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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-160

Filed: 17 November 2015

Moore County, Nos. 13 CRS 1790, 51955

STATE OF NORTH CAROLINA

v.

GLYNN EDWARDS JACOBS, Defendant

Appeal by defendant from judgment entered 15 September 2014 by Judge Lindsay R. Davis, Jr. in Moore County Superior Court. Heard in the Court of Appeals 24 August 2015.

Roy Cooper, Attorney General, by June S. Ferrell, Special Deputy Attorney General, for the State.

Staples Hughes, Appellate Defender, by John F. Carella, Assistant Appellate Defender, for defendant-appellant.

DAVIS, Judge.

Glynn Edwards Jacobs (“Defendant”) appeals from the trial court’s 15 September 2014 judgment entered on the jury’s verdicts finding him guilty of attempted first-degree rape, assault with a deadly weapon, and attaining the status of a violent habitual felon. On appeal, Defendant argues that the trial court committed plain error by (1) admitting the victim’s prior statement into evidence; and

(2) failing to give a limiting instruction to the jury concerning the prior statement.

After careful review, we conclude that Defendant received a fair trial free from error.

Factual Background

The State's evidence at trial tended to establish the following facts: On 28 June 2013, "Martha"¹ decided to walk from her friends' home in Pine Bluff, North Carolina to a nearby Walmart to purchase herself a birthday cake. Martha is from Germany and was spending the summer in North Carolina visiting her former host family with whom she had stayed during the 2009-2010 school year as a foreign exchange student. Upon approaching Highway 5, she crossed the road and began to follow the railroad tracks toward her destination.

As she was walking, Martha heard someone approaching her from behind. She saw Defendant jogging toward her and stepped off the railroad tracks "to get out of the way." Defendant also stepped off the tracks, came toward Martha, and grabbed her by the shoulders. She began to scream, and Defendant pushed her to the ground, put his hands around her neck, and started to choke her. Martha struggled to get free and was able to get back on her feet when Defendant pulled out a knife and told her "to be quiet, to not do anything, to not resist." Martha responded, "All right. Just don't kill me. I will do anything you tell me to, but do not kill me." At that point,

¹ "Martha" is a pseudonym used throughout this opinion to protect the privacy of the victim in this case and for ease of reading.

Defendant began to drag Martha toward some bushes near the other side of the railroad tracks.

Defendant ordered Martha to take off her clothes, and she complied. Martha was on the ground near the bushes when Defendant, who was standing behind her, started to “feel on” her. Defendant ordered Martha not to move and threatened to stab her in the ribs as he “was trying to get inside of [her] with his hand” and “[t]rying to start raping [her].” Martha pleaded for Defendant to put away the knife and told him that she would not “do anything stupid anymore.” When Defendant closed the knife and put it in his pants pocket, Martha ran up the hill away from Defendant and toward the highway. Martha reached the highway and ran into the road, attempting to flag down a passing car. Several cars stopped to assist her, and law enforcement officers were called to the scene.

While Martha was sitting in a police car at the scene, she observed a green Volkswagen Beetle (“the Beetle”) parked in a nearby driveway. She recognized the vehicle from earlier that day because it had a distinctive “little bumper sticker on the back in the window” of a pink deer. While she was walking to the Walmart before the attack, the driver of the Beetle had driven past her, rolled his window down, and asked her if she wanted a ride, which she declined. Shortly thereafter, she noticed the Beetle drive past again, this time in the opposite direction. Martha informed the police officer sitting with her of the “coincidence” of seeing the green Beetle again.

STATE V. JACOBS

Opinion of the Court

The following week, Detective Bobbi Rodger (“Detective Rodger”) of the Aberdeen Police Department, one of the officers investigating the attack, recalled observing a vehicle matching Martha’s description of the Beetle at a construction site while responding to an incident there. The vehicle Detective Rodger had seen at the construction site bore a South Carolina license plate. Detective Rodger returned to the construction site and asked the construction company’s human resources department if any of the company’s employees were from South Carolina. Detective Rodger was provided with Defendant’s name and informed that he was now working at a site in Goldsboro. Defendant was apprehended in Goldsboro and arrested for attempted first-degree rape, kidnapping, and assault with a deadly weapon.

On 19 August 2013, a grand jury returned bills of indictment charging Defendant with attempted first-degree rape, first-degree kidnapping, assault with a deadly weapon, and having attained habitual felon status and violent habitual felon status. A jury trial was held in Moore County Superior Court before the Honorable Lindsay R. Davis, Jr. beginning on 8 September 2014.

At trial, Martha testified about the attack and identified Defendant as her attacker. The State introduced Martha’s prior statement that she had made to law enforcement officers the day of the incident to corroborate her trial testimony.

