NO. COA08-201

NORTH CAROLINA COURT OF APPEALS

Filed: 7 October 2008

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 05 CRS 210732-734
05 CRS 210736
05 CRS 31762

ERIC JASON WASHINGTON

Appeal by defendant from judgments entered 9 August 2007 by Judge David S. Cayer in Mecklenburg Superior Court. Heard in the Court of Appeals 27 August 2008.

Parish, Cooke & Condlin, by James R. Parish, for the defendant.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly W. Duffley, for the State.

ELMORE, Judge.

Defendant appeals from judgments finding him guilty of second degree rape, three counts of second degree sex offense, and one count of second degree kidnapping. We find no error.

I.

On 3 March 2005, the victim[1], a sixteen-year-old girl, was waiting for her school bus when a man walked past her, then returned. He grabbed her coat, told her he had a gun, and then

[1]We refer to the victim in this case only by this phrase in this opinion so as to protect her identity.

walked her to his car. Once inside, defendant began to drive, then told the victim to perform oral sex on him, which she did.

Defendant drove to his house and took the victim inside, where he made her perform oral sex on him again. He then attempted to have intercourse with her, but was unable to penetrate her after several attempts. Defendant then made the victim write down her home address, telling her that if she told anyone about what happened, he would hurt her and her family. She gave defendant her grandmother's address and said she attended West Charlotte High School, which she had not attended since the previous year. Defendant drove her to West Charlotte High School and dropped her off there. She was then able to find a familiar guidance counselor and was taken to the nurse. The victim was then taken to Presbyterian Hospital, where a rape kit was performed.

The victim later identified defendant in a photographic line-up. At trial, the criminologists who examined the physical evidence taken during the administration of the rape kit testified that the oral swab taken from the victim included semen containing defendant's DNA.

A jury returned verdicts of guilty on one charge of second degree rape, three counts of second degree sex offense, and one count of second degree kidnapping. Defendant was sentenced to a term of 34 to 50 months' imprisonment for the kidnapping charge and 116 to 149 months' imprisonment for each of the other charges, all to run consecutively. Defendant appeals.

II.

Defendant first argues that he was denied a fair trial because the court admitted the testimony of Byseema White, a woman who testified that defendant assaulted her in January 2005. We disagree.

White testified as follows: She was waiting at a bus stop for a city bus when a small car drove past her, then turned around and made several more passes up and down the street in front of her. The driver then stopped, threatened White with a gun, and told her to get in the car. After she did so, the driver forced her to perform oral sex on him as he drove. White managed to escape the car and ran into a nearby bar for help. White identified defendant as her assailant.

Before allowing White to testify, the court gave the jury the following limiting instruction:

> This evidence is received solely for the purpose of showing the identity of the person who committed the crime charged in this case, if it was committed, or that there existed in the mind of the Defendant a plan, scheme, system, or design involved in the crime charged in this case. If you believe this evidence you may consider it, but only for the limited purpose for which it was received. [T p. 554]

Defendant argues first that the facts of the two incidents were too dissimilar for White's testimony to provide evidence of a common scheme or plan. We disagree.

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation,

> plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2007). Our Supreme Court has noted that the Rule is "a clear general rule of inclusion . . . subject to but one exception requiring its exclusion if its only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (emphasis removed). However, it is "constrained by the requirements of similarity and temporal proximity." *State v. al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002).

Defendant here challenges the factual similarity of the two crimes. However, both crimes involved victims who were black, female, and sixteen years old; both victims were waiting at a bus stop when the assault occurred; and both stated their assailant was driving a blueish green Ford Focus. The assailant in both cases told the victim he had a gun to induce them to enter the car; in both cases, he took down his pants once he had the victim in the car and attempted to make the victim perform fellatio on him while he continued driving; in both cases, he attempted to force the victim's head down toward his genitals by the head or neck. Given these distinct similarities, we cannot say the trial court erred in admitting this testimony in order to show a common scheme or plan.

Defendant also argues that the testimony should not have been allowed for the purpose of proving identity. This argument is without merit.

The State presented evidence at trial that defendant's DNA was present in an oral swab taken from the victim. Thus, defendant argues, White's testimony was more prejudicial than probative on the issue of identity, in violation of Rule 403 of the North Carolina Rules of Evidence. *See* N.C. Gen. Stat. § 8C-1, Rule 403 (2007). "'[W]here at least one of the [other] purposes for which the prior act evidence was admitted was [proper,]' there is no prejudicial error." *State v. Morgan*, 359 N.C. 131, 158, 604 S.E.2d 886, 903 (2004) (citation omitted; alterations in original). Because we find that the evidence was properly admitted for purposes of a common scheme or plan, we need not address defendant's argument as to the basis of identity.

III.

Defendant next argues that the trial court erred in failing to dismiss the charge of second degree rape based on the insufficiency of the evidence. We disagree.

To survive a motion to dismiss, the State must have presented substantial evidence to prove each essential element of the crime charged and that the defendant was the perpetrator. *State v. Lowery*, 309 N.C. 763, 766, 309 S.E.2d 232, 235-36 (1983).

> In considering a motion to dismiss, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. The test of whether the evidence is sufficient to withstand a motion to dismiss is whether a reasonable inference of defendant's guilt may be drawn therefrom, and the test is the same whether the evidence is direct or circumstantial.

State v. Gainey, 343 N.C. 79, 85, 468 S.E.2d 227, 231 (1996) (citation omitted). When a trial court considers such a motion, "'[i]f the trial court determines that a reasonable inference of the defendant's guilt may be drawn from the evidence, it must deny the defendant's motion and send the case to the jury even though the evidence may also support reasonable inferences of the defendant's innocence.'" *State v. Alexander*, 337 N.C. 182, 187, 446 S.E.2d 83, 86 (1994) (quoting *State v. Smith*, 40 N.C. App. 72, 79, 252 S.E.2d 535, 540 (1979) (alteration in original; emphasis removed).

