's testimony, Davis and Lorandall both reported hearing sexual noises coming from the bedroom the defendant and the victim shared. Furthermore, Davis reported the presence of a semen stain on the bed they shared. Finally, the fact that defendant held the victim out as his wife is evidence of an ongoing sexual relationship. This evidence, viewed cumulatively, provides the corroboration of the victim's testimony that was lacking in *Hannon* and *Holloway*.

In light of the corroborating evidence, we determine Gush's testimony did not have a "probable impact on the jury's finding that the defendant was guilty." If Gush's testimony had been excluded, it is likely that the jury still would have found defendant guilty based on the overwhelming evidence presented by the State. As such, this assignment of error is without merit.

Defendant next contends the trial court erred by allowing Gush to state that Lori Bryant ("Bryant") had "substantiated definitely" that the victim had been sexually assaulted. Since defendant did not object to this testimony at trial, our review of this matter is limited to a plain error analysis. This is so even though the alleged error relates to the defendant's rights under the United States Constitution. *State v. Lemons*, 352 N.C. 87, 96, 530 S.E.2d 542, 547-48 (2000) ("[D]efendant failed to properly preserve at trial the issue of whether his Confrontation Clause rights were violated. Thus, we must evaluate the trial court's actions . . . under a plain error analysis . . . .").

As with his first issue, defendant cannot prevail on this assignment of error because the error had no probable impact on the jury's finding. The victim testified that defendant committed the crimes charged, and her story was supported by the additional evidence cited above. Accordingly, this assignment of error is overruled.

Defendant next argues the trial court erred in sentencing defendant as a Level II offender based upon committing the offenses in the instant case while on unsupervised probation in Maryland.

Defendant's probationary status added one point to his sentencing worksheet and raised his sentencing level from a Level I to a Level II offender. N.C. Gen. Stat. § 15A-1340.14(b)(7) (2005). Defendant contends that his probationary status was neither found by a jury nor admitted by defendant, and the court's judgment sentencing him as a Level II offender therefore violates the Sixth Amendment principles articulated in *Blakely v. Washington*, 542 U.S. 296 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed presumptive range must be submitted to a jury and proved beyond a reasonable doubt." *State v. Allen*, 359 N.C. 425, 437, 615 S.E.2d 256, 265 (2005). An aggravating factor need not be found by a jury, however, where the defendant admits the fact. *Apprendi*, 530 U.S. at 488.

We have previously considered the *Blakely*/*Apprendi* issue in a case where the defendant's probationary status was determined without being found as a fact by the jury:

> We recognize, as the State argues, that the fact of a defendant's probationary status is analogous to and not far-removed from the fact of a prior conviction. However, we find that we are bound by the language in *Blakely*, *Apprendi* and *Allen* that states that only the fact of a prior conviction is exempt from being proven to a jury beyond a reasonable doubt. Furthermore, we note that the fact of defendant's probationary status did not have the procedural safeguards of a jury trial and proof beyond a reasonable doubt recognized in *Apprendi* as providing the necessary protection for defendants at sentencing. We find that the trial court erred by adding a point to defendant's prior record level without first submitting the issue to a jury to find beyond a reasonable doubt.

State v. Wissink, 172 N.C. App. 829, 837, 617 S.E.2d 319, 325 (2005), *disc. rev. granted and supersedeas allowed*, ___ N.C. ___, ___ S.E.2d ___, 2006 WL 3863765 (2006). In *Wissink*, the defendant admitted his probationary status in the following exchange:

> [ATTORNEY FOR THE STATE]: . . . [The prior record level worksheet shows that defendant] has two -- eight points plus a one point, that's a -- he was on probation at the time of this offense, which gives him nine record level points, and he's a level IV for the -- for sentencing, Your Honor . . . .
>
> THE COURT: All right.
>
> [ATTORNEY FOR DEFENDANT]: I think that's correct, Your Honor.

Id. at 838, 617 S.E.2d at 325.

However, this Court determined that defendant's stipulation was ineffective since defendant was convicted prior to the *Blakely* and *Allen* decisions. For this reason, defendant was not aware that he had the right to have any sentencing-enhancement factors other than a prior conviction found as facts by a jury. As such, his admission to his probationary status was not a "knowing" and "intelligent" act, and was therefore ineffective.

Here, defendant's trial occurred after the *Blakely* decision was rendered, and thus the defendant in the instant case was charged with knowledge that he had a right to have a jury find any facts that might enhance his sentence. So the question becomes whether defendant admitted the factor, *i.e.*, his probationary status, which was used to enhance his sentence by categorizing him as a Level II offender.

During the sentencing phase of his trial, defendant stated, "[I]'ve only had that one point on my record." Further, defendant signed the worksheet determining his prior record level as a Level II offender. On that sheet, the words "unsupervised probation" are circled, and one prior record point is assessed based on this factor. The State contends this admission and signature are tantamount to a stipulation by defendant that he was in fact on unsupervised probation. We agree. "[D]uring sentencing, a defendant need not make an affirmative statement to stipulate to his or her prior record level or to the State's summation of the facts, particularly if defense counsel had an opportunity to object to the stipulation in question but failed to do so." *State v. Alexander*, 359 N.C. 824, 829, 616 S.E.2d 914, 918 (2005). There is no evidence in the record that defendant objected to the prior record worksheet. As such, this assignment of error is overruled.

Defendant lastly argues the trial court erred in failing to disclose material information contained in confidential records. The trial court reviewed the documents *in camera* and determined that nothing therein was subject to discovery by defendant. The files were transferred under seal to the Wake County Clerk's Office for storage pending appellate review. However, the clerk's office, despite a diligent search, has been unable to locate the records. On 28 February 2007, defendant filed a motion for appropriate relief seeking a new trial on the basis that the State has made it impossible for defendant to present a complete record preserving his arguments on appeal. Because this Court had not yet filed an

opinion in this case, we maintained jurisdiction to consider defendant's motion.

In his motion, defendant relies on *State v. Sanders*, 312 N.C. 318, 321 S.E.2d 836 (1984). In that case, the Court invoked N.C. R. App. P. 2 to vacate a defendant's convictions and order a new trial when there were material gaps in the transcribed record. The case *sub judice* is distinguishable from *Sanders* in that here the defendant can demonstrate no prejudice from the information omitted from the record as the evidence against him was abundant. Here, the victim testified that she engaged in a sexual relationship with defendant, and her testimony was corroborated by Davis and Lorandall, who both testified that they heard sexual noises coming from the room shared by defendant and the victim. Further, Davis reported discovering a semen stain on the bed shared by defendant and the victim, who claimed to be married, after defendant's arrest.

Even errors arising under the United States Constitution are harmless where they are harmless beyond a reasonable doubt. *State v. Blackwell*, 361 N.C. 41, 50, 638 S.E.2d 452, 458 (2006). In light of the evidence cited above, meaningful appellate review in this case was not frustrated by the loss of the records and any error was harmless beyond a reasonable doubt.

No prejudicial error.

Judges McGEE and STEPHENS concur.

Report per Rule 30(e).