NO. COA14-347

NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2014

STATE OF NORTH CAROLINA

v. Pitt County
No. 12 CRS 050058

CHRISTOPHER ASHLEY MANN,
Defendant.

Appeal by defendant from judgment entered 15 August 2013 by Judge Alma L. Hinton in Pitt County Superior Court. Heard in the Court of Appeals 24 September 2014.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly N. Callahan, for the State.

The Robinson Law Firm, P.A., by Leslie S. Robinson, for defendant-appellant.

BRYANT, Judge.

An indictment which sets forth a clear statement of the offense for which the defendant has been charged is not fatally defective. Where a defendant presents one argument to the trial court and a different argument on appeal, defendant's argument on appeal will be deemed waived. Where three questions asked by the prosecutor were not necessarily leading, and where defendant failed to show how the asking of those questions prejudiced him,

the trial court did not abuse its discretion in allowing those questions to be asked of a witness. Defendant may not complain on appeal about the admission of testimony to which he opened the door before the trial court.

On 29 May 2012, defendant Christopher Ashley Mann was indicted on one count of felony secret peeping. The charge came on for trial during the 13 August 2013 criminal session of Pitt County Superior Court, the Honorable Alma J. Hinton, Judge presiding. At trial, the State's evidence tended to show the following.

In August 2010, defendant and his wife Amy invited Amy's friend, Barbara Dauberman, to stay with them at their home in Winterville. Barbara accepted the invitation since she needed a place to stay while her infant son was being treated for a heart defect at Pitt County Memorial Hospital. While staying at defendant's home, Barbara lived in an upstairs bedroom which shared a bathroom with a second upstairs bedroom. Defendant and Amy's bedroom was located downstairs.

On 13 September 2010, Barbara spent the day at the hospital with her son, returning to defendant's home at around 10:00 p.m. that evening. After returning to the home, Barbara went upstairs to fold her laundry and use the bathroom. Upon

entering the bathroom, Barbara noticed a screw in the sink and some pink insulation in the toilet. Barbara then looked up and noticed that the air vent in the ceiling was missing a screw, that its slats had been bent, and that a neon blue light was visible inside the vent. After getting a chair to stand on so she could inspect the vent more closely, Barbara noticed a black surveillance camera inside the air vent.

Barbara then went downstairs and asked Amy to come upstairs with her to see the camera. Upon seeing the camera, Amy appeared to be "in shock" and "disgusted." Amy retrieved a screwdriver from downstairs to unscrew the air vent cover and attempted to pull out the camera, but she had to go into the attic to unplug the camera's cables. When defendant came upstairs to see what Barbara and Amy were doing, Barbara accused defendant of installing the camera. After defendant denied having any involvement with the installation of the camera, both women told defendant to call the police.

After defendant called the police, Barbara packed up her belongings, left the home, and called her husband to tell him about the camera. While on the phone with her husband, Barbara saw a police car pull up to defendant's home and leave shortly after Amy ran out of the home and spoke to the police officer.

Amy then called Barbara and asked her to return to the home. When she reached the driveway, Barbara stated that defendant began crying and apologizing to her for installing the camera. Amy removed the camera's monitor from defendant's truck and gave it to Barbara, who then left.

Barbara testified that she spoke to Amy several times over the phone and in person after she moved out of defendant's home. Barbara stated that Amy asked her not to call the police for the sake of Amy's son and step-daughters. At the hospital, Barbara received a bouquet of flowers and an apology note from defendant; Barbara threw away the note and gave away the flowers.

Barbara testified that Amy visited her several times at the hospital after Barbara moved out of Amy's house, and that Amy attended the funeral of Barbara's son in December. In January 2011, Barbara became concerned about her and her family's safety after she learned that defendant and Amy were considering becoming members of Barbara's church. In March, Barbara engaged the Kellum Law Firm to represent her because she wanted to keep defendant away from her and her family. Barbara stated that after she realized the Kellum Law Firm would require her to sign

a confidentiality agreement, she ended the firm's representation of her and contacted the Pitt County Sheriff's Office.

Barbara was interviewed by Detective Jeremy Monette of the Pitt County Sheriff's Office, and provided Detective Monette with a written statement and the surveillance camera and monitor. Detective Monette identified the surveillance camera as having been purchased at Sam's Club on 12 September 2010 by a person using defendant's membership card; he also confirmed that defendant sent flowers and a note to Pitt County Memorial Hospital for Barbara. Defendant declined to be interviewed. When interviewed by Detective Monette, Amy stated that she had installed the surveillance camera in Barbara's bathroom as part of a sexual role-playing game between herself and defendant, and denied that defendant had any knowledge of the camera.

On 15 August 2013, a jury convicted defendant of felony secret peeping. Defendant was sentenced to six to eight months imprisonment, with the trial court suspending that sentence and placing defendant on thirty-six months supervised probation. Defendant appeals.

