NO. COA14-802

NORTH CAROLINA COURT OF APPEALS

Filed: 17 March 2015

STATE OF NORTH CAROLINA

v. Forsyth County
No. 13CRS001562

ROBERT ARTHUR PACE

Appeal by Defendant from judgments entered 5 December 2013 by Judge A. Moses Massey in Forsyth County Superior Court. Heard in the Court of Appeals 3 December 2014.

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

Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for the Defendant.

DILLON, Judge.

Robert Arthur Pace ("Defendant") appeals from judgments entered upon a jury verdict finding him guilty of first-degree rape and indecent liberties with a child. We find no error in part and we vacate in part with instructions to the trial court to conduct further proceedings consistent with this opinion.

I. Background

The evidence tended to show the following: On 16 September 1989, an unknown male intruder broke into the room where the

victim, a female, was sleeping. The victim was seven years old at the time. The intruder ordered the victim to turn over on her stomach; he pulled down her panties; he licked her anal area; and he began to penetrate her vaginally and anally while holding the blade of a knife to her nose. When he had finished, he escaped out the window.

The victim's mother took her to the emergency room after the incident. While there, a doctor examined the victim and also processed a rape kit, sealing it and handing it over to police.

Thereafter, the case went cold for many years. In 2013, however, an agent with the State Bureau of Investigation ("SBI") determined that DNA present on the victim's panties, stored with the rape kit, matched a DNA profile now present in CODIS, the State's Combined DNA Index System, a database of DNA samples taken from convicted offenders. Based on that match, the State came to suspect Defendant. The State obtained an additional sample of Defendant's DNA to compare to the DNA detected on the victim's panties. Based on that comparison, the SBI agent confirmed the match.

Defendant was indicted on various charges in connection with the 1989 attack. He was tried by a jury, which found him guilty

of one count of first-degree rape and one count of taking indecent liberties with a child.

The trial court entered separate judgments on each conviction, sentencing Defendant to life in prison for first-degree rape and an additional ten years in prison for indecent liberties, and ordering that the sentences run consecutively. Defendant entered his notice of appeal in open court.[1]

II. Analysis

Defendant essentially makes three arguments on appeal, which we address in turn.

A. Evidentiary Issues

Defendant's first argument concerns the trial testimony of the victim's mother. Specifically, Defendant contends that the trial court committed plain error in allowing her to provide certain hearsay testimony and that the court abused its discretion in allowing her to offer an opinion as to changes she observed in her daughter's behavior after the assault. We disagree.

"Unpreserved error . . . is reviewed only for plain error." *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012).

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[1] Defendant appears to have entered his notice of appeal prematurely, after the jury returned its verdict but before the court imposed a sentence, and has, therefore, petitioned this Court for writ of certiorari. We hereby grant Defendant's petition.

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred . . . [that] had a ***probable*** impact on the jury's finding[.]" ***Id.*** at 518, 723 S.E.2d at 334 (internal marks and citation omitted) (emphasis added).

In the present case, the victim's mother testified that when she took her daughter to counseling, she was told, "[s]omething violent has happened to her." Assuming, ***arguendo***, that this testimony constituted inadmissible hearsay – as evidence that the alleged sexual assault in fact occurred, ***see*** N.C. Gen. Stat. § 8C-1, Rules 801, 802 (2013), Defendant failed to object to this testimony, and we do not believe the trial court's failure to strike the testimony on its own motion had a ***probable*** impact on the jury's verdict. ***See Lawrence***, 365 N.C. at 518, 723 S.E.2d at 334. Rather, the State presented substantial, uncontradicted evidence that the assault in fact occurred and that Defendant was the perpetrator. The victim described the assault in detail during her testimony. The emergency room doctor testified to the presence of "lacerations or large bruises" on the victim. The State tendered experts in DNA analysis and forensic serology who both testified to the presence of semen on the victim's panties. One expert in DNA analysis stated that the sperm found on the victim's panties matched Defendant's DNA, and that "[t]he probability of

randomly selecting an unrelated individual with a DNA profile that matches the DNA profile obtained from the sperm fraction from the cutting from the [victim's] panties is one in greater than one trillion, which is more than the world population[.]"

In light of this evidence, we do not believe it is *probable* that the jury's finding of guilt would have differed if the trial court had excluded the complained-of testimony. Accordingly, Defendant's contention is overruled.

Defendant contends in the alternative that the complained-of testimony constituted impermissible vouching. Again, based on the other evidence in the record, we do not believe it is *probable* that the jury's finding of guilt would have differed if the trial court had excluded the complained-of testimony. Accordingly, Defendant's contention in the alternative is also overruled.

