NO. COA14-929

NORTH CAROLINA COURT OF APPEALS

Filed: 17 February 2015

STATE OF NORTH CAROLINA

v. Forsyth County
Nos. 09 CRS 58372-73

SYLVESTER SAUNDERS, JR.

Appeal by Defendant from judgment entered 16 July 2013 by Judge Edwin G. Wilson in Forsyth County Superior Court. Heard in the Court of Appeals 8 January 2015.

*Attorney General Roy Cooper, by Assistant Attorney General Amy Kunstling Irene, for the State.*

*Appellate Defender Staples Hughes, by Assistant Appellate Defender David W. Andrews, for Defendant.*

STEPHENS, Judge.

In February 2013, Defendant Sylvester Saunders, Jr., was tried in the Forsyth County Superior Court on charges of first-degree rape, second-degree kidnapping, and first-degree burglary. After the jury deadlocked, the trial court declared a mistrial. Defendant was retried before a jury in July 2013. The evidence at the second trial tended to show the following:

The victim[1] was an 82-year-old woman who lived alone in her house in Winston-Salem. In the early morning hours of 1 August 2009, a man entered the victim's home, grabbed her around the neck in a choke hold, and demanded money. The victim gave the man all of the money in her purse as well as two checks, but he still forced her into her living room, threw her onto a loveseat, and raped her. The victim attempted to fight back, but the man was too strong. During the rape, the man told the victim to raise her right leg. She explained that she could not do so because of her arthritis. The man forced the victim's leg up anyway. The victim asked the man why he would choose an old woman to attack, and he responded that he "like[d] old people." After completing the rape, the man told the victim he was hungry and took her to the kitchen in a choke hold, where she gave him two ice cream cones. Once the man left, the victim called the police.

That same day, after a fingerprint at the victim's home was identified as belonging to Defendant, a warrant was issued for his arrest. Defendant was taken into custody on 2 August 2009 while standing next to his car. Following his arrest, the two

[1] We identify the victim as such, rather than by her name, in an effort to protect her privacy.

checks taken from the victim were discovered underneath Defendant's car. A print matching Defendant's left palm was discovered on one of the checks. Other evidence linking Defendant to the crimes included a dishtowel from the victim's kitchen which was found in the trunk of Defendant's car, as well as hair and fingerprint evidence from inside and outside the victim's home that was matched to Defendant.

At trial, the victim testified that, after the rape and burglary, she felt angry, upset, stressed out, and uncomfortable in social situations. She limited her public activities and worried that people around her knew about the rape. The victim had installed an alarm system and kept a gun in her home. Her family and associates testified that she seemed depressed and withdrawn since the incident. Defendant presented no evidence. The jury found Defendant guilty of each charge and returned verdicts finding three aggravating factors. The trial court imposed an aggravated sentence of life in prison without the possibility of parole.

From the judgment entered upon his convictions, Defendant appeals, raising a single issue: that the trial court erred in failing to instruct the jury that it could not use the same evidence to find both the element of mental injury for first-

degree rape and the aggravating factor that the victim was very old. Specifically, Defendant contends the jury may have relied on evidence about ongoing emotional suffering and behavioral changes which the victim experienced after the rape to find both an element of the offense and the aggravating factor. We find no error.

One of the aggravating factors submitted to and found by the jury was that the victim was very old. *See* N.C. Gen. Stat. § 15A-1340.16(d)(11) (2013) (providing that it is an aggravating factor if "[t]he victim [of a crime] was very young, or very old, or mentally or physically infirm, or handicapped"). "Evidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation, and the same item of evidence shall not be used to prove more than one factor in aggravation." N.C. Gen. Stat. § 15A-1340.16(d). Defendant acknowledges that he did not request a specific instruction on this point nor did he object to the court's jury instructions as given. Accordingly, Defendant is entitled only to plain error review of his argument.

> [T]he 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*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations and internal quotation marks omitted). Thus, we must consider whether the jury instructions were erroneous and, if so, whether "the error had a probable impact on the jury verdict." *See id.*

Our General Statutes provide that "[a] person is guilty of rape in the first degree if the person engages in vaginal intercourse . . . [w]ith another person by force and against the will of the other person, and . . . [i]nflicts serious personal injury upon the victim . . . ." N.C. Gen. Stat. § 14-27.2(a)(2)(b) (2013). Serious personal injury can be mental or emotional harm, but,

> in order to prove a serious personal injury based on mental or emotional harm, the State must prove that the defendant caused the harm, that it extended for some appreciable period of time beyond the incidents surrounding the crime itself, and that the harm was more than the *res gestae* results present in every forcible rape. *Res gestae* results are those so closely connected to an

> occurrence or event in both time and substance as to be a part of the happening.

