IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-511

Filed: 15 December 2015

Perquimans County, Nos. 12 CRS 50361, 13 CRS 29-32

STATE OF NORTH CAROLINA

v.

HARRELL GARRETT THACH

Appeal by Defendant from judgments entered 11 September 2014 by Judge Walter H. Godwin, Jr., in Perquimans County Superior Court. Heard in the Court of Appeals 21 October 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Larissa S. Williamson, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Katherine Jane Allen, for Defendant.

STEPHENS, Judge.

Factual and Procedural Background

In 1990, Defendant Harrell Garrett Thach was a thirty-six-year-old teacher at Perquimans High School. Thach, his wife, and their two children all rode horses at a local stable. "Kelly,"[1] a sixth-grade student who lived in Pasquotank County with her

[1] We refer to the minor victim in this case by a pseudonym in an effort to protect her privacy.

mother, boarded her horse at the same stable. Kelly knew Thach in passing, having encountered him and his family often at the stable. One day as Kelly was grooming her horse, Thach came up to her and kissed her on the mouth.

Shortly thereafter, Thach suggested to Kelly's mother that she move her horses to board at the Thach family farm. Kelly's mother agreed and also hired Thach as Kelly's trainer for horse shows. As a result of this arrangement, Kelly began spending a large amount of time with Thach and his family, including overnight trips out of town to attend horse shows. When Kelly was about 13 years old, she accompanied the Thach family on a beach vacation, during which Thach pushed his hand into Kelly's bathing suit and inserted his fingers into her vagina.

In 1991, on the day of her thirteenth birthday, Kelly was showering at the Thach home in preparation for a celebration dinner in her honor. Thach entered the shower, placed his hand over her mouth, and had vaginal intercourse with Kelly for the first time. Later, during a trip to an out-of-town horse show, Thach forced Kelly to perform oral sex on him. Thereafter, Kelly began to fear Thach. Through 1993, Thach engaged in vaginal intercourse and oral sex with Kelly on several occasions, as well as fondling and kissing her. Kelly's mother discovered the relationship in October 1993 when she overheard what she considered to be an inappropriate phone conversation between Thach and Kelly. Unknown to Thach or Kelly, the conversation was recorded on the family's answering machine as Kelly's mother listened. Kelly's

mother did not interrupt the call, but disturbed by what she heard, allowed the call and recording to continue. Thereafter, Kelly's mother made a recording of the answering machine message. Kelly's mother played the recording for various people, including, *inter alia*, Kelly, Kelly's mother's boyfriend, an attorney, and Thach's wife. Kelly's mother also gave Thach's wife a copy of the recording. Kelly's "relationship" with Thach ended after her mother confronted her with the recording. She also moved Kelly's horses to another farm and sent Kelly to live at her father's home. The Thachs were divorced in 2005.

A copy of the recording was mailed to the Perquimans County District Attorney in 2012, which subsequently led to an investigation in which the State Bureau of Investigation ("SBI") assisted. SBI Agent Jennifer Matherly identified Kelly as one of the parties speaking on the recording and interviewed her. As a result of Kelly's cooperation, Thach was arrested in October 2012, and, on 10 December 2012, he was indicted on two counts of taking indecent liberties with a child. On 28 January 2013, the grand jury indicted Thach on eight additional counts of taking indecent liberties with a child. The case came on for trial at the 8 September 2014 criminal session of Perquimans County Superior Court, the Honorable Walter H. Godwin, Jr., Judge presiding. On 11 September 2014, the jury returned verdicts finding Thach guilty of all ten charges and further found the aggravating factor that Thach took advantage of a position of trust or confidence in committing eight of the offenses. The trial court

consolidated some of the convictions and imposed five consecutive sentences, one for three years in prison and the other four for seven years each. Thach gave notice of appeal in open court.

Discussion

I. Jury instructions

Thach first argues that the trial court plainly erred in failing to instruct the jury that evidence necessary to prove an element of the offense of taking indecent liberties with a child could not also be used to prove an aggravating factor. We disagree.

At trial, Thach did not request the omitted instruction and did not object to the instructions as given.

> In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C.R. App. P. 10(a)(4). We "review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996) (citations omitted). Plain error occurs when the error is "so basic, so prejudicial, so lacking in its elements that justice cannot have been done . . . ." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation and internal

quotation marks omitted). "Under the plain error rule, [the] defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted).

Thach was charged with taking indecent liberties with a child, the elements of which are:

> (1) the defendant was at least 16 years of age; (2) he was five years older than his victim; (3) he willfully took or attempted to take an indecent liberty with the victim; (4) the victim was under 16 years of age at the time the alleged act or attempted act occurred; and (5) the action by the defendant was for the purpose of arousing or gratifying sexual desire.

