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NO. COA07-1115

NORTH CAROLINA COURT OF APPEALS

Filed: 6 May 2008

STATE OF NORTH CAROLINA

v.

ROBERT NATHANIEL McCAIN

Guilford County
Nos. 05 CRS 97513
05 CRS 97514
05 CRS 97515
05 CRS 97518

Court of Appeals

Appeal by Defendant from judgment entered 9 February 2007 by Judge Steve A. Balog in Guilford County Superior Court. Heard in the Court of Appeals 5 March 2008.

Slip Opinion

Attorney General Roy Cooper, by Assistant Attorney General Charles E. Reece, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for Defendant.

STEPHENS, Judge.

On 12 December 2005, a grand jury indicted Defendant on two charges of first-degree rape and one charge each of second-degree kidnapping, false imprisonment, felony breaking or entering, assault by pointing a gun, and communicating threats. A jury found Defendant guilty of one count of first-degree rape, misdemeanor breaking or entering, false imprisonment, and communicating threats, and the trial court entered judgment on the verdicts. Defendant timely appealed to this Court, seeking a new trial. We

conclude that Defendant received a fair trial and do not grant relief.

FACTS

The trial began on 7 February 2007. The following day, the State called its first witness, "Jane,"[1] who testified as follows: Jane met and began dating Defendant at some point in 2005. The relationship was "[f]ine" for a few months, but by October 2005 Jane was trying to end it. On 7 October 2005, Jane and Defendant got into an argument over rent money, so they drove Jane's car from Greensboro, where they lived, to Defendant's mother's house in Reidsville to "get the money[.]" There, Jane told Defendant's mother that she was trying to end the relationship, but that Defendant would not listen to her. Jane then tried to leave in her car without Defendant. Defendant, however, forced his way into the driver's seat, pinning Jane under him. Defendant's mother began hitting Defendant with a rake and told him to let Jane leave. Another family member pulled Jane out from under Defendant, and Defendant drove away in the car.

Defendant's cousin, Tony, agreed to give Jane a ride back to Greensboro. As they were driving, a car flashed its headlights at them, and Tony "proceeded to pull over[.]" Defendant approached the car, pulled Jane out of the car, and "threw [Jane] into [her] vehicle on the passenger side." Defendant drove Jane to her apartment in Greensboro. There, Defendant threw Jane down and "forced [himself] on [Jane]."

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[1]We use the pseudonym, Jane, to protect the woman's privacy.

Jane fell asleep, woke up the next morning, and prepared to go to work. Defendant would not let Jane leave the house to go to work and instead made her drive him to a gas station. When Defendant got out of the car, Jane drove to a police substation and reported the events of that morning and the previous day. Jane did not report the sexual assault because she was "embarrassed and ashamed[.]" Thereafter, Jane moved in with a co-worker. She continued working at her job as often as possible, but Defendant repeatedly made harrassing phone calls to her at work. On at least one occasion, Jane had "police escorts to and from work." Jane next saw Defendant on 11 November 2005, when she returned to her apartment to get some clothes.

After collecting some clothes, Jane fell asleep on her couch. She heard a noise, woke, and saw Defendant coming through her back door with a handgun. Jane told Defendant she "didn't tell the police everything last time because [she] was embarrassed," and asked Defendant to leave her alone. Defendant placed his gun on a chair and said, "Well, let me give you something to tell the police." Defendant took off Jane's clothes and raped her on the couch. Defendant then threw Jane on the floor and raped her again. Jane "balled up" and cried, and Defendant rolled her over and tried to "clean [Jane] off[,]" presumably "wiping off semen or something." Jane "dozed off" and woke up the next morning.

In the morning, Jane noticed she was bleeding vaginally, so she went to the bathroom to tend to her injuries. She then tried to run out of the apartment, but Defendant would not let her leave.

