NO. COA08-475

NORTH CAROLINA COURT OF APPEALS

Filed: 20 January 2009

STATE OF NORTH CAROLINA

v.

Mecklenburg County
Nos. 05CRS071658-67
05CRS241867-68

EUGENE MATTHEWS

Appeal by defendant from judgments entered 6 September 2007 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 October 2008.

Attorney General Roy A. Cooper, III, by Assistant Attorneys General William P. Hart and Laura E. Crumpler, for the State.

Parish, Cooke & Condlin, by James R. Parish, for defendant-appellant.

HUNTER, Robert C., Judge.

Eugene Matthews ("defendant") appeals from judgments entered against him in Mecklenburg County Superior Court in accordance with jury verdicts finding him guilty of (1) seven counts of taking indecent liberties with a child pursuant to N.C. Gen. Stat. § 14-202.1; (2) three counts of first degree rape of a child pursuant to N.C. Gen. Stat. § 14-27.2(a)(1); (3) three counts of statutory rape of a person thirteen years of age pursuant to N.C. Gen. Stat. § 14-27.7A(a); and (4) one count of statutory rape of a person fourteen years of age, also pursuant to N.C. Gen. Stat. § 14-

27.7A(a). Defendant was sentenced to three active terms of 240-297 months imprisonment to be served consecutively. After careful review, we find no error.

I. Background

The State's evidence tended to show that on 28 September 2005, defendant drove his daughter, C.M.[1], to the hospital because she was suffering from abdominal pain and vaginal bleeding. Tests revealed C.M. was pregnant and had miscarried. A nurse asked C.M. who the baby's father was; she informed the nurse, "it was my Dad."

C.M. testified that her father first had sex with her when she was twelve years old and that it occurred while her mother was working third shift and her brothers were asleep. She further testified that after the initial encounter, defendant had sex with her almost every day until early September 2005, at which time C.M. was fourteen years old. C.M. described several of the sexual encounters and stated that sometimes defendant used a condom and sometimes he did not. She also testified that defendant had stated that if she told anyone about the sexual encounters "he would kill [her]."

In addition, C.M. testified that she told Detective Theresa Johnson ("Detective Johnson") that defendant often used a red towel to wipe her and himself off after intercourse. Law enforcement found a red towel on defendant's bathroom floor, and DNA tests were performed on two stains located on the towel. One stain was consistent with a mixture of the DNA profiles of defendant and C.M.

[1] Name changed to protect identity of juvenile.

The other stain contained a mixture of defendant's DNA profile and another female, but not C.M.

Detective Johnson interviewed C.M. at the hospital. Detective Johnson testified that C.M. told her "that her father was the one who had sexually assaulted her[,]" and "that [it] had been going on for several years." She further testified that C.M. stated that while her mother worked third shift, defendant often called her into his bedroom, closed the door, and engaged in intercourse with her. She stated that C.M. described the incidents in great detail and that C.M. told her that defendant "had threatened to kill her if she ever told anyone."

Detective Johnson arranged for defendant to be interviewed by another investigator, Detective Willie Thomas ("Detective Thomas"). Detective Thomas testified that during the interview, defendant admitted to having numerous sexual encounters with C.M., approximately two to three times per week, and that defendant claimed C.M. was at fault for these encounters. Later, defendant requested Detective Johnson's presence in the interview room, stating that "he wanted to find out from her what she knew." In Detective Thomas's presence, defendant told Detective Johnson "that he wanted to tell the truth" and "basically admitted to the sexual intercourse with [C.M.] on an every other day basis and he gave [Detective Johnson] detailed information of different places it happened . . . [and stated] that sometimes they would use a condom and sometimes they wouldn't."

The Detectives helped defendant complete a written statement. Detective Thomas read the statement aloud to defendant, had defendant read the statement back, and asked defendant to verify its truth by signing, which defendant did. In the statement, defendant admitted to having sex with C.M. "on average twice a week, sometimes 3 times a week[.]" He also admitted their sexual relationship began in 2003 and continued until the end of August 2005.

