IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-567

Filed: 17 November 2015

Wake County, No. 13 CRS 214421

STATE OF NORTH CAROLINA

v.

WILLIAM CHARLES COMPTON

Appeal by defendant from judgment entered 9 July 2014 by Judge Paul G. Gessner in Wake County Superior Court. Heard in the Court of Appeals 22 October 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Brenda Menard, for the State.

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

TYSON, Judge.

William Charles Compton ("Defendant") appeals from judgment entered after a jury convicted him of second-degree rape. We find no error in Defendant's conviction or the judgment entered thereon.

I. Factual Background

In early 2013, Defendant was residing in a men's homeless shelter in Raleigh, where he had lived for the preceding two years. In Spring 2013, Cedric Johnson ("Mr.

Johnson"), a guardian with Wake County Human Services, was assigned Defendant's case. Mr. Johnson worked with Defendant to find a more permanent placement, because Defendant "had been in a shelter so long[.]" Defendant was diagnosed with a seizure disorder, had suffered a stroke, and was not taking his medications. Mr. Johnson testified he "was trying to help [Defendant] find a place to live that was stable."

Defendant moved into Brookridge Assisted Living ("Brookridge"), located in Apex, North Carolina, in May 2013. Shortly thereafter, Mr. Johnson received phone calls from staff. They reported Defendant "was being disruptive," "disrespectful," and "calling women and staff members names[.]"

On 15 June 2013, Apex Police Department Officers Brian Opitz ("Officer Opitz") and Jonathan Guider ("Officer Guider") responded to a call from Brookridge, regarding complaints from residents alleging Defendant was communicating threats. Officer Guider spoke with several residents upon his arrival.

Officer Guider testified he called his superior, Corporal Steve Duckworth ("Corporal Duckworth") after his conversation with the residents because "there was an allegation of a rape that had occurred." D.D., the purported victim, was among the residents with whom the officers had spoken.

D.D. suffered a stroke in 2006. D.D.'s daughter, Tonya Hunter ("Tonya"), testified her mother had been a resident at Brookridge for three years at the time of

trial. Tonya explained her mother was unable to use her right arm, had trouble walking unassisted, and used a wheelchair. D.D. also wore a back brace in May and June 2013, due to an injury she sustained after falling inside the shower at Brookridge. Tonya testified her mother suffered from aphasia as a result of the stroke, and was unable to speak. D.D. communicated with others by nodding or shaking her head, and by writing with her left hand.

Corporal Duckworth spoke with Defendant in the hallway outside of his room after becoming aware of the rape allegation. Corporal Duckworth asked Defendant about his relationship with D.D. Defendant responded, "I'm just f—king her."

Officer Guider testified he also spoke with Defendant at Brookridge. Defendant asked Officer Guider, "Can you tell me what the f—k we're doing here?" Officer Guider replied, "I don't know. Why do you think we're here?" Defendant responded, "Slut probably made something up. . . . The slut that I've been f—king that gave me herpes." Officer Guider asked Defendant if he was referring to a girlfriend or a wife, to which Defendant replied, "No, just some slut I've been f—king."

Officer Guider continued to inquire into what Defendant was talking about, and Defendant mentioned D.D.'s name. Officer Guider asked Defendant if D.D. had told Defendant she wanted to have sex with him. Defendant replied, "No. She can't f—king talk." Officer Guider asked Defendant how D.D. told Defendant she wanted

to have sex with him. Defendant responded, "I don't f—king know. I didn't rape her or nothing."

Detective Worth Brown ("Detective Brown"), a criminal investigator with the Apex Police Department, arrived on the scene after the officers realized the changing nature of the call. Detective Brown testified his "primary duties are to investigate child abuse and sexual assault." Detective Brown spoke with D.D., and she confirmed Defendant was the individual who allegedly raped her.

The officers eventually asked Defendant to voluntarily accompany them to the Apex Police Department, and Defendant agreed. Defendant was not in custody or restrained in any way. Detective Brown interviewed Defendant at the police station. This interview was taped. The video recording was played for the jury at trial.

During the interrogation, Defendant once again stated he had sexual relations with D.D. in exchange for cigarettes. Defendant alleged D.D. infected him with herpes. He repeatedly referred to D.D. as a "slut," and said she was "full of s—t" if she said the sexual acts were not consensual. He denied raping her. Defendant was arrested and charged with second-degree rape.