State v. Thaggard, 168 N.C. App. 263, 282, 608 S.E.2d 774, 786-87 (2005) (citations omitted). The State also alleged an aggravating factor: that "[t]he defendant took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense." *See* N.C. Gen. Stat. § 15A-1340.16(d)(15) (2013). "Our Structured Sentencing Act provides that if the jury finds that one or more aggravating factors exist, and if the trial court determines that the aggravating factors outweigh the mitigating factors, then the court may impose a sentence in the statutorily-prescribed aggravated range." *State v. Facyson*, 367 N.C. 454, 457, 758 S.E.2d 359, 362 (2014) (citation omitted). "In determining whether an aggravating factor may properly be considered, section 15A-1340.16(d) dictates that evidence

necessary to prove an element of the offense shall not be used to prove any factor in aggravation." *Id.* at 457-58, 758 S.E.2d at 362 (citation, internal quotation marks, and brackets omitted).

Here, the trial court properly instructed the jury regarding the elements of taking indecent liberties with a child and the alleged aggravating factor, but failed to instruct the jury that "[e]vidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation . . . ." *See* N.C. Gen. Stat. § 15A-1340.16(d). That omission was error. As Thach notes,

> [t]he trial court has the burden of declaring and explaining the law arising on [the] evidence as it relates to each substantial feature of the case. Because N.C. Gen. Stat. § 15A-1340.16(d) limits what evidence the jury can consider in deciding whether an aggravating factor exists, the trial court was required to instruct the jury in accordance with the statute—as the pattern jury instruction specifies.

State v. Barrow, 216 N.C. App. 436, 445-46, 718 S.E.2d 673, 679 (2011) (citation omitted), *affirmed per curiam in part and disc. review improvidently allowed in part*, 366 N.C. 141, 727 S.E.2d 546 (2012).

However, as discussed *supra*, to establish plain error Thach must further demonstrate that, but for the trial court's failure to instruct the jury in accord with section 15A-1340.16(d), he would probably have been acquitted. *Jordan*, 333 N.C. at 440, 426 S.E.2d at 697. Thach contends that evidence of the age difference between himself and Kelly, which was required to prove several elements of taking indecent

liberties with a child, "also supported the aggravating factor submitted because . . . Thach's ability to take advantage of a position of trust or confidence was strengthened by the age difference[] between the parties." We are not persuaded.

Thach's trial was bifurcated. During the sentencing phase of the trial, the State's sole argument to the jury in support of the aggravating factor was that Thach was Kelly's trainer and she considered herself a part of his family:

> I promise this will be very brief and not to keep you here any longer. The State is alleging that the Defendant took advantage of a position of trust or confidence to commit the offense.
>
> You have heard the testimony from all of the witnesses. You have heard [Kelly] testify that the Defendant was a father-like figure to her. That she was a part of the family and he was supposed to be her horse trainer when he committed these offenses. You heard each and every witness testify that she was like part of the family. And I would ask that he—I would ask that you find him guilty—or find beyond a reasonable doubt that he used his position to take advantage. That he used his position of trust or confidence and he took advantage of the victim in this case.

In response, Thach argued that "if [Kelly] was a willing participant, then you should not find the aggravating factor." Thus, in arguing for and against the existence of the aggravating factor, neither side focused on the age difference between Thach and Kelly.

Further, we observe that the jury found Thach guilty of all ten counts of taking indecent liberties with a child, but found the aggravating factor for only eight of the

counts, even though the age difference between Thach and Kelly was obviously exactly the same when every offense took place. This strongly suggests that the jury did not rely upon evidence of that age difference in determining whether the State proved the existence of the aggravating factor beyond a reasonable doubt. Thus, Thach cannot show that the trial court's error in its instructions to the jury probably altered the outcome of his trial, and he therefore fails to establish plain error. Accordingly, we overrule this argument.

II. Admission of the telephone recording

Thach also argues that the trial court erred in admitting in evidence the recording of the telephone conversation between Thach and Kelly. Specifically, Thach contends that admission of the recording violated N.C. Gen. Stat. § 15A-287 and 18 U.S.C.S. § 2510 *et seq*. We first note that, at trial, Thach objected to the admission of the recording on two grounds: chain of custody[2] and violation of section 15A-287. Thach did not argue any violation of the federal statute at trial, and we therefore do not consider any arguments he makes on appeal on that basis. *See State v. Haselden*, 357 N.C. 1, 10, 577 S.E.2d 594, 600 (holding that appellate courts "will not consider arguments based upon matters not presented to or adjudicated by the trial court") (citations omitted), *cert. denied*, 540 U.S. 988, 157 L. Ed. 2d 382 (2003). Further, we

[2] Because Thach does not bring forward any argument regarding chain of custody, he has waived that issue on appeal. *See* N.C.R. App. P. 28(b)(6) (providing that issues not argued in a party's brief are deemed abandoned).

are not persuaded by Thach's argument that the admission of the recording violated section 15A-287.

