NO. COA11-1582
NORTH CAROLINA COURT OF APPEALS

Filed: 4 September 2012

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 09 CRS 227276

DARRYL THOMPSON,
Defendant.

Appeal by defendant from judgment entered 14 April 2011 by Judge Jesse B. Caldwell, III, in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 April 2012.

Attorney General Roy Cooper, by Assistant Attorney General Joel L. Johnson, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel R. Pollitt, for defendant-appellant.

GEER, Judge.

Defendant Darryl Thompson appeals from the judgment entered upon the jury's verdict finding him guilty of first degree rape. On appeal, defendant primarily argues that the indictment was insufficient to charge first degree rape. Although defendant's indictment did not precisely parallel the short form indictment language, our Supreme Court has previously held that an almost

identically-worded indictment complied with the short form indictment statute. Defendant has, therefore, failed to demonstrate any error in the indictment. Because we also are unpersuaded by defendant's remaining arguments, we hold that defendant received a trial free of prejudicial error.

Facts

The State's evidence at trial tended to show the following facts. On 4 September 2005 at around 7:00 p.m., "Lucy Smith" was exercising on the Eastway Middle School track.[1] As she was walking, defendant began to speak to Ms. Smith from a distance and then approached and grabbed her. He put his hand over her mouth and forced her toward the bleachers, ordering her not to scream. Upon reaching the bleachers, defendant began to lick her breasts and upper chest. He then forcibly spread her legs and inserted his penis into her vagina. Defendant threatened, "Don't say anything or I am going to kill you, bitch." At some point during the assault, he pulled out of his pocket a hammer or a stick with a ball on the end.

After putting back on her clothes, which defendant had ripped off, Ms. Smith drove to her niece's house. Ms. Smith's niece called the police, and an ambulance took Ms. Smith to the

[1]"Lucy Smith" is a pseudonym used to protect the woman's privacy.

hospital where she was examined by Cindy Alvord, a registered nurse, who was working in triage at Carolinas Medical Center.

Defendant was indicted for first degree rape, first degree kidnapping, and robbery with a dangerous weapon. At trial, Ms. Alvord testified as an expert witness. She reported that Ms. Smith was covered in grass and had red marks on her body. She said Ms. Smith told her that a "black male c[a]me into the park . . . [and] proceeded to tear her clothes off and rape her." Ms. Alvord stated that she found that Ms. Smith and Ms. Smith's history "seemed very credible." During her examination of Ms. Smith, Ms. Alvord found sperm in Ms. Smith's genital area and collected a rape kit from her. The rape kit was sent to LabCorp for DNA testing. A comparison of the rape kit swabs and a buccal swab from defendant showed that the samples were consistent with each other.

The trial court dismissed the charge of robbery with a dangerous weapon, and the jury convicted defendant of first degree rape and first degree kidnapping. After arresting judgment on the kidnapping charge, the trial court sentenced defendant to a presumptive-range term of 384 to 470 months imprisonment for first degree rape. Defendant timely appealed to this Court.

I

Defendant first argues that the indictment under which he was charged was insufficient to sustain his conviction for first degree rape because it did not allege all of the elements of first degree rape. The elements of first degree rape are: (1) "engag[ing] in vaginal intercourse," (2) "[w]ith another person by force and against the will of the other person," and (3) "[e]mploy[ing] or display[ing] a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon[,] or inflict[ing] serious personal injury upon the victim or another person . . . ." N.C. Gen. Stat. § 14-27.2(a)(2) (2011).

Here, defendant's indictment alleged in relevant part:

> that on or about the 4th day of September, 2005, in Mecklenburg County, Darryl Thompson did unlawfully, willfully and feloniously with force and arms engage in vaginal intercourse with [Lucy Smith], by force and against the victim's will.

Defendant contends that this indictment is insufficient because it failed to allege that defendant employed or displayed an article that the victim believed to be a dangerous or deadly weapon.