Defendant next contends that the trial court abused its discretion in allowing the victim's mother to testify about changes she observed in her daughter that she believed were a direct result of the assault, claiming such testimony constituted improper lay opinion testimony. We disagree.

We review a trial court's rulings on the admissibility of lay opinion testimony for an abuse of discretion. *State v. Collins*, 216 N.C. App. 249, 254, 716 S.E.2d 255, 259-60 (2011). Rule 701

of the North Carolina Rules of Evidence limits admissible lay opinion testimony to "those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2013).

However, we have long recognized that Rule 701 does not render "shorthand statement[s] of fact" inadmissible. *State v. Wade*, 155 N.C. App. 1, 14, 573 S.E.2d 643, 652 (2002) (internal marks omitted). A "shorthand statement of fact" has been defined as "the instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time." *Id.* (internal marks omitted). While themselves opinions, we have explained that

> [a]llowance of opinions in the form of a 'shorthand statement of fact' is premised upon the notion that a description of all the underlying detailed facts that helped to form the witness' opinion may be possible, but is not practical due to the inherent difficulties in articulating one's analytical thought processes.

State v. Lesane, 137 N.C. App. 234, 244, 528 S.E.2d 37, 44 (2000).

In the present case, the following colloquy transpired on direct examination of the victim's mother:

> [PROSECUTOR]: And what other changes did you

> observe in her that you believe are a direct result of her being sexually assaulted?
>
> [DEFENDANT[2]]: Objection, Your Honor.
>
> THE COURT: Objection overruled.
>
> [PROSECUTOR]: You can answer.
>
> [VICTIM'S MOTHER]: She was mean. She was—— she didn't want to do things. She was—— wanted to fight. She was violent. She just—— all these things.

Defendant characterizes this testimony as generally inadmissible because it states a conclusion or inference properly reserved to the jury or alternately as vouching for the credibility of a lay diagnosis of some malady about which only an expert witness would be properly qualified to opine. However, we believe the context surrounding the response demonstrates that the witness was merely describing the differences she observed in her daughter's behavior after being sexually assaulted. While "a description of all the underlying detailed facts that helped to form the witness'[s] opinion may [have been] possible," we do not believe it would be practical to require such a description. *Id*. at 244, 528 S.E.2d at 44. We hold that the victim's mother's response to the objected-to question constituted a shorthand statement of fact and

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[2] Defendant waived his right to counsel, representing himself at trial.

therefore did not qualify as improper lay opinion testimony under Rule 701. Accordingly, Defendant's contention is overruled.

B. Jury Instructions

Defendant next argues that the trial court committed plain error by giving a fatally inadequate jury instruction on the use of iPads and tablet computers after authorizing their use by the jurors for note-taking purposes. We disagree.

North Carolina law affords the presiding judge considerable discretion over the manner in which to conduct a trial. *State v. Rhodes*, 290 N.C. 16, 23, 224 S.E.2d 631, 635 (1976). "Generally, in the absence of controlling statutory provisions or established rules, all matters relating to the orderly conduct of the trial or which involve the proper administration of justice in the court, are within his discretion." *Id.* Whether to allow the jurors to take notes, for example, "is a discretionary decision made by the trial court." *State v. Crawford*, 163 N.C. App. 122, 127, 592 S.E.2d 719, 723 (2004).

In the present case, the trial court provided the jury with preliminary instructions, allowing them to take notes during the trial. The court had also previously admonished the jury "not [to] look up some topic on the internet, or . . . visit any social media site."

During the first day of trial, the trial court further instructed the jury as follows regarding note-taking:

> A question has been raised by a juror as to whether notes may be taken on an electronic device such as an iPad or a tablet as opposed to pen and paper. In my discretion, I will allow that. Just abide by the same instructions that I've given you concerning notes.

Defendant does not challenge the trial court's decision authorizing the jurors' use of iPads or tablet computers for note-taking purposes. *See id.* Rather, Defendant contends that the court's instructions concerning the use of these electronic devices were fatally defective, constituting plain error, recasting as instructional error subject to plain error review a decision we otherwise would review for an abuse of discretion. *Compare id. with Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333.

To establish the requisite prejudice resulting from this alleged instructional error, Defendant requests that we take judicial notice of common features of iPads and tablet computers; for example, that these devices have the capabilities to allow their users to communicate with others, to access information, and to record. In the present case, however, even if we were to take judicial notice of the capabilities of iPads and tablet computers, such notice would not alter our conclusion regarding Defendant's

argument because our review of the record reveals no prejudice. While true that iPads and other tablet computing devices have a range of capabilities a simple pen and paper do not, the record does not even ***hint*** at any specific prejudice resulting from the trial court's failure to educate the jurors more thoroughly about the wonders of the technology or to clarify or provide more detail in its instructions regarding the jurors' use of that technology.

