NO. COA14-508
NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

STATE OF NORTH CAROLINA

v.	Mecklenburg County Nos. 11 CRS 202838 11 CRS 202839 11 CRS 202840
RONALD DEWAYNE DEESE, III, Defendant.	

Appeal by defendant from judgments and orders entered 3 October 2013 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 October 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Laura E. Crumpler, for the State.

Mecklenburg County Public Defender Kevin Tully, by Assistant Public Defender Julie Ramseur Lewis, for defendant-appellant.

GEER, Judge.

Defendant Ronald Dewayne Deese, III appeals from judgments entered on convictions of felony breaking and entering, second degree sexual offense, and second degree rape. On appeal, defendant primarily argues that the trial court committed plain error in admitting incriminating public transit surveillance

footage that defendant contends was not properly authenticated. Because the evidence was simply overwhelming against defendant, defendant cannot demonstrate that any error amounted to plain error. However, we hold that the trial court erred in its order imposing lifetime satellite based monitoring ("SBM") for being convicted of second degree sexual offense based on the trial court's erroneous conclusion that second degree sexual offense is an "aggravated" offense. Nonetheless, as the trial court further ordered, defendant is subject to lifetime SBM based on his conviction of second degree rape.

Facts

The State's evidence tended to show the following facts. "Jessica" lived with her mother, "Amanda" at a house on Edgewood Road in the Charlotte area.[1] The house is equipped with a security system that chimes every time a door to the outside opens.

Defendant and Jessica began dating in July 2010. Defendant was "around the house a lot" while he and Jessica were dating. Defendant often rode the bus and, to get to Jessica's house, defendant would ride the Group 8 Charlotte Area Transit Service ("CATS") route. This bus dropped defendant off about a block from Jessica's house. Defendant would stay over sometimes with

[1]The pseudonyms "Jessica" and "Amanda" are used to protect the privacy of the victim.

Jessica in a spare bedroom, and Jessica let defendant sometimes borrow a house key. Defendant and Jessica also spent time at defendant's apartment.

On or about 10 January 2011, Jessica broke up with defendant. The last time the two had consensual intercourse was around Christmas time 2010. The week after they broke up, defendant and Jessica talked two times. On 16 January 2011, defendant told Jessica that he had a "surprise" for her and that he would meet Jessica at her house the next day at around noon.

The next morning, 17 January 2011, while still in bed, Jessica heard Amanda blow-drying her hair. Amanda left for work at about 8:15 a.m. Jessica was planning to go to work later in the afternoon.

Onboard surveillance footage from a CATS Group 8 bus showed defendant on that route to Jessica's house, and a time stamp on the footage indicated he was on the bus from 8:25 to at least 8:50 a.m. Defendant was wearing a blue or black hoodie underneath a jacket that still had the price tag on it. He was also wearing the backpack that he usually carried with him. After defendant got off the bus, he went to the house and unlocked the front door with a key he had in his possession. Jessica did not hear any sign of entry.

Defendant went upstairs to Jessica's bedroom where she was sleeping and disguised his voice "like it was . . . in a fan." He took a blanket and some electrical tape out of his backpack and taped the blanket around Jessica's head as a blindfold. Defendant also used electrical tape to bind Jessica's wrists and ankles together. He performed oral sex on Jessica and then forced her to have vaginal and anal intercourse with him. During this time, Jessica could not see and did not recognize defendant. She screamed out for her mother or defendant to rescue her. After the assault, defendant left Jessica bound. Defendant left Jessica's room around 9:35 a.m. and stashed his backpack under the back deck. Jessica never heard the front door shut.

A few minutes later, around 9:40 a.m., Jessica recognized defendant when he came up the stairs yelling her name. Defendant took a pair of scissors, cut the blanket from around Jessica's head and cut the tape from her wrists and ankles. Defendant threw the blanket and tape in the back of Jessica's closet. Jessica called Amanda and then 911. While Jessica was on the phone with the 911 operator, defendant grabbed the cell phone from her and started talking to the operator.

Amanda called a neighbor, Kevin Cullingford, and asked him to guard her house. Defendant stood outside with Mr.