Defendant testified on his own behalf. He claimed he did not rape his daughter. Though defendant admitted that while his wife was at work, he often told his daughter to come into his bedroom alone and kept the bedroom door closed, he testified that this was because "[C.M.] wanted to discuss some things with me that she didn't want [her brothers] to hear." Defendant admitted that he voluntarily agreed to be interviewed by the detectives; however, he stated that when the detectives took his written statement he was "upset and . . . nervous and still under the [effects of] drugs and alcohol[.]" He claimed that he signed the statement because he was "emotionally drained and . . . distraught," and because the detectives threatened him. Defendant further testified that his written statement was false and that C.M. and the detectives were lying.

C.M.'s mother testified that defendant was not intoxicated when he drove to the hospital. Detective Johnson testified that defendant "appear[ed] coherent" and that the detectives did not

threaten defendant. Detective Thomas testified that during the interview, defendant was "very relaxed and somewhat nonchalant."

Other facts necessary to the understanding of this case are set out in the opinion below.

II. Analysis

On appeal, defendant asserts the following errors occurred below: (1) the trial judge at his plea hearing and the trial judge for his criminal trial respectively denied his state and federal constitutional rights to effective assistance of counsel by failing to adequately inquire into his reasons for requesting that his court-appointed counsel be dismissed and by not providing him with new appointed counsel; (2) the trial court committed plain error by admitting DNA test results and testimony, which showed a sixty-seven percent (67%) probability that defendant was the father of C.M.'s fetus; (3) the trial court erred by failing to dismiss the three charges of statutory rape of a person thirteen years of age due to insufficient evidence; and (4) defense counsel's failure to object to the insufficiency of the evidence at the close of all evidence as to the aforementioned three charges constituted ineffective assistance of counsel in violation of the state and federal constitutions.[2] We find defendant's arguments to be without merit and address each argument in turn.

A. Court-Appointed Counsel

[2] As stated in his brief, defendant abandons assignments of error two, three, ten, and eleven.

The presiding judge at defendant's plea hearing,[3] Judge Robert Bell ("Judge Bell"), and the presiding judge at defendant's trial, Judge Richard D. Boner ("Judge Boner") both denied defendant's request to dismiss his court-appointed counsel, Sean Perrin ("Mr. Perrin"), and to provide defendant with new counsel. Both judges offered defendant the choice to retain Mr. Perrin, hire private counsel, or represent himself. Defendant asserts both judges failed to conduct a "meaningful" inquiry into his reasons for wanting Mr. Perrin dismissed and that consequently, both judges did not possess sufficient information to allow them to conclude that Mr. Perrin could provide effective assistance of counsel and that no conflict existed that might have rendered Mr. Perrin's representation ineffective. Defendant appears to assert that a detailed inquiry, such as a separate hearing, should have been conducted here. He further asserts that neither Judge Bell nor Judge Boner conducted any inquiry and that as a result, he is entitled to a new trial. This argument is without merit.

At the outset, we note the strict hearing requirement advanced by defendant was rejected by our Supreme Court in *State* v. *Thacker*:

> Defendant . . . argues that regardless of the apparent nature of the conflict, the trial court should inquire into its basis and that failure to make a detailed inquiry amounts to a *per se* violation of defendant's right to counsel. To this end, defendant requests that we formulate a set of criteria by which a

[3] The record indicates that defendant's case was originally set for plea and that a hearing regarding the plea agreement was conducted on 26 March 2007. Defendant rejected the proposed plea agreement at this hearing and his case ultimately proceeded to trial.

> trial court must determine whether a valid conflict exists and that we require the trial courts to make findings of fact to permit appellate review of such decisions. We decline to adopt such an unnecessary and stringent requirement. . . . While some situations may indeed require an in-depth inquiry and detailed findings of fact, the conflict in the case *sub judice* is clearly not one of them. The trial court made sufficient inquiry to learn that the conflict here was not such as to render the public defender's assistance ineffective. Having so learned, his failure to inquire further was entirely proper.