On 6 August 2013, a grand jury indicted Defendant for one count of second-degree rape of a physically helpless person, and one count of first-degree kidnapping for the purpose of committing rape. Defendant was tried before a jury on 7 July 2014.

A. Victim's Testimony

D.D. testified at trial. She wrote her responses to counsel's questions on a steno pad because she is unable to speak. An employee from the clerk of court's office read D.D.'s written responses aloud to the jury. The steno pad was also tendered and admitted into evidence as State's Exhibit 1.

D.D. testified she had never wanted to have a sexual relationship with Defendant. She wrote Defendant pushed her wheelchair into his bedroom and raped her. D.D. stated she never told Defendant she wanted to have sex with him, and she was unable to resist him or get him off of her due to her physical incapacities. D.D. also testified she was not planning to report the incident to police because Defendant had threatened her by saying, "You ever tell anyone, so help me, bitch."

B. Defendant's Testimony

Defendant testified in his own defense. He admitted he had sex with D.D., but stated it was not against her will. Defendant claimed "[D.D.]'s not as crippled as she wants everybody to think she is." Defendant testified he began having sex with D.D. "because [he] was trading cigarettes for sex." He stated when he initially suggested the idea to her, "[s]he was appalled at first and then finally agreed to it."

Defendant also testified that on another occasion, D.D. "pushed [him] backwards [into the bushes] and motioned to come down there." He subsequently admitted he had not told the truth, after explaining he weighed 230 pounds and he estimated D.D. weighed 100 pounds. He stated, "Well, she motioned me down there."

The State asked Defendant about his five former wives. The following dialogue ensued:

> Q: Tell me about the five wives that you've had.
>
> A: Well, they all became useless to me, as I really don't have any use for a woman other than sex.
>
> Q: And that's really the truth, isn't it?
>
> A: It is.
>
> Q: You don't care for women at all?
>
> A: Not at all.
>
> . . . .
>
> Q: Bottom line. And they're just a vessel for you to have sex; isn't that true?
>
> A: That's true.

C. Jury Instructions

At the close of all the evidence, the trial judge informed the State and Defendant's counsel he intended to use the pattern jury instruction for second-degree rape. After the court's inquiry, Defendant's counsel stated he did not have any additions, deletions, or special requests for the jury instructions.

The trial judge also told the parties he would incorporate two definitions of "physically helpless" from the pattern jury instructions, which were pertinent to the

case: "physically unable to resist an act of vaginal intercourse" and "physically unable to communicate unwillingness to submit to an act of vaginal intercourse."

The trial judge asked counsel for Defendant if he wished to be heard on this matter. Defense counsel stated he "agree[d] those are the two appropriate parentheticals" for this case, and did not wish to be heard on any other matter regarding the pattern jury instructions.

The trial court's instruction to the jury on second-degree rape stated as follows:

> The defendant has been charged with second degree rape. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt:
>
> First, that the defendant engaged in vaginal intercourse with [D.D.]. . . .
>
> Second, that the victim was physically helpless. A person is physically helpless if the person is physically unable to resist an act of vaginal intercourse or physically unable to communicate unwillingness to submit to an act of vaginal intercourse.
>
> And third, that the defendant knew or should reasonably have known that the victim was physically helpless.

The jury began deliberations and presented two questions to the court after receiving the instructions on second-degree rape. The trial judge read both notes into the record. The first note read: "Can she legally consent to have sex if she is physically handicapped?" The second note read: "Judge, as much as it doesn't make

sense, even if the plaintiff consented to having sex, does that have any effect on the outcome of our decision?"

The trial judge explained his proposed response to the jury's questions to counsel, and called the jury back into the courtroom. The trial judge responded to the jury's questions by stating:

> Members of the jury, in my discretion, I'm going to charge you as follows . . . in response to the two questions that you have handed out.
>
> In this matter, all the evidence has been presented. I have given you the law that you are to apply in this case. Each element of each offense is given to you. I charged you on it, and I have given you a copy. That is the law that you are to apply in this case.
>
> You are to apply the law as the Court has given to you and not as you think it is or as you might like for it to be. And I believe that that specific instruction was something that we went over . . . in jury selection, and is also in the very beginning. It's the first instruction that I gave you, that it's your duty that you understand and apply the law as I give it to you and not as you think it is, or as you might like it to be.
>
> . . . .
>
> So in closing, I'm just going to say, you need to go back to the jury room and *apply all of the law that I've given to you and only the law that I have given to you in your deliberations*.

(emphasis supplied). Neither the State nor defense counsel objected to this instruction.