Cullingford until the police arrived. After the police secured the house as a crime scene, defendant went with Jessica to the hospital where she was administered a rape test kit that included vaginal and rectal swabs. Subsequently, upon testing, the vaginal swab only indicated the presence of Jessica's DNA, but the rectal swab was an "exact" match to defendant's DNA.

The front door of Jessica's house showed no signs of forced entry. In searching the house, police found the tip of a black latex glove on Jessica's bed, and they found defendant's backpack under the deck surrounded by cinderblocks. In the backpack, police found a hoodie, a pair of scissors, a pair of sport gloves, and a roll of black electrical tape. Police also found a pair of black latex gloves with the thumb tip of one glove missing. When DNA was found on the latex glove tip, testing concluded that defendant could not be excluded as a contributor.

Sometime later, Jessica found in her closet the blanket that was wrapped around her head during the incident with cut black electrical tape. She identified this blanket as one she and defendant had used at defendant's apartment when they would watch television together. She had never seen it in her house before.

Defendant was arrested and indicted for felony breaking and entering, second degree rape, and second degree sexual offense. At trial, the State's DNA expert, Eve Rossi, testified that sperm cells in the rectal area typically stay there for less than a day. Defendant, who testified on his own behalf, claimed that the last time he had consensual intercourse with Jessica was 15 January 2011, about two days prior to the assault.

Defendant also testified that "the bus schedules were off" the day of the assault and that the time stamp of the CATS surveillance footage was off by about an hour. Defendant stated that he had originally taken a CATS route to Central Piedmont Community College -- traveling the opposite direction of Jessica's house -- to take care of some class registration issues. However, once he arrived at the college and found out it was closed, defendant stated that he had a "weird feeling that something was wrong" and then hopped on the Group 8 CATS route toward Jessica's house. Defendant stated he thought he had caught the 9:25 a.m. Group 8 bus, even though the time stamp on the surveillance footage indicated he was on the bus between 8:25 and 8:50 a.m. Referencing a still image taken from the Group 8 CATS surveillance footage, defendant identified himself as wearing the backpack that was found underneath Jessica's

deck, but testified that the backpack only contained "[j]ust a few snacks, some ink pens" and "my phone charger."

He also testified that once he got off the bus stop at Jessica's house, he noticed a large figure in dark clothing running away from the house. Rather than pursue the figure, defendant testified that he ran to the house and upstairs through the front door, which was ajar, to see if Jessica was there and injured. Defendant identified the backpack found under the deck as belonging to him, but claimed that the hoodie, tape, scissors, and gloves that were retrieved from the backpack were not in it when he was riding the Group 8 bus to Jessica's house.

Defendant was convicted of all three offenses: felony breaking and entering, second degree rape, and second degree sexual offense. Defendant stipulated to a prior record level worksheet. Defendant's judgments indicate he had six record points and a prior record level of III. Defendant was sentenced to a presumptive-range sentence of 10 to 12 months for the breaking and entering charge followed by two consecutive sentences of 96 to 125 months imprisonment for second degree rape and second degree sexual offense. Additionally, defendant was required to enroll in lifetime SBM for his second degree rape conviction in one order, and, in another order, to enroll

in lifetime SBM for his second degree sexual offense conviction. Defendant gave oral notice of appeal in open court.

I

Recognizing his failure to object to its admission at trial, defendant argues that the trial court committed plain error when it admitted into evidence the Group 8 CATS surveillance footage. As our Supreme Court has explained:

> 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, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citation and quotation marks omitted).

Defendant contends that the time stamp on the footage is incorrect and, similar to surveillance footage at issue in *State v. Mason*, 144 N.C. App. 20, 550 S.E.2d 10 (2001), the CATS footage is inadmissible because it was not properly authenticated. In *Mason*, a store robbery case, this Court held that a trial court erred in admitting video surveillance footage where "[t]he evidence presented at trial was insufficient to

establish that the store security system was properly functioning on [the date of the crime][,]" "trial testimony also was insufficient to establish that the tape accurately represented the events it purported to show[,]" and "the chain of custody was not adequately established." *Id.* at 27, 550 S.E.2d at 15.