Thacker, 301 N.C. 348, 353, 271 S.E.2d 252, 255-56 (1980). As to the necessary inquiry trial judges must undertake in addressing a defendant's request for dismissal of appointed counsel and appointment of new counsel, our Supreme Court has stated:

> The right to counsel guaranteed to all defendants in state prosecutions by the fourteenth amendment requires only that defendant receive competent assistance of counsel. Thus, when faced with a claim of conflict and a request for appointment of substitute counsel, the trial court must satisfy itself only that present counsel is able to render competent assistance and that the nature or degree of the conflict is not such as to render that assistance ineffective. The United States Constitution requires no more.

Id. at 353, 271 S.E.2d at 256. "Once it becomes apparent that the assistance of counsel has not been rendered ineffective, the trial judge is not required to delve any further into the alleged conflict." *State v. Poole*, 305 N.C. 308, 311-12, 289 S.E.2d 335, 338 (1982). With regard to when denial of substitute appointed counsel is proper, our Supreme Court has stated:

> [W]hen it appears to the trial court that the original counsel is reasonably competent to

> present defendant's case and the nature of the conflict between defendant and counsel is not such as would render counsel incompetent or ineffective to represent *that* defendant, denial of defendant's request to appoint substitute counsel is entirely proper.

Thacker, 301 N.C. at 352, 271 S.E.2d at 255.

After careful review of the record, we believe that both trial judges here made sufficient inquiry and acquired sufficient information to "satisfy [themselves] . . . that present counsel [wa]s able to render competent assistance and that the nature or degree of the conflict [wa]s not such as to render that assistance ineffective." *Id.* at 353, 271 S.E.2d at 256. Both judges allowed defendant to assert his grievances and made some inquiry of the circumstances from defendant and Mr. Perrin. They were also informed that Mr. Perrin was defendant's second court-appointed counsel, that defendant had levied the same claims against his first court-appointed attorney who had been removed from the case, and that defendant's claims against prior appointed counsel and Mr. Perrin were made long after representation began and right before defendant's case was set for plea or trial. Further, both judges were informed that Mr. Perrin had secured a more favorable plea deal (240 to 297 months) than defendant's prior counsel (300 to 369 months), that the plea deal substantially reduced the amount of time served if defendant was found guilty on all charges, and that the State possessed defendant's confession.

Additionally, nothing in the record demonstrates Mr. Perrin's lack of competence or willingness to represent defendant. In fact, Judge Boner specifically inquired of defense counsel: "Mr. Perrin,

the fact that you are aware of [defendant's] feelings, do you think that will effect [sic] the job that you do?" And Mr. Perrin responded, "[n]o, Your Honor, I do not." Furthermore, the record shows Mr. Perrin ably and zealously advocated for defendant, including thoroughly arguing a motion to suppress defendant's confession and making efforts to renegotiate another plea deal with the State during a lunch recess provided by Judge Bell. In sum, after careful review of the record, we conclude both trial judges conducted adequate inquiries into defendant's requests for Mr. Perrin's removal and appointment of new counsel and that they did not err by denying his requests.

B. Plain Error and DNA Evidence

At trial, the State's expert, Shawn Weiss ("Mr. Weiss"), testified that he performed DNA testing on fetal tissue obtained from C.M.'s miscarriage and that the results showed a 66.66% probability that defendant was the father. Mr. Weiss noted, however, that to establish paternity, the probability needed to be greater than 99.75%. Defense counsel did not object; therefore, our review is for plain error. *State v. Black*, 308 N.C. 736, 741, 303 S.E.2d 804, 807 (1983).

> "[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 a 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) (alterations in original; citations omitted).

Clearly, this DNA evidence did not possess any real statistical significance as to defendant's paternity. However, "conceding, *arguendo*, that the challenged evidence in the instant case was objectionable, we hold that the admission of this evidence was not . . . 'plain error'" given the other evidence presented to the jury, including, *inter alia*, defendant's confession and C.M.'s statements and testimony. *Black*, 308 N.C. at 741, 303 S.E.2d at 807.