Following the State’s case-in-chief, Defendant elected to testify in his own defense. Defendant denied assaulting or attempting to rape Martha and stated that

STATE V. JACOBS

Opinion of the Court

he had seen Martha walking down the highway with another man. He testified that he gave Martha and the other man a ride in his Beetle, and the man asked him to pull over at a house. The man then asked him for money and started to grab Defendant's necklace. Defendant fled, leaving his car there. Defendant testified that he later attempted to retrieve the Beetle but could not locate it because his glasses had been knocked off during the altercation.

The jury found Defendant guilty of attempted first-degree rape, assault with a deadly weapon, and attaining violent habitual felon status. The trial court entered judgment on the jury's verdicts, sentencing Defendant to life imprisonment without parole. Defendant gave notice of appeal in open court.

Analysis

Defendant initially argues that Martha's prior statement to law enforcement officers at the police department on the day of the attack was inadmissible as corroborative evidence because it contained key facts not present in her trial testimony. Defendant did not object to the prior statement's admission at trial, and we are therefore limited to reviewing this issue solely for plain error.

On plain error review, Defendant bears the burden of showing that a fundamental error occurred at trial. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "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." *Id.* (citation and quotation marks omitted). Defendant argues that the improper admission of the prior statement at trial rose to the level of plain error because Defendant's remarks to Martha during the attack as described in her prior statement constituted the only evidence demonstrating Defendant's intent to rape Martha — an essential element of attempted first-degree rape. *See State v. Oxendine*, 150 N.C. App. 670, 673, 564 S.E.2d 561, 564 (2002) ("To convict a defendant of attempted rape, the State must prove the following two essential elements beyond a reasonable doubt: (1) that the defendant had the specific intent to rape the victim, and (2) that the defendant committed an act that goes beyond mere preparation, but falls short of the actual commission of the rape." (citation, quotation marks, and brackets omitted)), *disc. review denied*, 356 N.C. 689, 578 S.E.2d 325 (2003).

A witness' prior consistent statement may be admitted at trial for corroborative, nonhearsay purposes. *State v. Tellez*, 200 N.C. App. 517, 526, 684 S.E.2d 733, 739-40 (2009).

Corroborative 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's 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.

STATE V. JACOBS

Opinion of the Court

State v. Bell, 159 N.C. App. 151, 155, 584 S.E.2d 298, 301 (2003) (internal citations and quotation marks omitted), *cert. denied*, 358 N.C. 733, 601 S.E.2d 863 (2004).

A prior out-of-court statement is not rendered inadmissible because of slight variations between the pretrial statement and the witness' trial testimony because "[s]uch variations affect only the weight of the evidence which is for the jury to determine." *State v. Duffie*, ___ N.C. App. ___, ___, 772 S.E.2d 100, 105 (2015) (citation and quotation marks 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.

Here, Defendant argues that Martha's prior statement was inconsistent with her trial testimony because while the prior statement included a description of Defendant telling her that he "just want[ed] sex" and her response that she would "have intercourse with him if he just put[] the knife up," her trial testimony did not include this exchange of words. We disagree.

At trial, Martha's narrative of the attack mirrored the earlier account contained in her prior statement to the police. She explained that Defendant came up from behind her while she was walking on the railroad tracks and then grabbed her, choked her, and threatened her with a knife. She further testified that Defendant forced her to remove her clothes and that she told him she would "do whatever he want[ed her] to do" if he put the knife away. Finally, she recounted how

STATE V. JACOBS

Opinion of the Court

she was able to escape from Defendant by running toward the highway while Defendant was putting away the knife. Martha's prior statement described this same sequence of events.

While Martha did not testify at trial that Defendant expressly told her he wanted to have sexual intercourse with her, she did state that Defendant told her not to resist, pulled her into a wooded area, instructed her at knifepoint to take off her clothes and get on the ground, began to "feel on" her lower body, and then attempted to "get inside of [her] with his hand" and "start raping [her]." Therefore, we cannot conclude that Martha's prior out-of-court statements that (1) Defendant told her he "just want[ed] sex"; and (2) she said she would "have intercourse with him if he just put[] the knife up," contradicted her trial testimony so as to render the admission of Martha's pretrial statement erroneous. Indeed, our Supreme Court has emphasized that "prior 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." *State v. Williamson*, 333 N.C. 128, 136, 423 S.E.2d 766, 770 (1992). We conclude that this standard is clearly satisfied here.

Moreover, Martha's trial testimony that Defendant forced her to remove all of her clothing, began touching her lower body, and tried to "get inside of [her] with his hand" and "start raping [her]" provided sufficient circumstantial evidence of Defendant's intent to rape her to support his conviction of attempted first-degree

STATE V. JACOBS

Opinion of the Court

rape. See *Oxendine*, 150 N.C. App. at 674, 564 S.E.2d at 564 (“An overt act manifesting a sexual purpose or motivation on the part of the defendant is adequate evidence of an intent to commit rape. Evidence that an attack is sexually motivated will support a reasonable inference of intent to engage in vaginal intercourse with the victim even though other inferences are also possible.” (citations and quotation marks omitted)).