However, even assuming without deciding, that the CATS surveillance was improperly introduced at trial, defendant cannot show plain error because the State presented overwhelming evidence of his guilt. Shortly before the assault, Jessica broke up with defendant. Defendant told Jessica, the day the assault occurred, that he was going to bring her a laptop as part of a "surprise" at noon, yet no laptop was found at the crime scene. Defendant knew both Amanda's and Jessica's work schedules. He had access to a house key while he and Jessica were dating, and the front door showed no signs of forced entry. Jessica and defendant identified the blanket found in Jessica's closet that had been wrapped around Jessica's head as belonging to defendant, and Jessica stated that she had never seen that blanket in her house before. The CATS surveillance footage portrayed defendant on the day of the assault with the backpack he usually wore, and defendant's backpack was discovered concealed under the back deck, containing electrical tape and

latex gloves (with the tip of one finger missing) that were linked to the assault. Further, defendant could not be excluded as a possible match to the DNA on the tip of the latex glove found in Jessica's bedding. Finally, the DNA identified from Jessica's rectal swab was a match to defendant. Although defendant claimed that he and Jessica last had consensual intercourse about two days prior to the incident, the State presented expert testimony that DNA from sperm in the rectum remains intact for not more than a day.

Because the other evidence introduced was overwhelmingly supportive of a guilty verdict, it is highly unlikely a jury would have believed defendant's explanation that someone else assaulted Jessica and reached a different verdict in the absence of the surveillance footage. Consequently, defendant has failed to demonstrate plain error from the admission of the footage.

II

Defendant next argues that the trial court did not properly apply N.C. Gen. Stat. § 15A-1340.14 (2013) to determine that he had a prior record level of III based on a finding of six prior record points. Defendant contends that, under this statute, he could not have stipulated -- or, alternatively, did not properly stipulate -- to a prior record point for committing an offense while on probation. Alleged statutory errors pertaining to

sentencing are questions of law and, as such, are reviewed de novo. *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721 (2011).

A criminal defendant receives a prior record level of III if he has six record points. N.C. Gen. Stat. § 15A-1340.14(c). A defendant is given one point for an offense that "was committed while the offender was on supervised or unsupervised probation, parole, or post-release supervision . . . ." N.C. Gen. Stat § 15A-1340.14(b)(7). "While a jury may determine the existence of prior points, subsection (f)(1) [of N.C. Gen. Stat. § 15A-1340] allows proof of prior convictions by stipulation of the parties." *State v. Marlow*, ___ N.C. App. ___, ___, 747 S.E.2d 741, 747, *appeal dismissed*, ___ N.C. ___, 752 S.E.2d 493 (2013).

Here, at defendant's sentencing hearing, the trial court indicated that it had found defendant to have a prior record level of III. Defense counsel stated that defendant had "reviewed the prior record level worksheet" and that defendant "stipulate[d] to the convictions that are shown on the worksheet[.]" The worksheet included a point for having committed an offense while on probation.

The State argues that defendant's arguments are foreclosed by *Marlow*. In *Marlow*, this Court upheld a trial court's

sentence based on the defendant's stipulation of prior record points which included a point under N.C. Gen. Stat. § 15A-1340(b)(7) for commission of the offense while on probation. ___ N.C. App. at ___, 747 S.E.2d at 748. Thus, under *Marlow*, a defendant may stipulate to a record point for committing a crime while on probation.

Defendant nonetheless contends that he merely stipulated to those "prior convictions" that he "testified to . . . during direct examination" and did not stipulate to the fact that he committed an offense while on probation. However, this Court concluded that the defendant in *Marlow* had stipulated to committing an offense while on probation when the court asked if defense counsel had reviewed and discussed the prior record level with the defendant,

> defense counsel responded "[h]e did [stipulate], yes, sir." Defense counsel had the opportunity to inform defendant of the repercussions of conceding certain prior offenses and defendant had the opportunity to interject had he not known such repercussions. Yet, even after being informed, defendant neither objected to nor hesitated when asked about such convictions.