*State v. Baker*, 336 N.C. 58, 62-63, 441 S.E.2d 551, 554 (1994) (citations, internal quotation marks, and brackets omitted; italics in original). For example, in *Baker*, ten to twelve months after the rape, the victim was still experiencing weight loss, depression, sleep disruptions, and social anxiety, and had quit her job, moved, and sought counseling. *Id.* at 65, 441 S.E.2d at 555. Thus, a jury's determination that a rape victim has suffered a serious personal injury based on mental or emotional harm involves consideration of the *after-effects* of the crime upon the victim. *See id.*

In contrast, regarding the aggravating factor of the victim being "very old,"

> [t]his Court has observed that the policy underlying this aggravating factor is to deter wrongdoers from taking advantage of a victim because of [her] age or mental or physical infirmity.
>
> However, age should not be considered as an aggravating factor in sentencing unless it makes the defendant more blameworthy than he or she already [would be] as a result of committing a violent crime against another person.
>
> A criminal may take advantage of the age of a victim in two different ways: First, he may target the victim because of the victim's age, knowing that his chances of

> success are greater where the victim is very young or very old. Or the defendant may take advantage of the victim's age during the actual commission of a crime against the person of the victim, or in the victim's presence, knowing that the victim, by reason of age, is unlikely to effectively intervene or defend [herself].
>
> Appellate review of a . . . finding of the aggravating factor at issue thus necessarily focuses upon *whether the victim, by reason of* [*her*] *years, was more vulnerable to the* [*crime*] *committed against* [*her*] *than* [*she*] *otherwise would have been*.

*State v. Hilbert*, 145 N.C. App. 440, 442-43, 549 S.E.2d 882, 884 (2001) (citations and internal quotation marks omitted; emphasis added). A jury's determination of the aggravating factor that the victim was very old requires consideration of facts and circumstances that existed before or during the crime, to wit, "whether the victim, by reason of [her] years, was more vulnerable to the [crime] committed against [her] than [she] otherwise would have been." *See id.* at 443, 549 S.E.2d at 884.

Defendant cites *State v. Barrow*, 216 N.C. App. 436, 718 S.E.2d 673 (2011), in support of his position that the trial court plainly erred in its jury instructions. We find that case easily distinguishable. First, we note that *Barrow* did not involve plain error, and thus, that case received a different

standard of review than does Defendant's argument. *Id.* at 445, 718 S.E.2d at 679. More importantly, in *Barrow*,

> the State's theory regarding second[-]degree murder relied almost exclusively on the fact that because of the vulnerability of a five-month[-]old child, shaking him is such a reckless act as to indicate a total disregard of human life — the showing necessary for malice. Thus, the State's theory regarding malice is virtually identical to the rationale underlying submission of the aggravating factor that the victim was "very young and physically infirm."

*Id.* at 446-47, 718 S.E.2d at 680 (citation omitted). In other words, the victim's infancy was the sole evidence to establish the recklessness of shaking him, and, of course, his age of five months was also the evidence to prove the aggravating factor of the victim in *Barrow* being "very young." *See id.*

Here, as noted *supra*, at trial, testimony from the victim and other witnesses established that, following the rape, the victim suffered mental and emotional consequences from the rape that extended for a time well beyond the attack itself. *See Baker*, 336 N.C. at 62-63, 441 S.E.2d at 554. These after-effects of the crime were the evidence that the jury considered in finding that the victim suffered a serious personal injury, an element of first-degree rape. *See id.* None of the evidence regarding the lingering negative impact of the rape on the

victim's emotional well-being was specifically related to her age. Indeed, it would not be surprising for a rape victim of *any* age to suffer such after-effects. Further, because all of this evidence concerned the victim's behavior, mental state, and activities *after* the rape, plainly none of it can have been relevant to "whether the victim, by reason of h[er] years, was more vulnerable to the [crime] committed against [her] than [she] otherwise would have been." *Hilbert*, 145 N.C. App. at 443, 549 S.E.2d at 884; *see also State v. Hines*, 314 N.C. 522, 525, 335 S.E.2d 6, 8 (1985) (noting that this aggravating factor is properly found "where age impedes a victim from fleeing, fending off attack, recovering from its effects, or otherwise avoiding being victimized"). The pertinent evidence on this issue was that Defendant was 53 years old, while the victim was 82 years old and attempted to fight back against Defendant but was overpowered by him. In sum, for the age of the victim to be an aggravating factor, the relevant evidence is that existing before or during the crime: whether and how age made the victim a more likely or easier target. For a serious personal injury by emotional suffering to be found to prove first-degree rape, the relevant evidence is that existing after and caused by the crime: on-going harmful effects of the crime on the victim's

well-being. In this case, there is no overlap in the evidence on these issues, and thus, the jury cannot possibly have relied on the same evidence in making these two distinct determinations. Accordingly, there was no need for the trial court to give any instruction cautioning against a violation of section 15A-1340.16(d).

NO ERROR.

Judges GEER and DILLON concur.