The jury returned a verdict finding Defendant guilty of second-degree rape and first-degree kidnapping. The trial court arrested judgment on the conviction of first-degree kidnapping and entered judgment for second-degree kidnapping.

The trial court sentenced Defendant to a term of 83 to 172 months imprisonment for his second-degree rape conviction. The trial court sentenced Defendant to a consecutive term of 29 to 47 months imprisonment for his second-degree kidnapping conviction, to begin at the expiration of his sentence for his second-degree rape conviction. The trial court also ordered Defendant to register as a sex offender and enroll in satellite-based monitoring for the remainder of his life.

Defendant gave notice of appeal in open court.

II. Issue

Defendant argues the trial court erred by instructing the jury on the elements of second-degree rape using the pattern jury instructions.

III. Standard of Review

Defendant failed to object to any portion of the trial court's jury instructions on second-degree rape at trial. "A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict[.]" N.C.R. App. P. 10(a)(2).

Under our limited review, we determine whether the trial court's failure to instruct the jury that lack of consent was an element of the offense constituted plain

error. N.C.R. App. P. 10(a)(4) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved . . . 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."); *State v. Goforth*, 170 N.C. App. 584, 587, 614 S.E.2d 313, 315 (stating "[b]ecause defendant failed to object to the jury instructions at trial, the standard of review therefore is plain error"), *cert. denied*, 359 N.C. 854, 619 S.E.2d 854 (2005).

> 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 affects 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).

IV. Analysis

Defendant does not dispute D.D. was physically helpless or unable to verbally communicate. Defendant argues the trial court, through its instructions to the jury, erroneously failed to instruct the jury that it must find a lack of consent as a necessary element to convict him of second-degree rape with a physically helpless person. We disagree.

N.C. Gen. Stat. § 14-27.3(a) provides:

> A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person:
>
> > (1) By force and against the will of the other person; *or*
> >
> > (2) Who is mentally disabled, mentally incapacitated, or *physically helpless*, and the person performing the act knows or should reasonably know the other person is mentally disabled, mentally incapacitated, or physically helpless.

N.C. Gen. Stat. § 14-27.3(a) (2013) (emphasis supplied).

N.C. Gen. Stat. § 14-27.1(3) defines "physically helpless" as "a victim who is unconscious[,]" or "a victim who is physically *unable to resist* an act of vaginal intercourse or a sexual act *or communicate unwillingness* to submit to an act of vaginal intercourse or a sexual act." N.C. Gen. Stat. § 14-27.1(3) (2013) (emphasis supplied).

Our Supreme Court held "[i]n the case of a sleeping, or similarly incapacitated victim . . . sexual intercourse with the victim is *ipso facto* rape because the force and lack of consent are implied in law." *State v. Moorman*, 320 N.C. 387, 392, 358 S.E.2d 502, 506 (1987) (noting "[o]ur rape statues essentially codify the common law of rape," which "implied in law the elements of force and lack of consent so as to make the crime of rape complete upon the mere showing of sexual intercourse with a person who is asleep, unconscious, or otherwise incapacitated"); *see also Bill Books File*, H.B.

800 (1979) May 22, 1979 Senate Debate, p. 3 (Senator Mathis stating, "In second degree rape, we are adding persons who are mentally defective, mentally incapacitated, or physically helpless. This is basically a statutory rape section in cases where someone engages in a sex act with a person who is, in fact, incapable of resisting or communicating resistance.").

Defendant relies on our Supreme Court's holding in *State v. Holden*, 338 N.C. 394, 406, 450 S.E.2d 878, 884-85 (1994) for the proposition that there is "no merit in the suggestion that N.C.G.S. § 14-27.3(a)(2) makes it a crime to have *consensual* sexual intercourse with a physically helpless person." *Id.* (emphasis in original). Defendant's reliance on *Holden* is inapplicable to the facts at bar.

In *Holden*, the issue was whether the defendant's prior conviction of attempted second-degree rape, standing alone, was sufficient for a jury to find as an aggravating factor the commission of a felony involving the use of violence. The defendant was convicted of first-degree murder and sentenced to death. At his capital sentencing proceeding, the jury found three aggravating factors, one of which was the defendant was previously convicted of a felony involving the use of violence to the victim — attempted second-degree rape. *Id.* at 397, 403, 450 S.E.2d at 879, 883. The trial court instructed the jury that "attempted rape is by definition a felony involving the use of violence to the person." *Id.* at 403-04, 450 S.E.2d at 883.