That specific language is not required when the indictment conforms to the short-form indictment statute, N.C. Gen. Stat. § 15-144.1 (2011). The statute states in relevant part:

> (a) In indictments for rape it is not necessary to allege every matter required to be proved on the trial; but in the body of the indictment, after naming the person accused, the date of the offense, the county in which the offense of rape was allegedly committed, and the averment "with force and arms," as is now usual, it is sufficient in describing rape to allege that the accused person unlawfully, willfully, and feloniously *did ravish and carnally know the victim*, naming her, by force and against her will and concluding as is now required by law. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for rape in the first degree and will support a verdict of guilty of rape in the first degree . . . .

Id. (emphasis added).

Defendant argues, however, that the indictment does not constitute a proper short-form indictment because the indictment alleged that defendant did "engage in vaginal intercourse [with the victim]" rather than using the statute's language of "ravish and carnally know the victim." *Id.* However, our Supreme Court has held that the precise language used in defendant's indictment "complied with the statute[] authorizing short-form indictments for rape . . . ." *State v. Wallace*, 351 N.C. 481, 505, 528 S.E.2d 326, 342 (2000). Defendant's argument that the indictment was facially invalid is, therefore, not persuasive.

II

Defendant next argues the trial court erred in denying his motion to dismiss. Defendant contends that the State failed to present sufficient evidence, under N.C. Gen. Stat. § 14-27.2(a)(2)(a), that defendant "employ[ed] or display[ed] . . . an article which [Ms. Smith] reasonably believe[d] to be a dangerous or deadly weapon[.]"

In reviewing the denial of a motion to dismiss, this Court must consider the evidence in the light most favorable to the State, and

> the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.

State v. Mercer, 317 N.C. 87, 96, 343 S.E.2d 885, 891 (1986).

Ms. Smith testified that when defendant was on top of her, he showed her either a hammer or a stick with a ball on the end of it and threatened to kill her. Ms. Smith said she prayed to God to protect her and told defendant she would not call the police. This testimony was sufficient to permit the jury to find that Ms. Smith in fact believed that defendant was threatening her with a dangerous or deadly weapon. With respect to the question whether this belief was reasonable, our courts

have held that a reasonable jury could find that either a hammer or a stick, depending on its use, amounted to a deadly weapon. *See, e.g.*, *State v. Camacho*, 337 N.C. 224, 233, 446 S.E.2d 8, 13 (1994) (holding that hammer qualifies as deadly weapon); *State v. Palmer*, 293 N.C. 633, 643, 239 S.E.2d 406, 413 (1977) (holding that whether stick constituted deadly weapon was question for jury).

Turning to the question whether the State presented sufficient evidence that the hammer/stick was "employ[ed] or display[ed]," N.C. Gen. Stat. § 14-27.2(a)(2)(a), defendant argues that any weapon was displayed only after the rape was over. However, our Supreme Court has held that a weapon was "employed" for purposes of the statute when the defendant had the weapon in his possession at the time of the rape, regardless whether the weapon was actually displayed then. *State v. Langford*, 319 N.C. 340, 344, 354 S.E.2d 523, 526 (1987) ("[S]uch a weapon has been 'employed' within the meaning of N.C.G.S. § 14-27.2 when the defendant has it in his possession at the time of the rape.").

Since Ms. Smith's testimony tends to prove that defendant had the hammer/stick in his possession during the rape, even if it was shown to her after penetration was completed, the State presented sufficient evidence of each element of first degree

rape. The trial court, therefore, properly denied the motion to dismiss.

III

Defendant further contends the trial court committed plain error under Rules 405(a) and 608 of the Rules of Evidence in allowing certain testimony of Cindy Alvord, an expert witness for the State, that she believed Ms. Smith to be credible. Our Supreme Court has recently held regarding plain error review:

> We now reaffirm our holding in *Odom* and clarify how the plain error standard of review applies on appeal to unpreserved instructional or evidentiary error. For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]

State v. Lawrence, ___ N.C. ___, ___, 723 S.E.2d 326, 334 (2012) (internal citations and quotation marks omitted).