Based on our review of the record, we do not believe it is reasonably possible – much less reasonably probable - that the jury's finding of guilt would have differed if the trial court's instructions regarding note-taking had differed. Therefore, assuming, ***arguendo***, that the court's failure to instruct the jury more fully regarding the use of iPads and tablet computing devices constituted error, we hold that it did not constitute plain error. Accordingly, this argument is overruled.

C. Sentencing

Finally, Defendant argues – and the State concedes - that the trial court erred in imposing an aggravated sentence of ten (10) years for his indecent liberties conviction and that the matter should be remanded for resentencing. However, Defendant and the State disagree as to the ***scope*** of the resentencing hearing. Defendant contends that this Court should instruct the trial court

on remand to impose a presumptive sentence (3 years) for the indecent liberties conviction. The State, however, contends that the trial court should be free to impose an aggravated sentence (10 years) based on a proper finding of aggravating factors.

For the reasons stated below, we hold that the trial court erred in sentencing Defendant to an aggravated sentence, and we remand the matter for resentencing with instructions to the trial court to conduct further proceedings consistent with this opinion.

1. Statutory Error

Defendant first contends – and the State concedes - that the trial court committed a statutory error in imposing the sentence it did. We agree.

Alleged statutory errors present questions of law, which we review *de novo*. *State v. McLean*, ___ N.C. App. ___, ___, 753 S.E.2d 235, 238 (2014). Relevant to the present case, the sentencing regime applicable to crimes committed in North Carolina in 1989 is the Fair Sentencing Act. Under the Fair Sentencing Act, "the judge must specifically list . . . each matter in aggravation or mitigation," and "find that the factors in aggravation outweigh the factors in mitigation" before imposing an aggravated sentence. N.C. Gen. Stat. § 15A-1340.4(b) (1989). Under the Fair Sentencing Act, indecent liberties with a child is

a Class H felony with a presumptive sentence of three years and a maximum, aggravated sentence of ten years. *State v. Lawrence*, 193 N.C. App. 220, 223, 667 S.E.2d 262, 264 (2008).

Here, the indecent liberties judgment simply lists an offense date of 16 September 1989 and then purports to sentence Defendant to ten years in prison without indicating that the court considered the aggravating and mitigating factors set forth in N.C. Gen. Stat. § 15A-1340.4(a) (1989); without listing findings in aggravation or mitigation; and without making a finding that the factors found in aggravation outweighed those in mitigation. *See id.* § 15A-1340.4(b). This constitutes reversible error. Accordingly, we vacate the judgment imposing this sentence and remand for resentencing.

2. Scope of Resentencing Hearing on Remand

Determining the proper scope of the resentencing hearing is complicated by the fact that this case belongs to a small universe of cases which are subject to *both* the Fair Sentencing Act – *see State v. Mickey*, 347 N.C. 508, 513, 495 S.E.2d 669, 672 (1998) (stating that the Fair Sentencing Act applies to those *offenses* committed before 1 October 1994) – and the requirements flowing from the United States Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed.2d 403 (2004),

which apply prospectively to cases pending on direct review and not final on 24 June 2004, irrespective of the offense date. *State v. Hasty*, 181 N.C. App. 144, 146-47, 639 S.E.2d 94, 95-96 (2007).

Our resolution of the issue requires an understanding of the effect of *Blakely* on our law and its impact on our application of the Fair Sentencing Act in current prosecutions of pre-1994 crimes. The version of the Fair Sentencing Act applicable to Defendant's indecent liberties offense committed in 1989 provides sixteen (16) factors which may be considered to enhance the punishment of a defendant convicted of certain felonies. N.C. Gen. Stat. § 15A-1340.4(a)(1) (1989). Fifteen (15) of the factors deal with characteristics of the crime of which the defendant was convicted, such as whether the crime was "especially heinous, atrocious, or cruel," or whether the defendant was armed at the time the offense was committed. *Id.* The remaining factor is the fact of the defendant's prior conviction for an offense punishable by more than sixty (60) days' confinement. *Id.*

Prior to *Blakely*, it was the trial judge who determined the existence of aggravating factors by the preponderance of the evidence. *State v. Jones*, 314 N.C. 644, 648, 336 S.E.2d 385, 387-88 (1985). The aggravating factors were not considered "elemental facts" which had to be found "beyond a reasonable doubt." *Id.* at

648, 336 S.E.2d at 388. Though the Fair Sentencing Act was replaced by the General Assembly in 1994 with the Structured Sentencing Act, it still has application to prosecutions for offenses committed prior to its repeal. *Mickey*, *supra*.

