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NO. COA10-166

NORTH CAROLINA COURT OF APPEALS

Filed: 21 September 2010

STATE OF NORTH CAROLINA

v.

Rockingham County
Nos. 07 CRS 53591
07 CRS 53682

CHRISTOPHER LEE ALLEN VAUGHAN

Appeal by defendant from judgment entered 8 July 2009 and order entered 13 July 2009 by Judge Edwin G. Wilson, Jr., in Rockingham County Superior Court. Heard in the Court of Appeals 1 September 2010.

Attorney General Roy Cooper, by Assistant Attorney General Annette R. Stephenson, for the State.

Robert W. Ewing, for defendant-appellant.

CALABRIA, Judge.

Christopher Lee Allen Vaughan ("defendant") appeals (1) a judgment entered upon jury verdicts finding him guilty of statutory rape, indecent liberties with a child, and contributing to the delinquency of a child; and (2) an order requiring defendant to enroll in satellite-based monitoring ("SBM") while on post-release supervision. We find no error at trial, but reverse the order requiring defendant to enroll in SBM.

I. Background

In the early morning hours of 27 October 2007, defendant, who was twenty-five years old, and his cousin Clay (collectively "the men") picked up defendant's fifteen-year-old girlfriend Brenda and her friend Lisa.¹ The men then took the girls back to defendant's residence, where Clay provided marijuana for everyone. The group smoked marijuana together while watching a movie.

Brenda and defendant then proceeded to defendant's bedroom, where they began kissing. The kissing progressed into sexual intercourse. This was the first time that Brenda and defendant had engaged in sexual intercourse.

That morning, the men returned Brenda and Lisa to Lisa's residence. As they approached the house, Lisa's father came out and began to chase the men in his pickup truck. When Lisa's father returned, he brought Brenda's mother with him. Brenda's mother then took her to Annie Penn Hospital ("the hospital").

At the hospital, Brenda was examined by a Sexual Assault Nurse Examiner, Sharon Reynolds ("Nurse Reynolds"). As part of the examination, Nurse Reynolds collected several swabs from Brenda's genital area. A subsequent analysis of these swabs revealed that they contained defendant's DNA.

On 2 November 2007, defendant was interviewed by Detective Daniel Hardy ("Det. Hardy") of the Rockingham County Sheriff's Department. Defendant voluntarily provided a statement to Det. Hardy admitting that he had sexual intercourse with Brenda.

¹ "Brenda" and "Lisa" are pseudonyms used to identify the minor children involved with this case.

Defendant also stated that he had believed that Brenda was seventeen years old.

Defendant was subsequently arrested and indicted. On 8 July 2009, defendant was tried by a jury in Rockingham County Superior Court for one count of statutory rape, one count of indecent liberties with a minor, and one count of contributing to the delinquency of a juvenile. At the close of the State's evidence and at the close of all the evidence, defendant made a motion to dismiss the charges of indecent liberties with a child and contributing to the delinquency of a juvenile, and the trial court denied the motions. Defendant did not present any evidence.

The jury returned verdicts of guilty to all of the charges. The trial court consolidated the offenses for judgment and defendant was sentenced to a minimum of 202 months to a maximum of 252 months in the North Carolina Department of Correction. After a hearing on 13 July 2009, defendant was also ordered to enroll in SBM while on post-release supervision. Defendant appeals.

II. Statutory Rape

Defendant argues that the State presented insufficient evidence at trial to support submitting the charge of statutory rape to the jury. However, the record indicates that when the trial court asked if there were any motions at the close of the State's evidence, defendant's trial counsel responded with a motion to dismiss only the charges of indecent liberties and contributing to the delinquency of a juvenile. Defendant's trial counsel did not make a motion to dismiss the statutory rape charge. After this

motion was denied, defendant did not present any evidence, and defendant's counsel simply renewed his previous motion at the close of all the evidence.

"A defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action . . . at trial." N.C.R. App. P. 10(b)(3) (2008). Because defendant's trial counsel failed to make a motion to dismiss the statutory rape charge, this assignment of error was not preserved for appellate review. However, in the alternative, defendant argues that trial counsel's failure to make a motion to dismiss the statutory rape charge constitutes ineffective assistance of counsel. We disagree.