Brandishing his gun, Defendant forced Jane into her car and said, "Come on. We're going to the woods." Defendant first drove Jane to a cousin's house and then drove Jane to a friend's house, but Jane never got out of the car. After leaving the friend's house, Jane tried to jump out of the car as it slowed around a curve, but Defendant threatened to shoot her if she jumped. Defendant parked the car in a wooded area and walked Jane into the woods. Jane asked Defendant if she could call her mother, to which Defendant replied, "Why? So you can tell her that I'm gonna kill you?" Jane then asked Defendant if she could "clean [herself] up" because she was still bleeding vaginally. Defendant drove Jane to his mother's house and got out of the car. Defendant left the keys in the car's ignition, so Jane got into the driver's seat and began driving back to Greensboro. On the way to Greensboro, Defendant and Tony came "flying up behind" her in a car. She pulled into a gas station, ran inside, told the clerks to call the police because a man was trying to kill her, and locked herself in the gas station's bathroom. When police officers arrived, Jane told them what had happened, and the officers brought Jane to a hospital. Jane told a nurse at the hospital what had happened, and the nurse collected a sexual assault evidence kit. Defendant was arrested two days later.

After Defendant was arrested, he wrote Jane several letters from prison. Jane read portions of the letters in court, and the letters were admitted into evidence. In one letter, Defendant wrote:

> I know I hit you a lot of times and, yes, I was wrong. . . . You don’t have to be so damn mean to me. I know why you are doing it. You want me to hurt just as much as I hurt you. . . . Baby, I’m sorry for f***ing you. I’m sorry for beating on you. Please, please, please forgive me and let’s work this out . . . .

In another letter, Defendant wrote:

> It takes a man to admit when he’s wrong and, yes, I was very wrong. Baby, I love you so damn much and I’m sorry that you thought I would kill you or do anything to hurt you.

In a third letter, Defendant wrote:

> I am truly sorry for putting my hands and all the pain I caused and put you through. . . . Baby, okay, you win. Everything I was doing to you was just to scare you. I would never kill you and you know that.

Finally, in a fourth letter, Defendant wrote:

> I’m very sorry from the bottom of my heart for beating you and for making you have sex with me. I realize I have put you through hell and I wish I could have seen this when I was out. . . . I feel better now that I got the truth off my chest. You told me if I just admit to it, you would be okay. Well, I did and let’s see if you can meet me halfway.

Officer J.A. Pennington of the Greensboro Police Department testified that he interviewed Jane at the police substation on 8 October 2005. Her statements to Officer Pennington concerning the October events were consistent with her trial testimony. The clerks working at the gas station into which Jane ran and hid on 12 November 2005 offered testimony consistent with Jane’s trial testimony concerning that day’s events. The co-worker with whom Jane lived after 8 October 2005 testified that a man who identified himself as “Robert” repeatedly called her cell phone looking for

Jane and that on one occasion the man apologized for hitting Jane. Officer J.P. Byerly of the Greensboro Police Department testified that he responded to a call from the gas station on 12 November 2005 and thereafter interviewed Jane. Jane's statements to Officer Byerly were consistent with her trial testimony. John H. Hellier, an employee of the Forensic Crime Division of the Greensboro Police Department, testified that he found semen stains on the couch in Jane's apartment. Finally, the nurse who collected the sexual assault evidence kit testified that Jane described the November events to her. Jane's statements to the nurse were consistent with Jane's trial testimony. On the morning of 9 February 2007, the State rested.

That morning, Defendant began his evidence by calling his mother to the stand. Defendant's mother testified that on 7 October 2005, she wrestled with Defendant in an effort to get Jane's car keys from him, but that she did not see Defendant force his way into the car or see anyone pull Jane from the car. Defendant's stepfather testified that he saw Jane and Defendant at his house on 7 October and 12 November, but that he did not observe anything unusual on either date. Defendant's aunt offered testimony similar to Defendant's stepfather's testimony. After Defendant's aunt testified, Defendant's attorney attempted to introduce into evidence a photograph taken with a cell phone. The picture allegedly showed Defendant and Jane lying in bed together on 31 October 2005, and defense counsel sought to introduce the picture in light of Jane's testimony that she had no contact with

Defendant between 8 October and 11 November 2005. Defense counsel stated that he first saw and came into possession of the picture approximately an hour before he sought to introduce it at trial and that he promptly notified the State of his intent to offer it into evidence. The State objected to the picture's admission. The trial court sustained the State's objection because "there was [not] due diligence in bringing this material forward by the defendant in a timely manner." Specifically, the court excluded the picture as a discovery sanction. Defendant's sister then concluded Defendant's evidence by testifying that she was at her mother's house on 7 October and 12 November and that she did not observe anything unusual on either of those days.

The jury returned its verdicts that evening. The trial court determined that Defendant was a prior record level VI for sentencing. In one consolidated judgment, the trial court sentenced Defendant to a minimum of 384 and a maximum of 470 months in prison, a term of imprisonment at the lowest level of the presumptive range of sentencing for a level VI offender convicted of first-degree rape. N.C. Gen. Stat. §§ 14-27.2(b), 15A-1340.17 (2005).