In 2004, the United States Supreme Court handed down its decision in *Blakely*. In *Blakely*, the Court held that, under the Sixth Amendment right to a jury trial, any factors which could be used to enhance a defendant's sentence *other than the fact of prior conviction* had to be found beyond a reasonable doubt by a jury. 542 U.S. at 301-04, 124 S. Ct. 2536-38. In the wake of *Blakely*, based on the United States Supreme Court's previous decision in *Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed.2d 649 (1987), we held that *Blakely*'s mandate applied prospectively to proceedings pending on direct appeal and not final as of 24 June 2004. *Hasty*, 181 N.C. App. at 146-47, 639 S.E.2d at 95-96. Therefore, even though the Fair Sentencing Act applies to the present proceeding – as Defendant committed the offense in 1989 – the *Blakely* mandate also applies, as the proceeding was not commenced until well after 2004.

The replacement of the Fair Sentencing Act with the Structured Sentencing Act brought a number of changes to the procedure and treatment of aggravating factors in our State, many in response to

Blakely. *See, e.g.*, 2005 N.C. Sess. Law 145. Under the current law, there are twenty-nine (29) aggravating factors which must be considered by a jury. N.C. Gen. Stat. § 15A-1340.16 (2013). The fact of prior conviction is still used to enhance a defendant's punishment; however, it is no longer considered an aggravating factor, but rather is used to determine a defendant's prior record level. *See id.* § 15A-1340.14.

Regarding notice, the Fair Sentencing Act did not contain any provision requiring the State to provide advance notice of its intent to seek an aggravated sentence. However, the Structured Sentencing Act, pursuant to an amendment to that Act passed by the General Assembly in response to *Blakely*, requires that the State provide a defendant with "written notice of its intent to prove the existence of" aggravating factors "at least 30 days before trial[.]" N.C. Gen. Stat. § 15A-1340.16(a6) (2013). However, this statutory notice requirement does not apply to proceedings for crimes committed prior to 30 June 2005. *State v. Henderson*, 201 N.C. App. 381, 389, 689 S.E.2d 462, 467-68 (2009).

Notwithstanding that the thirty (30) day statutory notice requirement does not apply to the current proceeding – as the offense date was in 1989 - our Supreme Court has held that under the Sixth Amendment, a defendant is otherwise entitled to

"'*reasonable notice*' sufficient to ensure that [the defendant] [is] afforded an opportunity to defend against the charges [brought against him]," *State v. Hunt*, 357 N.C. 257, 271, 582 S.E.2d 593, 602 (2003) (emphasis in original), and stated that this "reasonable notice" requirement applies to aggravating factors. *Id.* at 275-76, 582 S.E.2d at 605.

In the present case, Defendant argues that his right to "reasonable notice" was violated. We do not believe Defendant's Sixth Amendment right to "reasonable notice" is violated where the State provides no prior notice that it seeks an enhanced sentence based on the fact of prior conviction. It *appears* from the record on appeal that this was the sole basis relied upon by the State in the initial sentencing hearing.[3] Accordingly, we hold that the trial court on remand may impose an aggravated sentence on the indecent liberties conviction based on a finding by a preponderance of the evidence that Defendant had a prior conviction qualifying as an aggravating factor pursuant to N.C. Gen. Stat. § 15A-1340.4(a)(1)(o) (1989). However, if the State intends to present evidence of any aggravating factors *other than the fact of prior conviction*, we hold that it must first satisfy the trial court that it provided Defendant with constitutionally adequate notice.

[3] The record is not entirely clear on this point.

III. Conclusion

We find no reversible error regarding the testimony by the victim's mother or in the instructions regarding the use of iPads or tablet computers by the jury. We hold, however, that the trial court erred by imposing an aggravated sentence for Defendant's conviction for taking indecent liberties with a child. We vacate the judgment imposing that sentence and remand the case to the trial court with instructions to conduct further proceedings consistent with this opinion.

Further, as the State points out, the trial court misidentified the class of each felony on the judgments, mistakenly identifying the class under current law rather than under 1989 law. Accordingly, on remand the trial court shall correct the Judgment and Commitment for the first degree rape offense to reflect the offense as a class "B" felony rather than a class "B1" felony; and the trial court shall correct the Judgment and Commitment for the indecent liberties offense to reflect a class "H" felony rather than a class "F" felony. *See* N.C. Gen. Stat. § 14-27.2(b) (1989); *id.* § 14-1.1(a)(2); *id.* § 14-202.1(b).

NO ERROR in part; VACATED in part; and REMANDED.

Judges BRYANT and DIETZ concur.