NO. COA09-454

NORTH CAROLINA COURT OF APPEALS

Filed: 22 January 2009

STATE OF NORTH CAROLINA

v. Rowan County
Nos. 05 CRS 007832
05 CRS 054174
05 CRS 054726

EDY CHARLES BANKS, JR.,
Defendant.

Appeal by defendant from judgments entered 30 November 2007 by Judge Carl R. Fox in Rowan County Superior Court. Heard in the Court of Appeals 26 October 2009.

Roy Cooper, Attorney General, by Margaret A. Force, Assistant Attorney General, for the State.

Staples Hughes, Appellate Defender, by Katherine Jane Allen, Assistant Appellate Defender, for defendant-appellant.

MARTIN, Chief Judge.

Defendant appeals his 30 November 2007 convictions by a jury of second degree rape, taking indecent liberties with a child, and statutory rape. For the reasons stated herein, we find no error.

In May 2005, J.L. was a fifteen-year-old girl living at Youth Haven, a group home in Salisbury, North Carolina. J.L. has been involved with the Department of Social Services since she was removed from her mother at the age of two. As a result of the abuse and neglect J.L. endured as a child, she suffers from various mental disorders, including reactive attachment disorder, bipolar

disorder, dissociative disorder, oppositional defiant disorder, and contact disorder. She is also mildly to moderately retarded. J.L.'s conditions have resulted in her placement in various facilities throughout the years, including Youth Haven.

On 1 May 2005, J.L. got into an argument with another resident at Youth Haven, and, as a result of this incident, the police were called. Once the police defused the situation and departed, J.L., apparently still mad about the situation, left the group home. After wandering around Salisbury for a while, J.L. met Kelvin Sifford ("Kelvin") and eventually went with him back to his apartment located at 917 South Railroad Street in Salisbury, North Carolina. J.L. remained at Kelvin's apartment for the next few days, and during this time, Kelvin engaged in sexual intercourse with her on multiple occasions. Kelvin brought various people over to the apartment while J.L. was there, and on 4 May 2005, defendant and his friend Tim Cohen accompanied Kelvin to his apartment. While at the apartment, defendant, who was twenty-nine at the time, engaged in one act of sexual intercourse with J.L.

Sometime after defendant's encounter with J.L., Kelvin became angry with J.L. and forcibly removed her from his apartment. J.L. then began wandering around Salisbury, and while walking along the railroad tracks, she met two men named Lance and Calvin. J.L. went with these two men to a house where they too had sexual intercourse with her. J.L. was eventually able to leave Lance and Calvin on the morning of 5 May 2005 and went back to Kelvin's apartment.

Later that day, Officer Daniel Kennerly ("Officer Kennerly") of the Salisbury Police Department was dispatched to a location near 909 South Main Street to locate a missing juvenile. When he arrived, two men motioned for him to come to the nearby address of 917 South Railroad Street. After reaching 917 South Railroad Street, Officer Kennerly found J.L. sitting in the backyard. Officer Kennerly approached J.L. and asked her to come back to his patrol car with him. As they were walking, J.L. informed Officer Kennerly that a man named "Kevin" had assaulted her and had sex with her. After finding out that Kelvin lived at the residence where J.L. was found, Officer Kennerly used the computer in his patrol car to look up Kelvin's information. As he was doing this, J.L. was in the back seat of the patrol car and could see the computer. As the picture of Kelvin appeared on the screen, J.L. identified him as the man who sexually assaulted her.

Officer Kennerly then decided to take J.L. to Rowan Regional Medical Center. At the hospital, a rape kit was performed on J.L. Officer Rita Rule ("Officer Rule") of the Salisbury Police Department was called to the hospital to continue the investigation. After talking with J.L. about the sexual assaults, Officer Rule obtained a search warrant for Kelvin's apartment. Officer Rule, in talking with Kelvin, was given defendant's name as an additional suspect. As the investigation continued, the evidence collected from the rape kit revealed that the DNA extracted from sperm cells found on J.L.'s shorts and on the swab of her vagina matched defendant's DNA profile. Additionally, on 17

May 2005, J.L. identified defendant from a photographic lineup as one of the men that had sex with her.

Defendant was indicted on charges of (1) taking indecent liberties with a child pursuant to N.C.G.S. § 14-202.1(a), (2) second degree rape pursuant N.C.G.S. § 14-27.3, and (3) statutory rape of a person 13, 14, or 15 years old pursuant to N.C.G.S. § 14-27.7A. Defendant pleaded not guilty to all charges, and was found guilty by a jury of the three charged offenses. At sentencing, defendant was found to have a prior record level I. For the conviction of statutory rape, defendant was sentenced within the presumptive range to a minimum term of 240 months and a maximum term of 297 months. The trial court consolidated the convictions of second degree rape and indecent liberties with a child for the purposes of sentencing, imposed a sentence within the presumptive range, and ordered defendant be imprisoned for a minimum term of 73 months and a maximum term of 97 months. This sentence was to run consecutively to the sentence imposed for the statutory rape conviction. Defendant appeals.