DISCUSSION

On appeal, Defendant argues the trial court erred in excluding the cell phone picture from evidence because: (1) Defendant did not violate the discovery statutes and, therefore, the trial court was not authorized to impose any discovery sanction; (2) even if Defendant did violate the discovery statutes, the trial court

abused its discretion in its choice of the sanction imposed; and (3) the exclusion of the picture violated Defendant's state and federal constitutional rights.

1. Constitutional Violation

Defendant argues that excluding the cell phone picture from evidence violated Defendant's constitutional "due process right to present his defense . . . ." Having thoroughly reviewed the transcript of the trial proceedings, we agree with the State that Defendant never presented this constitutional argument to the trial court. Rather, Defendant argued only that he had complied with the discovery statutes and that the trial court should not exclude the picture from evidence as a sanction for a statutory violation.

"In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make . . . ." N.C. R. App. P. 10(b)(1); *see also State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473 ("Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal.") (citation omitted), *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002); *State v. Battle*, 172 N.C. App. 335, 338, 615 S.E.2d 733, 735 (2005) ("Our Courts have consistently held that a defendant may not advance a theory on appeal which was not first argued at trial.") (citations omitted), *vacated in part on other grounds and remanded for reconsideration*, 361 N.C. 148, ___ S.E.2d ___ (2006). Our Supreme Court "has repeatedly emphasized that Rule 10(b)

'prevent[s] unnecessary new trials caused by errors . . . that the [trial] court could have corrected if brought to its attention at the proper time.'" *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, ___ N.C. ___, ___, 657 S.E.2d 361, 363 (2008) (citations omitted). "[A] party's failure to properly preserve an issue for appellate review ordinarily justifies the appellate court's refusal to consider the issue on appeal." *Id.* at ___, 657 S.E.2d at 364. Defendant did not assert in his assignments of error or in his appellate brief that the exclusion of the picture amounts to plain error. Accordingly, Defendant is not entitled to plain error review of the constitutional issue. *State v. Dennison*, 359 N.C. 312, 608 S.E.2d 756 (2005). We discern no "exceptional circumstances" which would allow us to take the "extraordinary step" of invoking Rule 2 of the Rules of Appellate Procedure to excuse Defendant's failure to preserve this issue for review. *State v. Hart*, 361 N.C. 309, 315-17, 644 S.E.2d 201, 205-06 (2007). We thus decline to consider this issue for the first time on appeal.

2. Discovery Violation

Defendant next argues that he complied with the discovery statutes and that, therefore, the trial court was not authorized to impose any discovery sanction. In the alternative, Defendant argues that even if he did not comply with the discovery statutes, the trial court abused its discretion in choosing the particular sanction it imposed. Defendant acknowledges that, in order to obtain relief under either argument, he must show this Court that

he was "prejudiced" by the trial court's alleged error. N.C. Gen. Stat. § 15A-1443(a) (2005). Defendant was prejudiced only if "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." *Id.*

Defendant's assertion to the contrary, the outcome of the case did not "turn[] on the jury's assessment of the credibility of [Jane]." In addition to Jane's testimony, the State introduced the letters Defendant wrote to Jane after he was arrested. Defendant never denied writing the letters and never contested the letters' authenticity. In the letters, Defendant wrote:

> Baby, I'm sorry for f***ing you. I'm sorry for beating on you. Please, please, please forgive me and let's work this out . . . .;

and:

> I'm very sorry from the bottom of my heart for beating you and for making you have sex with me.

Assuming without deciding that the trial court erred in excluding the picture as a discovery sanction, and in light of all the evidence but particularly in light of Defendant's statements in the letters, we are wholly unpersuaded that there is a reasonable possibility that, had the picture been admitted into evidence, a different result would have been reached at trial. First, even if the picture had any tendency to call Jane's credibility into doubt, seven other witnesses bolstered Jane's credibility by corroborating various portions of her trial testimony. Second, in the letters, Defendant admitted that he raped Jane. Thus, it simply cannot be

said that Defendant was prejudiced as a result of the alleged error. Defendant's argument is overruled.

NO PREJUDICIAL ERROR.

Judges McGEE and TYSON concur.

Report per Rule 30(e).