IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1400

Filed: 4 October 2016

Guilford County, Nos. 13 CRS 100144, 100146-52, 100154, 14 CRS 24350

STATE OF NORTH CAROLINA

v.

QUENTON LEE DICK

Appeal by defendant from judgment entered 18 June 2015 by Judge Susan E. Bray in Guilford County Superior Court. Heard in the Court of Appeals 8 June 2016.

Roy Cooper, Attorney General, by James M. Stanley, Jr., Special Deputy Attorney General, for the State.

Mark Montgomery for defendant-appellant.

DAVIS, Judge.

Quenton Lee Dick ("Defendant") appeals from the judgment entered upon his convictions for one count of first degree sexual offense, one count of first degree burglary, four counts of first degree kidnapping, and four counts of first degree robbery with a firearm. On appeal, he contends that the trial court erred in submitting the charge of first degree sexual offense to the jury on the theory that he was aided and abetted by another person. After careful review, we vacate his

conviction for first degree sexual offense and remand for a new trial solely as to that charge and for resentencing.

Factual Background

The State presented evidence at trial tending to establish the following facts: At approximately 2:00 a.m. on 4 December 2013, E.M.[1] and her roommate Ottiana Robinson were at their apartment in Greensboro, North Carolina. Two other persons — Tyri Simien and Eean Whiteside — were also present. There was a knock on the door, and Robinson, who was waiting for a friend to arrive, answered the door. Robinson returned to the living room and said, "[T]hey had the wrong apartment[.]"

Upon hearing another knock, Robinson once again opened the door. A man wearing a bandanna on his face walked into the apartment, looked around, and then walked out. Robinson tried to close the door, but four men with hoodies or bandannas over their heads walked in. Two of the men had guns.

Three of the men went into the back of the apartment and began carrying various items out the door. The fourth man stood in the living room with a gun pointed at E.M., Robinson, Simien, and Whiteside. He told them to go to their rooms and get their purses and other belongings. When they returned, two of the men taped their hands behind their backs with duct tape.

[1] We use initials to protect the victim's privacy.

The man who had remained in the living room told E.M. to walk to the end of the hallway. E.M. complied. He then pointed with his gun toward Robinson's bedroom and ordered E.M. to go inside. Upon entering the bedroom, E.M. realized that three of the men were in the room with her. She started crying and begged the men not to rape her. One of the men responded, "Shut up, bitch. We're not going to rape you." He then taped her mouth shut. One of the men left the bedroom, and the other two began taking off E.M.'s clothes and touching her body.

At some point, all three men left the bedroom. However, one of them — who was later identified as Defendant — returned to the bedroom. E.M. saw a gun in his pocket. Defendant took the duct tape off her mouth and forced her to perform oral sex on him. Defendant subsequently ejaculated on E.M.'s face and shirt. Defendant then left the bedroom and immediately exited the apartment. The other men had left the apartment while Defendant was in the bedroom with E.M.

The police were called, and E.M. was taken to the hospital. While at the hospital, she completed a rape kit. The DNA profile obtained from semen on E.M.'s shirt matched Defendant's DNA profile.

On 3 February 2014, Defendant was indicted on four counts of first degree kidnapping, one count of first degree burglary, four counts of robbery with a dangerous weapon, and one count of conspiracy to commit robbery with a firearm. On 2 June 2014, Defendant was indicted on one count of first degree sexual offense.

A jury trial was held before the Honorable Susan E. Bray in Guilford County Superior Court beginning on 15 June 2015. At the close of the evidence, Defendant moved to dismiss all of the charges based on insufficiency of the evidence. The trial court denied the motion except as to the conspiracy to commit robbery with a firearm charge.

The jury found Defendant guilty of all remaining charges. The trial court consolidated the four robbery with a firearm convictions with the four kidnapping convictions and sentenced Defendant to consecutive terms of imprisonment of 276 to 392 months on the first degree sexual offense conviction, 73 to 100 months on the burglary conviction, and four consecutive terms of 83 to 112 months on the consolidated robbery and kidnapping convictions. Defendant gave written notice of appeal.