Under our General Statutes, the "[w]illful" interception of a telephone call without the consent of at least one party to the call is a felony. *See* N.C. Gen. Stat. § 15A-287(a)(1) (2013). In *State v. McGriff*, this Court noted that, under this statute, willful means "done with a bad purpose, without justifiable excuse, or stubbornly, obstinately, or perversely." 151 N.C. App. 631, 639, 566 S.E.2d 776, 781 (2002) (citation and internal quotation marks omitted). Applying that understanding of the term willful, the Court in *McGriff* considered factual circumstances much like those here: A woman's cordless phone inadvertently picked up an upsetting and highly sexualized phone call between two of her neighbors, one a minor female and the other an adult male. *Id.* Disturbed to hear what appeared to be a discussion of sexual abuse, the woman continued to listen to the call for about an hour, confirming the identities of the speakers and noting the acts being discussed so that she could alert the mother of the minor. *Id.* The adult male was charged with sex offenses, and, at trial, the defendant, like Thach, objected to the admission of testimony about the overheard phone call, citing section 15A-287. *Id.* This Court held that the woman's "interception" of the phone call was not willful because the "continued listening was not done with a bad purpose or without a justifiable excuse; rather, it was done out of concern for the welfare of a minor." *Id.* As a result, this Court did "not address

whether a conversation heard in violation of the statute is admissible in a criminal [trial]." *Id.* at 639-40, 566 S.E.2d at 781.

Thach urges that *McGriff* is distinguishable because the woman in that case "inadvertently" eavesdropped on a call via her cordless phone, while Kelly's mother "record[ed] the conversation[.]" This assertion is based upon an inaccurate statement of the facts. Kelly's mother did *not* take any action or make a decision to record the call. Rather, like the woman in *McGriff*, Kelly's mother merely inadvertently overheard the call between Thach and Kelly which happened to be recorded on a preset answering machine and only "continued listening . . . out of concern for the welfare of a minor." *See id.* at 639, 566 S.E.2d at 781.

Thach also contends that, because she chose not to immediately confront Thach or contact the authorities, Kelly's mother was not acting out of concern for Kelly's welfare like the woman in *McGriff*. We reject this argument. Kelly's mother *did* confront both Kelly and Thach's wife, which put an immediate end to the relationship. In light of the possible consequences to her young daughter of a criminal complaint or public disclosure of sexual abuse by a trusted family friend and well-known schoolteacher, Kelly's mother's action clearly reflects concern over her daughter's welfare. In sum, the interception of the call between Thach and Kelly by Kelly's mother was not willful and, thus, section 15A-287 is inapposite here.

We are also not persuaded by Thach's argument that this Court's decision in *State v. Shaw*, 103 N.C. App. 268, 269-70, 404 S.E.2d 887, 888, *disc. review denied*, 329 N.C. 503, 407 S.E.2d 548 (1991), controls the outcome of this appeal. Thach cites *Shaw* for the proposition that recordings made in violation of section 15A-287 are inadmissible at trial. However, the Court in *Shaw* held that the recorded evidence in that case was inadmissible under the explicit bar in the *federal* statute: "No part of the contents of such communication and *no evidence derived therefrom may be received in evidence at any trial*, hearing, or other proceeding in or before any court . . . if disclosure of that information would be in violation of this chapter." *Id.* at 270, 404 S.E.2d at 888 (quoting *Rickenbaker v. Rickenbaker*, 290 N.C. 373, 382, 266 S.E.2d 347, 352 (quoting 18 U.S.C.S. § 2515) (internal quotation marks omitted; emphasis in original), *affirming as modified* 28 N.C. App. 644, 222 S.E.2d 463 (1976)). Accordingly, *Shaw* does not address the issue that Thach preserved for argument in this appeal, to wit, whether a recording obtained in violation of section 15A-287 is admissible at trial.[3] This argument lacks merit.

[3] Further, even if the conversation had been willfully intercepted by Kelly's mother and *if* such a violation rendered the recording inadmissible in a criminal proceeding, we would likely hold that Kelly's mother had the power to vicariously consent to the recordation of her minor child's phone conversation with Thach. This Court has previously held that, at least with regard to recordings made in violation of the federal statute, "the vicarious consent doctrine . . . permit[s] a custodial parent to vicariously consent to the recording of a minor child's conversations, as long as the parent[] has a good faith, objectively reasonable belief that the interception of the conversations is necessary for the best interests of the child." *Kroh v. Kroh*, 152 N.C. App. 347, 352-53, 567 S.E.2d 760, 764 (2002) (citations, internal quotation marks, colon, and some brackets omitted). Were this issue before us, we would likely apply the same reasoning to a recording made in violation of section 15A-287.

NO PREJUDICIAL ERROR IN PART; NO ERROR IN PART.

Judges STROUD and DAVIS concur.

Report per Rule 30(e).