IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-327

Filed: 1 November 2016

Wayne County, Nos. 13 CRS 55838, 55839, 55840

STATE OF NORTH CAROLINA

v.

CHRISTOPHER BARRETT, Defendant.

Appeal by Defendant from judgments entered 30 April 2015 by Judge Arnold O. Jones, II in Wayne County Superior Court. Heard in the Court of Appeals 8 September 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Steven M. Arbogast, for the State.

Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for Defendant-appellant.

HUNTER, JR., Robert N., Judge.

Christopher Barrett ("Defendant") appeals his convictions for first degree rape, first degree sex offense, kidnapping, and robbery with a dangerous weapon. Defendant argues the trial court erred by admitting evidence gathered by police in violation of his Miranda rights, and by failing to instruct the jury there had been prior sexual contact between him and the victim. We disagree.

I. Facts and Procedural Background

On 6 October 2014, a Wayne County grand jury indicted Defendant on one count of first degree rape, three counts of first degree sex offense, one count of attempted first degree sex offense, one count of first degree kidnapping, two counts of second degree kidnapping, and one count of armed robbery. Defendant pled not guilty to all charges.

On 6 March 2015, Defendant filed a motion to suppress the transcript of an interview with detectives from the Goldsboro Police Department taken after his arrest. Defendant argued the interview should have been excluded because he was interrogated outside the presence of counsel despite his unambiguous request for an attorney. At the suppression hearing, the evidence tended to show that on 20 December 2013, Defendant was arrested and questioned by Detectives Adams ("Detective Adams") and Bethea ("Detective Bethea"). The detectives first turned on an audio/visual recording device to record the interrogation. They then handed Defendant a sheet of paper listing Defendant's *Miranda* rights. The detectives explained each of the rights to Defendant, and had Defendant initial each right to signify he understood and chose to waive that right.

Defendant initially stated, "I don't want no lawyer," but shortly thereafter asked, "if I want a lawyer, I still get my lawyer?" The detectives continued to explain Defendant's right to an attorney. The following exchange occurred:

> Defendant: I want a lawyer, but I want to talk – too.
> Det. Adams: It doesn't work that way, bud.

> Det. Bethea: It does not work that way. If you want a lawyer, get a lawyer. If you don't want a lawyer sign that paper and talk to me.

Defendant asked whether he could stop the interview later and request an attorney if he chose not to ask for an attorney at that moment. The detectives confirmed he could. Defendant then initialed the paper, waiving his right to an attorney.

During the interview, Defendant admitted knowing two of his alleged victims, "Kimberly,"[1] and Elias Henderson ("Elias") and to knowing where they lived. Defendant had previously purchased cigarettes from Elias, and had attended the same middle school as Kimberly. While Defendant stated he had heard about the crimes, he maintained he had been wrongly accused: "[m]an, I'm going to get charged right here and I don't know what they're going to do to me. It's my word against their word."

The trial court filed an order denying Defendant's motion on 7 April 2015. Defendant filed an objection immediately after the court's ruling, and preserved the issue by objecting when the interview was introduced at trial.

The case came for trial on 13 April 2015, and the evidence tended to show the following. Kimberly testified she lives in the Lincoln Homes housing project in Goldsboro, North Carolina, with her one year old son. Kimberly's boyfriend and father of her children, Elias, lives elsewhere but often stays with her. Kalob Barrett

[1] A pseudonym is used to protect the victim's privacy.

("Kalob"), a mutual friend of the couple, stays with Kimberly and Elias to babysit their son. Kimberly and Elias operate a "store" out of the apartment, selling cigarettes, cigars, and marijuana to people in the neighborhood. The business "made a lot of money."

On the night of 18 December 2013, Elias and Kalob stayed with Kimberly in the apartment, playing video games in the living room. Kimberly, nine months pregnant at the time, tired easily. At around 10:00 p.m., she undressed and got ready for bed in her bedroom. Just after getting into bed, Kimberly heard Elias loudly say "don't do it." Getting out of bed, she came into the living room to investigate. She saw Defendant holding a gun on Elias and Kalob. Defendant demanded she, Elias, and Kalob each strip naked. Defendant specifically told Kimberly to shake out her hair to see if she had any money or drugs on her. Kimberly, at gunpoint, then made sure the front and back doors were locked.

Defendant then forced Kimberly into her bedroom and told her to "get comfortable." Kimberly heard Defendant tell Elias and Kalob to sit out in the hallway, so he could "make Elias watch him [and] his girlfriend." Defendant removed his clothes, laid down on the bed, and demanded Kimberly "get on top." Keeping the gun pointed at her head or at her pregnant stomach, Defendant proceeded to rape her in different positions. At one point during the rape, Defendant demanded she perform

oral sex on him. Crying, Kimberly told Defendant he was hurting her and she was in pain. Defendant did not stop.