Analysis

The sole issue on appeal is whether the trial court erred in its jury instructions on the charge of first degree sexual offense.[2] Specifically, Defendant argues that the trial court incorrectly gave a disjunctive instruction for this offense that allowed the jury to find him guilty based on the alternative theories that Defendant (1) employed or displayed a dangerous weapon; *or* (2) was aided and abetted by one or more persons. Defendant contends that because there was no evidence that he was, in fact,

[2] Defendant does not challenge on appeal his convictions for kidnapping, burglary, or robbery with a dangerous weapon.

aided and abetted by another person at the time he forced E.M. to perform oral sex on him, the jury's conviction on the first degree sexual offense charge could have been improperly based on the theory of aiding and abetting rather than on the theory of employing or displaying a dangerous weapon.

We review challenges to jury instructions *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973) (citations omitted), *cert. denied*, 418 U.S. 905, 41 L. Ed. 2d 1153 (1974). "[A]n error in jury instructions is prejudicial and requires a new trial only if there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (citation and quotation marks omitted).

The North Carolina Constitution provides that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court[.]" N.C. Const. art. I, § 24. Although — as discussed below — the use of disjunctive jury instructions may in some circumstances constitute error, our Supreme Court has held that not every disjunctive jury instruction violates the right to jury unanimity. *State v. Walters*, __ N.C. __, __, 782 S.E.2d 505, 505 (2016).

In *Walters*, the Supreme Court discussed the two lines of cases that have developed regarding the use of disjunctive instructions. The first line of cases, originating with *State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986), stands for the proposition that "a disjunctive instruction, which allows the jury to find a defendant guilty if he commits either of two underlying acts, *either of which is in itself a separate offense*, is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense." *Walters*, __ N.C. at __, 782 S.E.2d at 507 (citation and quotation marks omitted).

The second line of cases, originating with *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990), provides that "if the trial court merely instructs the jury disjunctively as to various alternative acts *which will establish an element of the offense*, the requirement of unanimity is satisfied." *Walters*, __ N.C. at __, 782 S.E.2d at 507-08 (citation and quotation marks omitted). However, in such cases, "where the trial court instructs disjunctively in this manner, there must be evidence to support all of the alternative acts that will satisfy the element." *State v. Johnson*, 183 N.C. App. 576, 582, 646 S.E.2d 123, 127 (2007).

With this background in mind, we now turn to the facts of the present case. Defendant's first degree sexual offense charge was based on his actions in forcing E.M. to perform oral sex upon him. First degree sexual offense requires proof that the defendant engaged "in a sexual act with another person by force and against the

will of the other person" and that in the course of doing so, the defendant either (1) employed or displayed a dangerous or deadly weapon; (2) inflicted serious injury on the victim; or (3) was aided and abetted by another person. N.C. Gen. Stat. § 14-27.26 (2015).[3]

A person aids or abets another when he is

> actually or constructively present at the scene of the crime and . . . aids, advises, counsels, instigates or encourages another to commit the offense. Even though not actually present during the commission of the crime, a person may be an aider or abettor if he shares the criminal intent of the perpetrator and if, during the commission of the crime, he is in a position to render any necessary aid to the perpetrator.

State v. Barnette, 304 N.C. 447, 458, 284 S.E.2d 298, 305 (1981) (internal citations omitted).

The trial court's instructions on first degree sexual offense stated as follows:

> If you find from the evidence beyond a reasonable doubt that on or about the alleged date of December 4th, 2013, the defendant, Quenton Dick, acting either by himself or together with others, engaged in a sexual act with [E.M.], and that he did so by force or threat of force, and that this was sufficient to overcome any resistance which [E.M.] might make, that [E.M.] did not consent and it was against her will, and that defendant, Quenton Dick, employed a dangerous and deadly weapon or was aided and abetted by another person or persons, it would be your duty to return a verdict of guilty of first degree sexual offense.

[3] Here, the jury was not instructed on the "inflicted serious injury on the victim" prong.

(Emphasis added.)

At trial, Defendant objected to the trial court's instruction regarding aiding and abetting. The trial court overruled the objection, and the jury returned a guilty verdict for first degree sexual offense without specifying which theory it had based its verdict upon.

The present case falls within the *Hartness* line of cases. Here, the trial court instructed the jury that it could find the defendant guilty of first degree sexual offense if it found that he either employed a dangerous or deadly weapon *or* was aided and abetted by another. Therefore, the instruction constituted error only if the evidence at trial failed to support both theories — i.e., that Defendant employed a dangerous or deadly weapon *and* that Defendant was aided and abetted by another person.