On appeal defendant raises two issues: (I) whether the trial court lacked jurisdiction to try him for second degree rape when the indictment alleged that J.L. was "mentally defective" instead of "mentally disabled," "mentally incapacitated," or "physically helpless;" and (II) whether the convictions for both second degree rape and statutory rape violate his federal constitutional

protection against double jeopardy when they were both based on a single act of sexual intercourse.

In his first argument, defendant contends that the bill of indictment charging him with second degree rape alleged that J.L. was "mentally defective" instead of tracking the language of N.C.G.S. § 15-144.1(c). He urges that, as a result, the indictment was fatally defective, depriving the trial court of jurisdiction to try him on this charge. We disagree.

We first note that defendant failed to raise this issue at trial. However, "it is well-settled that the failure of a criminal pleading to charge the essential elements of the stated offense is an error of law which may be corrected upon appellate review even though no corresponding objection, exception or motion was made in the trial division." *State v. Marshall*, 188 N.C. App. 744, 747, 656 S.E.2d 709, 712 (internal quotation marks omitted), *disc. review denied*, 362 N.C. 368, 661 S.E.2d 890 (2008). Therefore, this issue is properly before this Court.

In reviewing the sufficiency of an indictment, we apply a *de novo* standard of review. *Id.* "North Carolina law has long provided that [t]here can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence of an accusation the court acquires no jurisdiction whatever, and if it assumes jurisdiction a trial and conviction are a nullity." *State v. Neville*, 108 N.C. App. 330, 332, 423 S.E.2d 496, 497 (1992) (alterations in original) (internal quotation marks omitted). Thus, if an indictment "wholly fails to charge some

offense . . . or fails to state some essential and necessary element of the offense of which the defendant is found guilty," it is fatally defective and does not grant the trial court jurisdiction to try the defendant for that charge. *State v. Gregory*, 223 N.C. 415, 418, 27 S.E.2d 140, 142 (1943).

However, it is not necessary, as a constitutional matter, for an indictment to "allege every element of the crime for which a defendant was charged, the manner in which the crime was carried out, and the means employed." *State v. Hunt*, 357 N.C. 257, 267, 582 S.E.2d 593, 600, *cert. denied*, 539 U.S. 985, 156 L. Ed. 2d 702 (2003). Instead, an indictment is sufficient "as long as it notifies an accused of the charges against him sufficiently to allow him to prepare an adequate defense and to protect him from double jeopardy." *State v. Haddock*, 191 N.C. App. 474, 476-77, 664 S.E.2d 339, 342 (2008) (citing *State v. Lowe*, 295 N.C. 596, 603, 247 S.E.2d 878, 883 (1978)); *see also* N.C. Gen. Stat. § 15-153 (2007) ("Every criminal proceeding by . . . indictment . . . is sufficient in form for all intents and purposes if it express[es] the charge against the defendant in a plain, intelligible, and explicit manner . . . to enable the court to proceed to judgment."). Thus, if the crime charged is "clearly set forth so that a person of common understanding may know what is intended[,]" the indictment will not fail. *State v. Coker*, 312 N.C. 432, 435, 323 S.E.2d 343, 346 (1984).

In looking at an indictment for second degree rape, this Court has held that "[a] short-form indictment for rape which tracks the

language of N.C. Gen. Stat. § 15-144.1 is sufficient to give the trial court jurisdiction to enter judgment, even though such indictments do not specifically allege each and every element[.]" *Haddock*, 191 N.C. App. at 477, 664 S.E.2d at 342-43 (internal quotation marks omitted); *see also Hunt*, 357 N.C. at 274, 582 S.E.2d at 604 (reaffirming the constitutionality of short form indictments). This is so because an indictment which follows the language of the short form statute "specifies the offense [i]n words having precise legal import [thereby] put[ting] the defendant on notice that he will be called upon to defend against proof of the manner and means by which the crime was perpetrated." *Haddock*, 191 N.C. App. at 477, 664 S.E.2d at 343 (alterations in original) (internal quotation marks omitted). Under N.C.G.S. § 15-144.1(c), an indictment for second degree rape is sufficient if it alleges "that the defendant unlawfully, wilfully, and feloniously did carnally know and abuse a person who was *mentally disabled, mentally incapacitated or physically helpless*." N.C. Gen. Stat. 15-144.1(c) (2007) (emphasis added).