On appeal, defendant contends: (I) the indictment was insufficient to charge felony secret peeping; and (II) the trial

court erred in denying defendant's motion to dismiss the charge due to insufficient evidence. Defendant further argues that the trial court abused its discretion and committed prejudicial error in (III) allowing the prosecutor to ask leading questions; and (IV) admitting statements as corroborative evidence.

I.

Defendant first argues that the indictment was insufficient to charge felony peeping. We disagree.

This Court reviews the sufficiency of an indictment *de novo*. *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2009) (citation omitted).

Defendant contends the trial court erred in denying his motion to dismiss the indictment as fatally defective. Specifically, defendant contends the indictment was fatally defective because it did not allege all of the elements of felony secret peeping.

"It is elementary that a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony." *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981) (citations omitted). It is well established that "[a]n indictment is fatally defective if it 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." *State v. Partridge*, 157 N.C. App. 568, 570, 579 S.E.2d 398, 399 (2003) (citation and quotation omitted).

> As a general rule[,] [an indictment] following substantially the words of the statute is sufficient when it charges the essentials of the offense in a plain, intelligible, and explicit manner. . . . [unless] the statutory language fails to set forth the essentials of the offense, [in which case] the statutory language must be supplemented by other allegations which plainly, intelligibly, and explicitly set forth every essential element of the offense as to leave no doubt in the mind of the defendant and the court as to the offense intended to be charged.

State v. Barneycastle, 61 N.C. App. 694, 697, 301 S.E.2d 711, 713 (1983) (citations omitted).

The indictment against defendant, returned pursuant to N.C. Gen. Stat. § 14-202, stated that:

> The jurors for the State upon their oath present that on or about the date of offense shown and in the County named above the defendant named above unlawfully, willfully and feloniously did secretly and surreptitiously install a wireless camera/device capable of creating a photographic image in the guest bathroom located at 562 Shadow Ridge Dr, Winterville, NC, to look at the victim, Barbara Dauberman, with the intent to capture an image for arousal and gratifying the sexual desire of himself or any person.

During the trial, defendant asked the State to clarify which section of N.C.G.S. § 14-202 the State wished to proceed under. Upon the State indicating that it would proceed under N.C.G.S. § 14-202(f), defendant made a motion pursuant to N.C. Gen. Stat. § 15A-924 to dismiss the indictment because the indictment lacked the element of consent as required by N.C.G.S. § 14-202(f). *See* N.C.G.S. § 14-202(f) (2013) ("Any person who, for the purpose of arousing or gratifying the sexual desire of any person, secretly or surreptitiously uses or installs in a room any device that can be used to create a photographic image with the intent to capture the image of another without their consent shall be guilty of a Class I felony."). The trial court denied defendant's motion on grounds that the language of the indictment was sufficient.

North Carolina General Statutes, section 15A-924, requires that every criminal pleading contain:

> A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant . . . of the conduct which is the subject of the accusation.

N.C.G.S. § 15A-924(5) (2013).

We disagree with defendant's contention that the indictment was fatally defective, since a review of the indictment in conjunction with N.C.G.S. § 14-202 indicates that the indictment, as returned, was sufficient to charge felony secret peeping. Although defendant is correct in his assertion that N.C.G.S. § 14-202(f) includes the language "without their consent," it is well-established by this Court that any charge brought under N.C.G.S. § 14-202 denotes an act by which the defendant has spied upon another without that person's consent. *See In re Banks*, 295 N.C. 236, 242, 244 S.E.2d 386, 390 (1978) ("This Court has, therefore, indicated that the word 'secretly' as used in G.S. 14-202 conveys the definite idea of spying upon another with the intention of invading her privacy. Hence, giving the language of the statute its meaning as interpreted by this Court, G.S. 14-202 prohibits the wrongful spying into a room upon a female with the intent of violating the female's legitimate expectation of privacy. This is sufficient to inform a person of ordinary intelligence, with reasonable precision, of those acts the statute intends to prohibit, so that he may know what acts he should avoid in order that he may not bring himself within its provisions.").