Defendant does not dispute the fact that sufficient evidence existed to raise a jury question as to whether he employed a dangerous or deadly weapon. However, he contends that no evidence was presented at trial that would have permitted the jury to conclude that he was aided and abetted by another person in forcing E.M. to perform oral sex upon him — the act that formed the basis for the first degree sexual offense charge. After thoroughly reviewing the record, we agree.

In *State v. McClain*, 112 N.C. App. 208, 435 S.E.2d 371 (1993), this Court vacated the defendant's convictions for first degree rape and first degree sexual offense because the State failed to present substantial evidence that the defendant

was aided and abetted by another in the commission of the crimes as charged in the indictment. The State's evidence showed that the defendant and his nephew brought two girls to an abandoned house. At the house, the defendant's nephew took one of the girls into a room and forced her to have oral sex and sexual intercourse with him. The defendant's nephew then left the house. After his nephew left, the defendant forced the girl to have oral sex and sexual intercourse with him. *Id.* at 210, 435 S.E.2d at 372. This Court held that there was insufficient evidence that the nephew had aided or abetted the defendant in performing the sexual assault that occurred *after* the nephew left the house.

> Although there is evidence that defendant's nephew threatened [the girl] prior to defendant's offenses, there is no evidence that, at the time of defendant's offenses, his nephew was encouraging and aiding him or that his nephew was in a position to render aid to him. Since the State failed to prove that defendant was aided and abetted by another, an essential element of the crimes of first degree rape and first degree sexual offense, we find that the trial court erred in failing to dismiss those charges. Accordingly, we reverse the judgments based on the first degree rape charge and first degree sexual offense charge.

Id. at 212, 435 S.E.2d at 373.

Here, the State argues that one or more of the other intruders into E.M.'s apartment shared a common criminal purpose with Defendant that was sufficient to satisfy the aiding and abetting element of the offense. The State points to the fact that while her hands were duct-taped behind her back, three of the intruders were in

the bedroom with E.M., and several of them took off her clothes and touched her body, causing her to fear that she would be gang raped. However, the undisputed evidence shows that at the time Defendant forced her to perform oral sex on him, the other men had left the bedroom, and there is no indication that any of them were even aware that Defendant had gone back into the bedroom much less that he was forcing her to perform oral sex. Accordingly, the evidence simply does not show that any or all of the other men aided, advised, counseled, instigated, or encouraged Defendant in the act giving rise to Defendant's first degree sexual offense conviction. Nor — for the same reasons — could they have shared Defendant's criminal intent to commit that act.

Finally, we reject the State's alternative argument that the instructional error was harmless. In *State v. Pakulski*, 319 N.C. 562, 356 S.E.2d 319 (1987), the trial court disjunctively instructed the jury that a finding that the defendant was guilty of felony murder could be predicated on (1) the underlying felony of robbery; or (2) the use of a deadly weapon in the commission of the underlying felony of breaking and entering. *Id.* at 564-65, 356 S.E.2d at 321. After reviewing the record on appeal, our Supreme Court found that there was insufficient evidence of a deadly weapon and, therefore, breaking and entering could not serve as the underlying felony for defendant's felony murder conviction. *Id.* at 573, 356 S.E.2d at 326. The Court then addressed the State's argument that the error in submitting the breaking and

entering charge was harmless because the jury could have based its verdict on the robbery charge:

> The State's argument, while superficially appealing, overlooks that the verdict form does not reflect the theory upon which the jury based its finding of guilty of felony murder. Where the trial judge has submitted the case to the jury on alternative theories, one of which is determined to be erroneous and the other properly submitted, and we cannot discern from the record the theory upon which the jury relied, this Court will not assume that the jury based its verdict on the theory for which it received a proper instruction. Instead, we resolve the ambiguity in favor of the defendant.

Id. at 574, 356 S.E.2d at 326.

For these reasons, the trial court's disjunctive instruction on the charge of first degree sexual offense was erroneous, and that error prejudiced Defendant. *See id.* (remanding for new trial because one of alternative theories submitted to jury for charge of felony murder was unsupported by evidence).

Conclusion

For the reasons stated above, we vacate Defendant's conviction on the charge of first degree sexual offense (14 CRS 24350) and remand for a new trial solely as to that charge and for resentencing. Nothing herein shall affect the validity of Defendant's remaining convictions.

VACATED IN PART AND REMANDED FOR NEW TRIAL AND RESENTENCING.

Judges ELMORE and DIETZ concur.

Report per Rule 30(e).