The indictment for second degree rape in the present case alleges that defendant "unlawfully, wilfully and feloniously did ravish and carnally know [J.L.], who was at the time, *mentally defective*." It is true, as defendant argues, that this indictment fails to track the exact language of N.C.G.S. § 15-144.1(c). However, an indictment is not *per se* facially invalid if it does not use the precise language of the short form statute. *See Haddock*, 191 N.C. App. at 477-78, 664 S.E.2d at 343; *see also State*

v. Haywood, 144 N.C. App. 223, 228, 550 S.E.2d 38, 42, *appeal dismissed and disc. review denied*, 354 N.C. 72, 553 S.E.2d 206 (2001). Instead, an indictment charging a defendant with second degree rape pursuant to N.C.G.S. § 15-144.1(c) is valid as long as its language allows "a person of common understanding [to] know that the intent of the indictment was to accuse defendant of having sexual intercourse with a person deemed by law to be incapable of giving consent." *Haddock*, 191 N.C. App. at 447, 664 S.E.2d at 343. Thus, the question left for this Court to decide is whether a person of common understanding would comprehend the charges alleged against defendant from the indictment presented in the present case.

At issue here is the indictment's use of the phrase "mentally defective." "Mentally" is defined as something that is "[o]f or relating to the mind." *The American Heritage Dictionary* 1098 (4th ed. 2000). "Defective" is an adjective used to describe someone or something that is below the norm in "structure, function, intelligence, or behavior." *Id.* at 475. Taken together, the common meaning of "mentally defective," when used to describe a person, is someone who falls below the norm in intelligence.

This definition is synonymous with the statutory definition of "mentally disabled." Specifically, "mentally disabled" means in pertinent part, "a victim who suffers from mental retardation, or . . . a victim who suffers from a mental disorder, either of which temporarily or permanently renders the victim substantially incapable of appraising the nature of his or her conduct." N.C.

Gen. Stat. § 14-27.1(1) (2007). As the phrase "mental retardation" is not further defined in this article, we must assume that the legislature intended its ordinary meaning to apply.[1] *Lafayette Transp. Serv., Inc. v. Robeson Cty.*, 283 N.C. 494, 500, 196 S.E.2d 770, 774 (1973). Thus, the common meaning of "mental retardation" is "[s]ubnormal intellectual development." *The American Heritage Dictionary* 1098 (4th ed. 2000). Accordingly, the use of the phrase "mentally defective," which means a person who falls below the norm in intelligence, to describe the victim in the present case necessarily suggests that the victim was "mentally disabled" in that she suffered from "mental retardation," or subaverage intellectual development. This connection is further compounded by the fact that a common synonym for "defective" is "retarded." J.I. Rodale, *The Synonym Finder* 267 (Laurence Urdang, et al. eds., 1978).

Moreover, statutory changes made to N.C.G.S. § 15-144.1(c), § 14-27.1(1), and § 14-27.3(a)(2) indicate the legislature's intent that the meanings of the phrases "mentally defective" and "mentally disabled" be synonymous. *See* 2002 N.C. Sess. Laws 635, 636, ch. 159, § 2(a),(b),(d); *see also* Memorandum from the Gen. Statutes Comm. to the Senate Judiciary I Comm. 2 (Aug. 26, 2002) (on file with the North Carolina Supreme Court Library). In 2002, the legislature passed technical amendments to the above named statutes

---

[1] The legislature has defined "mentally retarded" for the purposes of N.C.G.S § 15A-2005. This definition, which states that mentally retarded means in part "[s]ignificantly subaverage general intellectual functioning," is consistent with the common definition of the phrase. N.C. Gen. Stat. § 15A-2005(a)(1)(a) (2007).

replacing the word "defective" with the word "disabled." 2002 N.C. Sess. Laws 635, 636, ch. 159, § 2(a),(b),(d). Thus, the changes to N.C.G.S. § 15-144.1(c) appeared as follows:

> If the victim is a person who is mentally ~~defective~~,disabled, mentally incapacitated, or physically helpless it is sufficient to allege that the defendant unlawfully, willfully, and feloniously did carnally know and abuse a person who was mentally ~~defective~~,disabled, mentally incapacitated or physically helpless, naming such victim, and concluding as aforesaid. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law for the rape of a mentally ~~defective~~,disabled, mentally incapacitated or physically helpless person and all lesser included offenses.

Id. at § 2(d). Similarly, the word "defective," as it appeared in N.C.G.S. § 14-27.1(1) and § 14-27.3(a)(2) was replaced with the word "disabled" to reflect a conforming change in terminology. *Id.* at § 2(a),(b). Nothing else in relation to the actual definition was altered. *Id.* at § 2(a),(b),(d). Thus, the intent behind this change was not to alter the meaning of "mentally defective" or the substance of the law, but instead to reflect the need to use a more up-to-date and politically correct word. Memorandum from the Gen. Statutes Comm. to the Senate Judiciary I Comm. 2 (Aug. 26, 2002) (on file with the North Carolina Supreme Court Library). Thus, "mentally defective" as it was defined prior to the 2002 amendments had the exact same legal meaning as "mentally disabled" has today. 2002 N.C. Sess. Laws 635, 636, ch. 159, § 2(a),(b),(d); *see also* N.C. Gen. Stat. § 14-27.1(1).