On appeal, the defendant argued his conviction of attempted second-degree rape, standing alone, was insufficient to prove the aggravating circumstance beyond a reasonable doubt. The defendant contended a conviction of "second-degree rape may be predicated on sexual intercourse with a person who is mentally defective, mentally incapacitated, or physically helpless." *Id.* (citation omitted). Noticeably absent from the defendant's argument in *Holden* was whether the State needed to prove lack of consent in order to support a conviction of second-degree rape.

Our Supreme Court explicitly disagreed with the defendant's assertion, and reaffirmed its holding in *Moorman* that "sexual intercourse with [a physically helpless] victim is *ipso facto* rape because the force and lack of consent are implied in law." *Moorman*, 320 N.C. at 392, 358 S.E.2d at 506. The Court in *Holden* further emphasized this point by stating, "we reject the notion of any felony which may properly be deemed 'non-violent rape.'" *Holden*, 338 N.C. at 405, 450 S.E.2d at 884.

Here, the trial judge apprised the State and defense counsel of the pattern jury instructions he intended to use. The State and defense counsel were given an opportunity to object to or raise any concerns regarding the applicable instructions. Defense counsel did not raise any objections, and agreed to the submission of the definitions of "physically helpless" the trial judge planned to incorporate into the jury instructions. The pattern jury instructions with which the trial judge charged the jury comport with both North Carolina statutory and case law.

After deliberating for some time, the jury asked the trial judge two questions: (1) "Can she legally consent to have sex if she is physically handicapped?" and (2) "Judge, as much as it doesn't make sense, even if the plaintiff consented to having sex, does that have any effect on the outcome of our decision?" The trial judge directed the jury to the pattern jury instructions on second-degree rape of a physically helpless person and instructed the jurors "to apply the law as the Court has given to you and not as you think it is or as you might like for it to be."

The trial judge properly declined to give an additional instruction on consent. *State v. Weddington*, 329 N.C. 202, 210, 404 S.E.2d 671, 677 (1991) (holding trial court may repeat pertinent portions of its instructions in their entirety in order to address jurors' questions regarding elements of crime charged). "[T]he trial court is in the best position to determine whether further additional instruction will aid or confuse the jury in its deliberations, or if further instruction will prevent or cause in itself an undue emphasis being placed on a particular portion of the court's instructions." *State v. Prevette*, 317 N.C. 148, 164, 345 S.E.2d 159, 169 (1986).

Whether to give additional instructions is within the trial court's discretion pursuant to N.C. Gen. Stat. § 15A-1234:

> (a) After the jury retires for deliberation, the judge *may* give appropriate additional instructions to:
>
> > (1) Respond to an inquiry of the jury made in open court; or

> (2) Correct or withdraw an erroneous instruction; or
>
> (3) Clarify an ambiguous instruction; or
>
> (4) Instruct the jury on a point of law which should have been covered in the original instructions.

N.C. Gen. Stat. § 15A-1234(a) (2013) (emphasis supplied). "[T]he trial court is not required to repeat instructions which have been previously given absent an error in the charge." *State v. Moore*, 339 N.C. 456, 464, 451 S.E.2d 232, 236 (1994).

Again, we emphasize Defendant does not challenge that D.D. was physically helpless or could not verbally communicate. The trial court may instruct the jury in a second-degree rape case involving a victim who is physically helpless that force and lack of consent are implied in law based on our Supreme Court's decision in *State v. Moorman*, "if the uncontroverted facts could only lead to but one conclusion." *State v. Smith*, 170 N.C. App. 461, 467, 613 S.E.2d 304, 310 (2005) (holding trial court could not determine force and lack of consent as a matter of law where issue of whether victim was asleep at the time of sexual contact was in dispute).

Defendant failed to carry his burden to show *any* error occurred at his trial, much less a plain or "fundamental error" having "a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. The trial court properly instructed the jury on the elements of second-degree rape of a physically helpless person "because the force and lack of consent are implied in

law." *Moorman*, 320 N.C. at 392, 358 S.E.2d at 506. Defendant's argument is overruled.

V. Conclusion

Defendant failed to carry his burden to show the trial court's instructions on second-degree rape of a physically helpless person constituted plain error. The trial court properly answered the jury's questions by repeating its original instructions.

Defendant received a fair trial free from prejudicial or plain errors he preserved and argued. We find no error in Defendant's conviction or the judgment entered thereon.

NO ERROR.

Judges McCULLOUGH and DIETZ concur.

Report per Rule 30(e).