"To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (citations omitted). "[I]f a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 249 (1985). Therefore, we examine the merits of defendant's motion to dismiss claim to determine whether there is a reasonable probability that defendant's trial counsel's failure to move for dismissal of the statutory rape charge prejudiced his defense.

Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied. Substantial evidence is evidence that a reasonable mind might find adequate to support a conclusion. A trial court's ruling on a motion to dismiss is reviewed *de novo*.

State v. Moses, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (2010) (internal quotations and citations omitted).

A defendant is guilty of statutory rape "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[.]" N.C. Gen. Stat. § 14-27.7A(a) (2009). In addition, the statute specifically allows for the affirmative defense of marriage. *Id.*; see also *State v. Anthony*, 351 N.C. 611, 614, 528 S.E.2d 321, 323 (2000) ("[T]he legislature did specifically identify marriage as a defense in both subsections (a) and (b) of N.C.G.S. § 14-27.7A.").

Defendant concedes that substantial evidence was presented at trial that defendant engaged in vaginal intercourse with Brenda, that Brenda was fifteen years old, and that defendant was at least six years older than Brenda. However, he contends that the absence of marriage between a defendant and a victim should be considered an element of the offense of statutory rape, rather than a defense to the charge. Since the State did not present substantial evidence that defendant and Brenda were not lawfully married,

defendant argues the statutory rape charge should have been dismissed. Defendant's argument is without merit.

As previously noted, our Supreme Court has specifically identified marriage as a *defense* to statutory rape. "[I]n this State, we have traditionally placed the burden of production and persuasion on defendants who seek to avail themselves of affirmative defenses." *State v. Hageman*, 307 N.C. 1, 27, 296 S.E.2d 433, 448 (1982). Thus, it was defendant's burden to prove the defense of marriage, and in the instant case, he failed to do so.

The only evidence provided at trial regarding the nature of defendant's relationship with Brenda was Brenda's testimony that she and defendant had been dating for three or four months. In addition, Brenda repeatedly referred to defendant as merely her boyfriend. There was no evidence presented by defendant that could be construed to indicate that defendant and Brenda were lawfully married. Consequently, defendant failed to meet his burden to prove the affirmative defense of marriage and therefore was not entitled to a dismissal of the statutory rape charge. This assignment of error is overruled.

III. Contributing to the Delinquency of a Juvenile

Defendant argues that the trial court erred by denying his motion to dismiss the charge of contributing to the delinquency of a juvenile. Specifically, defendant contends that the State failed to provide substantial evidence that Brenda was not lawfully

married. Defendant has failed to preserve this issue for appellate review.

"[W]here a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts." *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) (internal quotations and citations omitted). Thus, when a defendant presents on appeal a different theory to support his motion to dismiss than that which he presented at trial, the assignment of error is waived. *State v. Euceda-Valle*, 182 N.C. App. 268, 272, 641 S.E.2d 858, 862 (2007).

At trial, defendant's counsel argued that "[a]ll the evidence I recall is that a gentleman named Clay brought the marijuana and gave it to [Brenda]." Because defendant argued only this specific ground in his motion to dismiss at trial, he may not now argue that the State failed to present substantial evidence that Brenda was not lawfully married for the first time on appeal. This assignment of error is overruled.

IV. SBM

Defendant argues, and the State concedes, that the trial court erred by ordering him to enroll in SBM while on post-release supervision. We agree.

Initially, we note that defendant attempted to give, pursuant to N.C.R. App. P. (4)(a)(1) (2008), oral notice of appeal from the trial court's SBM order. However, as this Court has made clear, "SBM hearings and proceedings are not criminal actions, but are

instead a 'civil regulatory scheme[.]'" *State v. Brooks*, ___ N.C. App. ___, ___, 693 S.E.2d 204, 206 (2010) (quoting *State v. Bare*, ___ N.C. App. ___, ___, 677 S.E.2d 518, 527 (2009)). As a result, when appealing from an SBM order, "oral notice pursuant to N.C.R. App. P. 4(a)(1) is insufficient to confer jurisdiction on this Court. Instead, a defendant must give notice of appeal pursuant to N.C.R. App. P. 3(a) as is proper 'in a civil action or special proceeding[.]' N.C.R. App. P. 3(a)." *Id.* Therefore, defendant's oral appeal is insufficient to grant jurisdiction upon this Court to hear defendant's appeal of the SBM order. *Id.*