C. Insufficiency of the Evidence

Next, defendant contends that because C.M. was twelve years old during part of the time span listed in the three indictments charging him with statutory rape of a person thirteen years old, these charges should have been dismissed due to insufficiency of the evidence. Defendant notes that the indictments and the verdict sheets for these offenses state that the statutory rape occurred between 1 July 2004 and 30 June 2005 and that C.M. did not turn thirteen until 11 July 2004. Because C.M. was twelve years old and not thirteen for this ten-day period, defendant argues the State failed to present substantial evidence that a rape occurred within the time frame alleged and that a rape occurred when C.M. was thirteen years old. This argument is without merit.

At the outset, we note that because defense counsel did not renew his motion to dismiss these charges at the close of all evidence, defendant is procedurally barred from raising this issue on appeal pursuant to N.C.R. App. P. 10(b)(3). However, because defendant argues that Mr. Perrin's failure to renew said motion as to these three charges constituted ineffective assistance of counsel, we address defendant's substantive argument, which was rejected by this Court in a similar case, *State v. Wiggins*, 161 N.C. App. 583, 589 S.E.2d 402 (2003), *disc. review denied*, 358 N.C. 241, 594 S.E.2d 34 (2004).

In considering a motion to dismiss for insufficiency of the evidence, the trial court must view the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference to be drawn from the evidence. *State v. Degree*, 322 N.C. 302, 307-08, 367 S.E.2d 679, 683 (1988) (citations omitted). In addition, "[i]f there [i]s substantial evidence — whether direct, circumstantial, or both — to support a finding that the offense charged was committed and that [the] defendant committed it, the case [i]s for the jury, and the motion to dismiss [i]s properly denied." *Id.* at 308, 367 S.E.2d at 683 (citation omitted).

N.C. Gen. Stat. § 14-27.7A(a) (2007) provides:

> 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.

In *Wiggins*, this Court noted that established North Carolina case law provides:

> "'[A] child's uncertainty as to the time or particular day the offense charged was committed goes to the weight of the testimony rather than its admissibility, and nonsuit may not be allowed on the ground that the State's evidence fails to fix any definite time when the offense was committed where there is sufficient evidence that the defendant committed each essential act of the offense.'"

Wiggins, 161 N.C. App. at 590, 589 S.E.2d at 407-08 (alterations in original; citations omitted). In *Wiggins*, the Court determined that the evidence established that the victim "was between thirteen and fifteen years old, an essential element of statutory rape under section 14-27.7A(a), during the time she lived with [the] defendant [at a particular residence] and [that] defendant engaged in almost daily sexual intercourse with her." *Id.* at 590, 589 S.E.2d at 408. Thus, the Court concluded "there was substantial evidence to withstand [the] defendant's motions to dismiss." *Id.*

Here, as in *Wiggins*, the State presented substantial evidence to support the fact that C.M. was thirteen years old at the time these three offenses occurred. C.M. testified that her father began having sex with her when she was twelve years old. She also testified that defendant had sex with her almost every day until the beginning of September 2005, at which point she was fourteen years old. In addition, defendant's written confession states that he began having sex with C.M. during the latter part of 2003 and continued until the end of August 2005 and specifically details

that intercourse regularly occurred between January 2005 and June 2005, during which time C.M. was thirteen years old.

Viewed in the light most favorable to the State, this evidence was sufficient to allow these charges to go to the jury; thus, the trial court did not err by not dismissing these three statutory rape charges.

D. Ineffective Assistance of Counsel and Failure to Object

Finally, defendant asserts he was denied his federal and state constitutional rights to effective assistance of counsel due to Mr. Perrin's failure "to move to dismiss due to the insufficiency of the evidence the charges at the close of all the evidence." In his brief, defendant only argues that Mr. Perrin's performance was deficient with regard to the three statutory rape charges discussed above; hence, our review of this issue is limited to Mr. Perrin's performance as to these charges.

To establish a claim for ineffective assistance of counsel:

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

State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)). As discussed *supra*, even if Mr. Perrin had renewed the motion to dismiss at the close of all evidence, the

evidence here was sufficient to withstand it. Accordingly, defendant has not adequately demonstrated that Mr. Perrin's representation was constitutionally inadequate, and we conclude this assignment of error is without merit.

III. Conclusion

In sum, after careful review of defendant's arguments, we find no error.

No error.

Judges ELMORE and GEER concur.

Report per Rule 30(e).