The essential elements of second degree rape are (1) "vaginal intercourse" (2) "[b]y force and against the will of the other person[.]" N.C. Gen. Stat. § 14-27.3(a)(1) (2007); *see also State v. Locklear*, 172 N.C. App. 249, 254, 616 S.E.2d 334, 338 (2005).

> In order for a charge of second degree rape to withstand a motion to dismiss, evidence of vaginal intercourse must be presented. The slightest penetration of the female sex organ by the male sex organ is sufficient to constitute vaginal intercourse within the meaning of the statute. It is not necessary that the vagina be entered or that the hymen be ruptured; the entering of the vulva or labia is sufficient.

State v. Bruno, 108 N.C. App. 401, 414, 424 S.E.2d 440, 448 (1993) (citations and quotations omitted).

In *Bruno*, "the victim testified that the defendant attempted to have sex with her but couldn't because in the defendant's words, she was 'too tight.'" *Id.* at 415, 424 S.E.2d at 448. The physician who treated her after the incident "testified that when he examined her he discovered a bruise around the right upper part

of the lips of the vaginal vault in the entrance to the vagina consistent with vaginal penetration." *Id.* This Court held that this evidence "was clearly sufficient on the issue of penetration to withstand the defendant's motion to dismiss." *Id.*

The State produced similar evidence in this case: the victim testified that defendant attempted penetration several times but was unable to complete the act, and the treating forensic nurse testified that the victim had sustained a tear to her hymen. Indeed, the State in this case produced evidence almost identical to that in *Bruno*, which this Court found "clearly sufficient." As such, we overrule this assignment of error.

IV.

Defendant next argues that the trial court abused its discretion and denied him a fair trial by ruling that one of defendant's witnesses violated the court's sequestration order and, therefore, not allowing her to testify. We disagree.

Upon defendant's motion, the trial court entered an order sequestering the witnesses at the beginning of the trial. Defendant's mother, Alice Washington, was present in the courtroom during a portion of the victim's testimony on two separate days. When defendant later attempted to call her as a witness, the State objected, noting her presence in the courtroom in violation of the sequestration order; as a result, the court did not allow her to testify.

"An order to sequester witnesses is issued in the sound discretion of the trial judge[,]" and "if the order is disobeyed,

the court can exclude the witness from testifying." *State v. Sings*, 35 N.C. App. 1, 3, 240 S.E.2d 471, 472 (1978) (citations omitted); *see also* N.C. Gen. Stat. § 15A-1225 (2005) ("[u]pon motion of a party the judge may order all or some of the witnesses other than the defendant to remain outside of the courtroom until called to testify"). We review this decision, therefore, for an abuse of discretion, and will reverse "only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Gladden*, 315 N.C. 398, 412, 340 S.E.2d 673, 682 (1986).

Here, defendant has made no such showing. His primary argument is that the trial court exercised no discretion at all, because its only inquiry was whether Ms. Washington was in fact present for other witnesses' testimony in violation of his order. When she admitted being present, the trial court sustained the State's objection. Defendant does not explain exactly what inquiry he believes the court should have undertaken, and our case law does not suggest any specific inquiries the trial court should make in such circumstances. This argument is without merit.[2]

V.

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[2]We also note that Ms. Washington's testimony was, according to defendant, to consist of a description of the "atmosphere" in the house where the assault took place. She was not present for the assault itself, but rather allegedly spoke to defendant at some point before or after the assault. Defendant claims that the court's forbidding her to testify denied him a fair trial, but, aside from this bald statement, he makes no suggestion as to how this decision prejudiced him.

Finally, defendant argues that his right to a unanimous jury verdict was violated due to the vagueness and duplicative nature of the indictments. This argument is without merit.

Defendant's three indictments for second degree sexual offense – 05 CRS 210733, 05 CRS 210734, and 05 CRS 31762 – contain identical language as to defendant's alleged actions: "[Defendant] did unlawfully, willfully, and feloniously with force and arms engage in a sexual act with [victim] by force and against that victim's will." On the verdict sheets given to the jury, the acts were described as: "second degree sexual offense (fellatio)" (05 CRS 210733); "second degree sexual offense (fellatio)" (05 CRS 210734); and "second degree sexual offense (cunnilingus)" (05 CRS 31762). The jury returned verdicts of guilty on all three counts.

Defendant argues that he did not receive unanimous jury verdicts because: (1) the language of the indictments was identical and (2) the State presented evidence of as many as three separate acts of forced fellatio, but the two indictments do not specify which of these three are meant.

However, our Supreme Court has specifically stated that "a defendant may be unanimously convicted of indecent liberties even if: (1) the jurors considered a higher number of incidents of immoral or indecent behavior than the number of counts charged, and (2) the indictments lacked specific details to identify the specific incidents." *State v. Lawrence*, 360 N.C. 368, 375, 627 S.E.2d 609, 613 (2006). In *Lawrence*, evidence of four incidents was presented, but only three counts were submitted to the jury,

which found the defendant guilty on all counts. *Id.* at 374, 627 S.E.2d at 612. In upholding the convictions, the Court noted that "while one juror might have found some incidents of misconduct and another juror might have found different incidents of misconduct, the jury as a whole found that improper sexual conduct occurred." *Id.* at 374, 627 S.E.2d at 612-13. Thus, here, as there, we hold that the identical language of the indictments and the nature of the evidence presented do not invalidate the unanimous verdicts brought in by the jury on the three counts at issue.

No error.

Judges TYSON and CALABRIA concur.

Report per Rule 30(e).