During redirect examination, Ms. Alvord gave the following testimony:

> Q Is there anything in her history that she provided to you that caused you to -- in your physical examination of her, did anything about that cause you to question her history?
>
> A No. She seemed very credible. She was petrified when she came in.

Rule 405(a) of the North Carolina Rules of Evidence provides that "[e]xpert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior." Our Supreme Court in *State v. Heath*, 316 N.C. 337, 342, 341 S.E.2d 565, 568 (1986), held that "Rules 608 and 405(a), read together, forbid an expert's opinion as to the credibility of a witness."

Although the trial court, therefore, improperly allowed Ms. Alvord's testimony regarding Ms. Smith's credibility, defendant has not satisfied the requirement that he prove that absent the error, the jury probably would have reached a different result. Given the DNA evidence indicating that defendant had vaginal intercourse with Ms. Smith and the evidence of Ms. Smith's appearance at the hospital -- including the fact that Ms. Smith had scratches and welts on her sides and legs seemingly caused by fingers and that her clothes, including her underwear, were torn -- we do not believe that there is any likelihood that the jury would have reached a different verdict in the absence of Ms. Alvord's testimony that she found Ms. Smith credible.

IV

Finally, defendant argues that the State failed to meet the requirements of N.C. Gen. Stat. § 15A-1340.14(f) (2011) in attempting to prove defendant's prior record level and that he is, therefore, entitled to a new sentencing hearing. Prior convictions can be proven by:

> (1) Stipulation of the parties.
>
> (2) An original or copy of the court record of the prior conviction.
>
> (3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
>
> (4) Any other method found by the court to be reliable.

Id.

In this case, the prosecutor simply provided the trial court with a sentencing worksheet. Defendant had not signed the stipulation on the worksheet, and the prosecutor presented no evidence establishing defendant's prior convictions. While it is well established that a sentencing worksheet, standing alone, is not adequate to meet the State's burden of proving a defendant's prior record level, this Court has held that when "a sentencing worksheet was the only proof submitted to the trial court, we look to the dialogue between counsel and the trial court to determine whether defendant stipulated to the prior

convictions . . . ." *State v. Wade*, 181 N.C. App. 295, 298, 639 S.E.2d 82, 86 (2007).

In *Wade*, this Court observed that "[a] stipulation does not require an affirmative statement and silence may be deemed assent in some circumstances, particularly if the defendant had an opportunity to object and failed to do so." *Id.*, 639 S.E.2d at 85. The Court then concluded that when a defendant had an opportunity to object to the worksheet, but rather than objecting, argued mitigating factors, defendant had stipulated to the prior convictions listed on the worksheet. *Id.* at 299, 639 S.E.2d at 86.

Here, the following exchange occurred during the sentencing hearing after the prosecutor handed up the prior record level worksheet:

> [PROSECUTOR]: Your Honor the defendant is a Prior Record Level IV. . . .
>
> . . . .
>
> I would ask for a sentence at the top of the presumptive range, given the defendant's record, which would be 384 months to 469 months, I believe, if my calculations are correct.
>
> . . . .
>
> THE COURT: . . . First, I need to let the defendant be heard.
>
> [DEFENDANT'S COUNSEL]: Darryl is 41 years of age. He was born in New York. Has

> lived in Charlotte basically all of his life. He was living in the Hidden Valley neighborhood prior to these troubles. He was employed before this.
>
> I can tell that you [sic] during the course of his pretrial confinement, he essentially did a lot to try to better himself. . . .
>
> [Defendant's counsel then tendered numerous certificates to show how defendant "better[ed] himself."]
>
> . . . .
>
> [DEFENDANT'S COUNSEL]: . . . I would just ask Your Honor to fashion a sentence commensurate with him attempting to better himself after his pretrial incarceration.

This exchange is materially indistinguishable from the one in *Wade*. Because defendant had the opportunity to object to the State's showing of his prior record level and instead sought to describe factors in mitigation, he stipulated to his prior convictions. Therefore, the trial court's sentence is supported by the evidence.

No error.

Judges ELMORE and THIGPEN concur.

Report per Rule 30(e).