Moreover, it is also clear from the language used in the indictment that the omission of the words "without their consent" did not render the indictment fatally defective. The indictment states that defendant "unlawfully, willfully and feloniously did secretly and surreptitiously" attempt to capture photographic images of "the victim, [Barbara]." Such strong language indicates that defendant intended to capture images of Barbara without her consent, since terms such as "feloniously," "unlawfully," "surreptitiously," and "victim" clearly allege that defendant has done something to another person (here, Barbara) without that person's consent. *See* BLACK'S LAW DICTIONARY 1582, 1703 (9th ed. 2009) (defining "surreptitious" as "unauthorized and clandestine; stealthily and usu[ally] fraudulently done"; defining "victim" as "[a] person harmed by a crime, tort, or other wrong"). Further, this Court has held that the element of "without consent" has been adequately alleged in an indictment that indicates the defendant committed an act unlawfully, willfully, and feloniously. *See State v. McCormick*, 204 N.C. App. 105, 112, 693 S.E.2d 195, 198—99 (2010) (holding that the element of "without consent" did not need to be specifically pled in a burglary indictment where it was clear that the language of the indictment, stating that defendant

"unlawfully, willfully and feloniously," indicated that defendant acted without consent or welcome in entering his estranged wife's house); *State v. Pennell*, 54 N.C. App. 252, 259—60, 283 S.E.2d 397, 402 (1981) (the element of "without consent" was presumed to exist within the indictment where "the language in the indictment, that the defendant 'unlawfully and wil[l]fully did feloniously break and enter a building of Forsyth Technical Institute, belonging to the Board of Trustees,' implies that defendant did not have the consent of the Board of Trustees [to enter their building]."). Therefore, the indictment was sufficient to charge felony secret peeping so that defendant's argument is, accordingly, overruled.

II.

Defendant next argues that the trial court erred in denying defendant's motion to dismiss the charge for insufficient evidence. Specifically, defendant contends the trial court erred in denying his motion to dismiss because the State did not present sufficient evidence to satisfy the *corpus delicti* rule. Defendant's argument cannot be reached on appeal, however, since defendant did not raise this argument before the trial court.

It is well-established by this Court that "where 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) (citations and quotations omitted). When, as here, a party changes theories between the trial court and an appellate court, the argument is deemed not properly preserved and is, thus, waived. *Id.* at 123—24, 573 S.E.2d at 685.

In his argument before the trial court, defendant made a general motion to dismiss the charge for insufficiency of the evidence, arguing that pursuant to the indictment, the State failed to demonstrate each element of N.C.G.S. § 14-202(f). The trial court denied the motion. The following day, defendant renewed his motion to dismiss for insufficiency of the evidence, this time arguing that under N.C.G.S. § 14-202(f) the State had failed to show how the surveillance camera met the statutory requirements for capturing an image; this motion was also denied.

On appeal, defendant now attempts to raise a new argument by contending that the State failed to satisfy the *corpus delicti* rule. However, as defendant never presented any argument concerning the *corpus delicti* rule to the trial court, his argument has not been properly preserved for appeal. *See*

State v. Shelly, 181 N.C. App. 196, 206, 638 S.E.2d 516, 524 (2007) (holding that where defendant made a motion to dismiss before the trial court for lack of premeditation and deliberation and on appeal argued a theory of *corpus delicti*, defendant had waived his argument on appeal).[1] Accordingly, defendant's argument is dismissed.

III.

Defendant next argues that the trial court abused its discretion and committed prejudicial error in allowing the prosecutor to ask leading questions. We disagree.

"Rulings by the trial judge on the use of leading questions are discretionary and reversible only for an abuse of discretion." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986) (citation omitted). "A trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *Id.* (citations

[1] We further note that defendant's *corpus delicti* rule argument could not be sustained on appeal even if it were properly before this Court. The *corpus delicti* rule would only apply if defendant's admission had been the only evidence of his commission of the crime. *See State v. Parker*, 315 N.C. 222, 229, 337 S.E.2d 487, 491 (1985) (holding that "an extrajudicial confession, standing alone, is not sufficient to sustain a conviction of a crime."). Here, there was additional evidence before the jury of defendant's guilt such that the application of the *corpus delicti* rule would have been inappropriate.

omitted). "[T]he trial court has discretionary authority to permit leading questions in proper instances, and absent a showing of prejudice the discretionary rulings of the court will not be disturbed. If the testimony is competent and there is no abuse of discretion, defendant's exceptions thereto will not be sustained." *State v. Hunt*, 297 N.C. 258, 263, 254 S.E.2d 591, 595 (1979) (citations omitted).

Defendant contends the trial court erred in allowing the prosecutor to ask leading questions of Barbara. During the State's examination of Barbara, the prosecutor asked the following three questions defendant now argues were leading:

> [THE STATE:] Do you feel an expectation of privacy in that bathroom?
>
> [DEFENDANT]: Objection to the form of his question.
>
> THE COURT: Overruled.
>
> [BARBARA:] Yes.
>
> [THE STATE]: If I can have one brief second, Your Honor.
>
> THE COURT: Yes.
>
> [THE STATE:] Did you ever give anyone permission to place a camera in the bathroom at the Mann's house that you--
>
> [DEFENDANT]: Objection. Form of his question again.

> [BARBARA:] No.
>
> [THE STATE]: I'll re-form that question, Your Honor.
>
> [THE STATE:] Did you consent to ever being filmed at the Mann's house?
>
> [BARBARA:] Absolutely not.
>
> [DEFENDANT]: Objection to the form of his question.
>
> THE COURT: Overruled.