___ N.C. App. at ___, 747 S.E.2d at 748.

Similarly, here, defense counsel responded that defendant had reviewed the prior record level worksheet that included a point for committing an offense while on probation. Defense

counsel did not thereafter object, but rather stated that defendant "stipulate[s] to the convictions that are shown *on the worksheet*." (Emphasis added.) Although defendant, citing the appellant's brief in *Marlow*, contends the stipulation for the N.C. Gen. Stat. § 15A-1340(b)(7) point in *Marlow* is based on the fact that the trial court explicitly mentioned that point in open court, this Court's finding a stipulation was based on the defense counsel's opportunity to have "a chance to review the prior record level and have a discussion with defendant . . . to inform defendant of the repercussions of conceding certain prior offenses and [that] defendant had the opportunity to interject had he not known such repercussions." ___ N.C. App. at ___, 747 S.E.2d at 748.

Nonetheless, defendant contends that the trial court erred because it failed to engage in the colloquy described in N.C. Gen. Stat. §§ 15A-1022(a) (2013) and 15A-1022.1(b) (2013). This colloquy requires an inquiry into whether record point stipulations are the product of an informed choice, advising defendant that he has the right to have a jury determine the existence of a N.C. Gen. Stat. § 15A-1340.14(b)(7) point, and advising him that he has the right to prove mitigating factors before a sentencing judge. N.C. Gen. Stat. §§ 15A-1022(a), 15A-1022.1(b). However, N.C. Gen. Stat. § 15A-1022.1(e) allows a

trial court to forego this inquiry and these questions when "'the context clearly indicates that they are inappropriate.'" *Marlow*, __ N.C. App. at ___, 747 S.E.2d at 748 (quoting N.C. Gen. Stat. § 15A-1022.1(e)).

Marlow held that because the defendant had the opportunity to review the prior record level and stipulated to it without further objection, there was "no reason to have engaged in an extensive colloquy with defendant." *Id.* at ___, 747 S.E.2d at 748. Based on this substantial similarity to the circumstances in *Marlow*, we hold that the trial court properly accepted defendant's stipulation to his record points.

We find *Marlow* controlling with respect to each of defendant's arguments. We conclude, therefore, that the trial court did not err in determining that defendant had a prior record level of III based on the existence of six record points.

III

Defendant lastly argues that the trial court erred by entering an order imposing lifetime SBM for his second degree sex offense conviction. Defendant's oral notice of appeal in court was insufficient to appeal his SBM orders. *See State v. Brooks*, 204 N.C. App. 193, 195, 693 S.E.2d 204, 206 (2010) ("[A] defendant [appealing an SBM order] must give notice of appeal pursuant to N.C.R. App. P. 3(a) as is proper 'in a civil action

or special proceeding[.]'" (quoting N.C.R. App. P. 3(a))). However, defendant has filed a petition for writ of certiorari to appeal his SBM orders on 7 July 2014, which, in our discretion, we allow. *See State v. Lineberger*, ___ N.C. App. ___, ___, 726 S.E.2d 205, 206-07 (2012) (granting defendant's petition for writ of certiorari for review of SBM order when defendant gave oral notice in open court).

N.C. Gen. Stat. § 14-208.40A(c) (2013) requires a trial court to order a criminal defendant to enroll in SBM for his or her life "[i]f the court finds that the offender has been classified as a sexually violent predator, is a recidivist, has committed an aggravated offense, or was convicted of G.S. 14-27.2A or G.S. 14-27.4A[.]" The trial court in this case found that defendant's convictions of second degree rape and second degree sex offense were "aggravated" offenses and, on this basis, imposed lifetime SBM of defendant. Defendant argues that second degree sexual offense is not an "aggravated" offense, as the State concedes. *See State v. Boyett*, ___ N.C. App. ___, ___, 735 S.E.2d 371, 381 (2012) (holding that conviction of second degree sexual offense is insufficient to support finding that defendant has been convicted of aggravated offense for purposes of SBM). We, therefore, vacate this order.

Defendant, however, does not and cannot challenge the order imposing lifetime SBM for his second degree rape conviction. *See State v. McCravey*, 203 N.C. App. 627, 641, 692 S.E.2d 409, 420 (2010) (holding second degree rape is an aggravated offense for which lifetime SBM must be imposed). Therefore, while the trial court erred in imposing lifetime SBM for defendant's second degree sexual offense conviction, it did not err in doing so for his second degree rape conviction.

Vacated in part; no error in part.

Judges STROUD and BELL concur.

Report per Rule 30(e).