While Defendant attempts to analogize the present case to *State v. Warren*, 289 N.C. 551, 223 S.E.2d 317 (1976), in asserting that Martha’s pretrial statement contradicted her trial testimony, *Warren* is easily distinguishable. In *Warren*, the State called Curtis Boyd Wyatt (“Wyatt”) to testify concerning information the defendant had revealed to him while the two were in jail together. *Id.* at 554, 223 S.E.2d at 319-20. The State then called State Bureau of Investigation Agent Dan Crawford (“Agent Crawford”) to corroborate Wyatt’s trial testimony. Agent Crawford testified that he had interviewed Wyatt prior to trial and then related the statement Wyatt had made during the interview. *Id.* at 555-56, 223 S.E.2d at 320.

In contrast to Wyatt’s trial testimony that the defendant had told Wyatt that he and his co-perpetrator decided to rob the victim, the victim “bucked up on them,” and that the defendant possessed a knife at the time, Agent Crawford testified that Wyatt had previously stated in his interview that (1) the defendant had planned to kill the victim; (2) the defendant cut the victim’s throat, chest, and face; and (3) after

killing the victim, the defendant and his co-perpetrator had planned to kill another person. *Id.* at 556-57, 223 S.E.2d at 320-21. Our Supreme Court concluded that the prior statement was improperly admitted because rather than corroborating Wyatt's testimony, the statements from the pretrial interview instead "flatly contradict[ed]" several key portions of his testimony — namely, the part where Wyatt "emphasized that defendant did not say he stabbed the deceased in the chest or cut him in the face, and that Wyatt never told anyone that he did." *Id.* at 556, 223 S.E.2d at 320-21. The Supreme Court concluded that the admission of the prior statement was prejudicial to the defendant and awarded him a new trial. *Id.* at 560, 223 S.E.2d at 322.

Unlike in *Warren*, Martha's prior statement did not contradict her testimony at trial. Instead, her pretrial statement followed in detail the same sequence of events that she testified to on the witness stand and merely included the additional information that Defendant had told her that he wanted to have sex with her. This additional piece of information did not render her pretrial statement inconsistent with her trial testimony given the other facts, discussed above, to which Martha testified that likewise suggested Defendant intended to have sex with her. *See State v. Lloyd*, 354 N.C. 76, 103-04, 552 S.E.2d 596, 617 (2001) (explaining that prior statement "need not merely relate to specific facts brought out in the witness's testimony at trial" and may "contain new or additional information so long as the

narration of events is substantially similar to the witness’s in-court testimony” (citations and quotation marks omitted)).

Consequently, because Martha’s prior statement corroborated her trial testimony, the trial court did not err — much less commit plain error — by admitting this statement into evidence. *See State v. Wade*, 213 N.C. App. 481, 493, 714 S.E.2d 451, 459 (2011) (explaining that before trial court’s action “can be plain error, it must be error”), *disc. review denied*, 366 N.C. 228, 726 S.E.2d 181 (2012). Therefore, Defendant’s argument is overruled.

In a related argument, Defendant contends that even if Martha’s prior statement was properly admitted, the trial court committed plain error by failing to instruct the jury at the time it was offered that the statement was being admitted solely for corroborative purposes — particularly in light of the fact that the trial court gave contemporaneous limiting instructions in connection with the admission of prior statements from several other witnesses who testified at trial. However, “[t]he law of this State is that an instruction limiting admissibility of testimony to corroboration is not required *unless counsel specifically requests such an instruction.*” *State v. Smith*, 315 N.C. 76, 82, 337 S.E.2d 833, 838 (1985) (emphasis added). Thus, the trial court’s failure to give a limiting instruction *sua sponte* at the time of the evidence’s admission does not constitute error. *State v. McGraw*, 137 N.C. App. 726, 730-31, 529 S.E.2d 493, 497-98, *disc. review denied*, 352 N.C. 360, 544 S.E.2d 554 (2000).

Accordingly, because the omission of such a limiting instruction under these circumstances was not error at all, it likewise cannot constitute plain error.²

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from error.

NO ERROR.

Chief Judge McGEE and Judge ELMORE concur.

Report per Rule 30(e).

² We note that during its charge to the jury at the conclusion of all of the evidence, the trial court explained that a witness' prior statement was "not substantive evidence," could only be used "in deciding whether you will believe or disbelieve the witness's testimony," and could not be considered for any other purpose. Therefore, the jury was properly informed that Martha's pretrial statement could only be considered for corroborative purposes.