"A leading question is generally defined as one which suggests the desired response and may frequently be answered yes or no." *State v. Britt*, 291 N.C. 528, 539, 231 S.E.2d 644, 652 (1977) (citations omitted). However, a question cannot be deemed leading simply because it calls for a yes or no answer. *State v. White*, 349 N.C. 535, 557, 508 S.E.2d 253, 267 (1998) (citation omitted). Questions which direct a witness towards a specific topic of discussion without suggesting any particular answer are not leading. *Id.* (citations omitted).

Defendant's argument that these three questions by the prosecutor were leading lacks merit, since a review of the record indicates that these questions were part of the prosecutor's more general questioning of Barbara regarding who typically used that bathroom and might have known about the existence of the surveillance camera. The specific questions

challenged by defendant merely directed the witness's attention to the subject at hand without suggesting an answer.

Further, assuming *arguendo* that these questions were in fact leading, defendant has not demonstrated how allowing these questions constituted an abuse of discretion or otherwise prejudiced him. Prior to asking the challenged questions, Barbara had already testified to being shocked and disgusted upon discovering the hidden camera. This and other evidence presented at trial clearly showed that Barbara had not given anyone consent to film her (especially in the bathroom where she had an expectation of privacy). Defendant's argument is, therefore, overruled.

IV.

In his final argument on appeal, defendant contends the trial court abused its discretion and committed prejudicial error in admitting statements as corroborative evidence. We disagree.

"The abuse of discretion standard applies to decisions by a trial court that a statement is admissible for corroborative purposes." *State v. Tellez*, 200 N.C. App. 517, 526, 684 S.E.2d 733, 739 (2009) (citations omitted).

Defendant argues that the trial court erred in admitting prior statements made by Barbara to Detective Monette for corroborative purposes. However, a review of the trial transcript indicates that defendant himself opened the door to admission of these statements. Defendant asked Barbara on cross-examination about her interview with Detective Monette and the typed statement Detective Monette requested she make and give to him regarding the events of 13 September 2010. A defendant cannot on appeal complain when he opened the door to the admission of this evidence in the trial court below. *State v. Moore*, 103 N.C. App. 87, 96, 404 S.E.2d 695, 700 (1991) (holding that where the defendant introduced evidence on cross-examination of a witness, "the defendant ha[d] 'opened the door' to this testimony and [could] not be heard to complain [on appeal]." (citation omitted)).

Moreover, even if defendant had not opened the door to Barbara's prior statements, these statements were admissible as corroborative evidence.

> [C]orroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness. In order to be admissible as corroborative evidence, a witness'[] prior consistent statements merely must tend to add weight or credibility to the witness's testimony. Further, it is well established that such

> corroborative evidence may contain new or additional facts when it tends to strengthen and add credibility to the testimony which it corroborates. If the previous statements are generally consistent with the witness' testimony, slight variations will not render the statements inadmissible, but such variations . . . affect [only] the credibility of the statement. A trial court has wide latitude in deciding when a prior consistent statement can be admitted for corroborative, non[-]hearsay purposes.

Tellez, 200 N.C. App. at 526—27, 684 S.E.2d at 740 (citations omitted). "The trial court is [ultimately] in the best position to determine whether the testimony of [one witness as to a prior statement of another witness] corroborate[s] the testimony of [the latter]." *State v. Bell*, 159 N.C. App. 151, 156, 584 S.E.2d 298, 302 (2003) (citation omitted). "Only if the prior statement contradicts the trial testimony should the prior statement be excluded." *Tellez*, 200 N.C. App. at 527, 684 S.E.2d at 740 (citation omitted).

During defendant's cross-examination of Barbara, Barbara testified about her interviews with Detective Monette and about the typed statement she had prepared and given to Detective Monette at his request. On redirect, the State questioned Barbara further about her statements to Detective Monette for purposes of clarifying her answers. A review of the trial transcript indicates that Barbara's prior statements made to

Detective Monette were indeed corroborative, since the statements were consistent with her testimony regarding the sequence of events involving defendant that transpired beginning 13 September 2010. Further, although defendant challenged Barbara about specific details contained in her prior statements, such as the order in which Amy removed the surveillance camera and its components from the air vent and attic, any slight variations between Barbara's prior statements and her trial testimony did not create a fundamental inconsistency in her account of discovering the surveillance camera and what happened thereafter. *See State v. Lloyd*, 354 N.C. 76, 104, 552 S.E.2d 596, 617 (2001) ("[P]rior consistent statements are admissible even though they contain new or additional information so long as the narration of events is substantially similar to the witness' in-court testimony." (citation omitted)). Accordingly, defendant's final argument is overruled.

No error.

Judges ELMORE and ERVIN concur.