Defendant was cognizant that mere oral notice of appeal of an SBM order was potentially inadequate to grant jurisdiction to this Court. Thus, he asks, in the alternative, that we treat his brief as a petition for writ of certiorari. In the interests of justice, and in light of the State's concession that the entry of the SBM order was in error, we allow defendant's petition for writ of certiorari and address the merits of his appeal of the SBM order.

In reviewing an SBM order, "we review the trial court's findings of fact to determine whether they are supported by competent record evidence, and we review the trial court's conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found." *State v. Kilby*, ___ N.C. App. ___, ___, 679 S.E.2d 430, 432 (2009) (internal quotations and citation omitted).

This Court has described the process involved in SBM hearings as follows:

[A] trial court's SBM determination involves two phases: a "qualification" phase and a "risk assessment" phase. In the qualification phase, if a defendant was convicted of a reportable offense as defined by N.C. Gen. Stat. § 14-208.6(4) (2007), then the district attorney shall present to the court any evidence that the defendant falls into one of five categories: (i) the offender has been classified as a sexually violent predator pursuant to G.S. 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, (iv) the conviction offense was a violation of G.S. 14-27.2A or G.S. 14-27.4A, or (v) the offense involved the physical, mental, or sexual abuse of a minor. Upon receipt of the evidence from the State and any contrary evidence from the offender, the trial court is required to determine whether the offender's conviction places the offender in one of the five categories and to make a finding of fact of that determination, specifying the category into which the offender falls.

State v. Causby, ___ N.C. App. ___, ___, 683 S.E.2d 262, 263 (2009) (internal quotations and citations omitted).

In the instant case, neither party contests the trial court's findings of fact. It is undisputed that defendant was convicted of a reportable offense and that the offense involved the physical, mental, or sexual abuse of a minor. It is likewise unchallenged that defendant was not a sexually violent predator, was not a recidivist, and was not convicted of an aggravated offense. After making these findings, the trial court then moved into the risk assessment phase.

Upon receipt of a risk assessment . . . the court shall determine whether, based on the Department's risk assessment, the offender requires the highest possible level of supervision and monitoring. If the court determines that the offender does require the highest possible level of supervision and

monitoring, the court shall order the offender to enroll in a satellite-based monitoring program for a period of time to be specified by the court.

N.C. Gen. Stat. § 14-208.40A(e) (2009). "The 'highest possible level of supervision and monitoring' simply refers to SBM, as the statute provides only for SBM and does not provide for any lesser levels or forms of supervision or monitoring of a sex offender." *Kilby*, ___ N.C. App. at ___ n.2, 679 S.E.2d at 432 n.2.

The only evidence presented at the risk assessment phase was the Department of Correction risk assessment required by N.C. Gen. Stat. § 14-208.40A(d) (2009). The risk assessment concluded that defendant posed a "moderate" risk of reoffending. As a result, the trial court found that defendant did "not require the highest possible level of supervision and monitoring." Nevertheless, the trial court then erroneously ordered defendant to enroll in SBM while on post-release supervision. Since the trial court found that defendant did not require "the highest possible level of supervision and monitoring," which has been defined by this Court as only constituting SBM, it logically follows that the trial court could not require defendant to enroll in SBM. Accordingly, we reverse the trial court's SBM order.

V. Conclusion

The record on appeal includes additional assignments of error not addressed by defendant in his brief to this Court. Pursuant to N.C.R. App. P. 28(b)(6) (2008), we deem these assignments of error abandoned and need not address them. Defendant received a fair trial, free from error. However, the trial court erroneously

ordered defendant to enroll in SBM while on post-release supervision, and so the trial court's SBM order is reversed.

No error at trial; SBM order reversed.

Judges MCGEE and GEER concur.

Report per Rule 30(e).