Consequently, we find that the indictment for second degree rape alleging that defendant "unlawfully, wilfully and feloniously

did ravish and carnally know [J.L.], who was at the time, *mentally defective*," would allow a person of common understanding to know that he was accused of having sexual intercourse with someone who suffered from below normal intellectual ability. This knowledge would allow defendant to have adequate notice of the charges against him and enable him to prepare his defense. Accordingly, the indictment charging defendant as such was not fatally defective.

Defendant, in urging a different result, argues that the use of the phrase "mentally defective" prevents him from knowing whether he would have to defend against the allegation that J.L. was "mentally disabled," "mentally incapacitated," or "physically helpless." As there is evidence that all three could apply to J.L., defendant asserts that the terminology used insufficiently notified him of which one the State was alleging. However, as stated above, "mentally defective" is synonymous with the statutory definition of "mentally disabled." Likewise, the definition of "mentally defective" is distinguishable from the statutory definitions of "mentally incapacitated" and "physically helpless."

Specifically "mentally incapacitated" refers to "a victim who due to any act committed upon the victim is rendered substantially incapable of either appraising the nature of his or her conduct." N.C. Gen. Stat. § 14-27.1(2). This requires an act committed upon the victim which prohibits her from resisting the sexual act. *Haddock*, 191 N.C. App. at 483, 664 S.E.2d at 346 (noting that the phrase "committed upon . . . connotes an action committed *upon* the

victim and not a voluntary act *by* the victim herself" (citation and internal quotation marks omitted)). No such requirement is implicated by the use of the phrase "mentally defective." Similarly, "physically helpless" means any "victim who is unconscious; or . . . who is physically unable to resist." N.C. Gen. Stat. § 14-27.1(3). This definition requires the victim to have some sort of physical impairment, whereas "mentally defective" implicates a mental impairment. Thus, the only reasonable conclusion for a person of common understanding to reach is that, in alleging that J.L. was "mentally defective," defendant would have to defend against the allegation that J.L. was "mentally disabled" as that term is defined in N.C.G.S. § 14-27.1(1).

Moreover, failure to distinguish which condition cited in N.C.G.S. § 15-144.1(c) applies does not render the indictment facially invalid. *See Haddock*, 191 N.C. App. at 476-77, 664 S.E.2d at 343. What is essential is that the indictment is worded such that "a person of common understanding would know that the intent of the indictment was to accuse defendant of having sexual intercourse with a person deemed by law to be incapable of giving consent." *Id.* Thus, the second degree rape indictment issued against defendant adequately notified him of the charges against him and was not fatally defective.

Defendant next argues that he was impermissibly prosecuted for and convicted of both second degree rape and statutory rape. He first contends that because both of these convictions are based on one act of sexual intercourse, there is insufficient evidence to

support his conviction of both offenses, thus making the trial court's denial of his motion to dismiss in error. However, in making this argument, defendant does not contend that the evidence fails to support the occurrence of the sexual act or any other element necessary for a conviction of statutory rape or second degree rape. Instead, he relies on the fact that both charges and subsequent convictions rely on the same sexual act, which he asserts "may not give rise to separate and distinct convictions for rape." His sufficiency of the evidence argument is in fact an extension of his double jeopardy argument. Because the sufficiency of the evidence issue was not properly argued in defendant's brief, this assignment of error is deemed abandoned. N.C.R. App. P. 28(b)(6) (2009) (amended Oct. 1, 2009). Thus, the only issue left for this Court to address is the double jeopardy implications surrounding defendant's convictions for both second degree rape and statutory rape.

In the present case, defendant moved to dismiss the charges against him at the close of the State's evidence and again at the close of all the evidence. At no time during his arguments in support of these motions did he raise the constitutional issue of double jeopardy. Likewise, defendant "did not raise the issue during the jury charge conference, move to set aside the verdict or for a new trial [on double jeopardy grounds], or request the court to arrest judgment on either charge because of double jeopardy issues." *State v. Fuller*, 166 N.C. App. 548, 555, 603 S.E.2d 569, 575 (2004). It is well established that this Court "will not pass

upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the court below." *State v. Jones*, 242 N.C. 563, 564, 89 S.E.2d 129, 130 (1955); *see also* N.C.R. App. P. 10(b)(1). Accordingly, because defendant did not raise the issue of double jeopardy regarding his convictions of second degree rape and statutory rape to the trial court, this assignment of error is dismissed.

NO ERROR.

Judges JACKSON and ERVIN concur.

Report per Rule 30(e).