Afterwards, Defendant dressed. He directed Kimberly to go into the bathroom to clean herself. Defendant then searched the house. Kimberly thought he was looking for money, marijuana, and cigarettes. Defendant "took everything that he could find," including Elias and Kalob's cell phones. Finally, after staying for an hour or so, Defendant walked to the front door, pointed a gun at Kimberly, Elias, and Kalob, and told Kimberly if she told anyone, he would come back and kill her. A few minutes after Defendant left, Kimberly called the police.

Elias also testified about the events of that night. While he was in the bedroom with Kimberly, he heard a knock on the door. Kalob went to the door, and Elias heard Defendant identify himself. Elias came out of the bedroom into the living room. There, Defendant pointed a gun at him and demanded his money. Elias told the court that Kimberly heard the confrontation, and came out after him to see what was happening. Elias testified Defendant then forced the three of them to strip naked "because he felt like we had more stuff on us."

Defendant then forced Elias, Kimberly, and Kalob into the apartment's two bedrooms to search for more money, drugs, or tobacco products. Unsuccessful in this search, Defendant became frustrated and put the gun directly in Elias's face, telling him "if you don't give me everything I'm going to start shooting people." Kimberly

then asked Defendant to talk to her, telling him not "to do this." Defendant turned his attention to Kimberly.

Defendant brought Elias and Kalob into the hallway looking into Kimberly's bedroom. He demanded Kimberly lie on her bed. Elias told the jury that Defendant then put the gun to his head and said he had known Kimberly since middle school and was "fixing to f*** your girl and you're going [to] watch." Defendant then raped Kimberly at gunpoint for the next 30 to 40 minutes. Elias heard Kimberly repeatedly cry out "stop, you're hurting me," but Defendant told her to "shut up" and "act like you f****** like it." Eventually, Elias saw Defendant get up from the bed and tell Kimberly to "get a cloth and clean herself off." Before leaving, Defendant warned Kimberly, Elias, and Kalob not to tell anyone, or else he would find out and kill them.

Kalob also testified for the State. On the night in question, he was spending the night with Kimberly and Elias playing video games in their living room. While Kimberly and Elias were in the bedroom, Kalob heard a knock on the door. He answered it and let Defendant into the house. After introducing himself, Defendant pulled a gun on Kalob and ordered him to the back room. Elias then emerged from the bedroom. Defendant pointed the gun at Elias.

Defendant forced Kalob and Elias into Kimberly's bedroom, where Defendant ordered all three of them to strip naked. Kalob testified that Defendant then forced

the three of them to search the house, taking the small amounts of money and marijuana they found.

Kalob next testified Kimberly "asked [Defendant] could he talk to her about what's going on and why he's doing this." Kalob told the jury he inferred Defendant was not going to have sex with Kimberly, and that by asking him to talk, Kimberly "came on to [Defendant]" in a romantic way. Defendant directed him and Elias to remain in the hallway, and for Kimberly to get on the bed. He then saw Defendant and Kimberly have sex. Kalob stated "[s]he was actually enjoying that," and was "fake crying." After he finished, Defendant told Kimberly to "go wash off." Finally, as he left the house, Defendant told Kimberly and Elias that he knew their whole family, and "he would come and kill their family."

After this testimony, the Assistant District Attorney showed Kalob a statement[2] he had given to police on the night of the rape:

> State: [Reading from the statement] He told [Kimberly] to get on the bed, [Kimberly] tried to talk to him, and he started to take his clothes off. He said he was going to get a Christmas present. Did you give that statement to Officer Adams?
>
> Kalob: Yes, ma'am.
>
> . . . .
>
> State: So didn't you tell Officer Adams so [Defendant] forced her to [give oral sex].

[2] Although the State marked Kalob's statement as State's Exhibit 8, the statement was never admitted into evidence, and as such is not part of the record.

> Kalob: Yes, ma'am.
> . . . .
>
> State: And didn't you tell Officer Adams [Kimberly] started crying?
>
> Kalob: Yes, ma'am.
> . . . .
>
> State: So while Chris is doing these things to [Kimberly] on the bed do you hear her ask him to stop because she's hurting?
>
> Kalob: Yes, ma'am.
>
> State: How many times do you hear her ask him to stop because she's hurting?
>
> Kalob: About three or four times.

Michelle Warren, the responding officer to Kimberly's 911 call, also testified for the State. When she arrived on the scene, Officer Warren found Kimberly extremely distraught, terrified Defendant was "going to come get her." She transported Kimberly to the hospital for treatment. Kimberly took hold of her hand and did not let go for several hours. While on the way to the hospital, Kimberly named Defendant as her rapist. At the hospital, doctors examined Kimberly and preserved evidence in a rape kit.

Detective Adams testified that he interviewed both Elias and Kalob after they arrived at the police station. Detective Adams took Elias's statement and prepared for him a photographic lineup containing Defendant's picture. Elias identified

Defendant as Kimberly's rapist. Detective Adams then took Kalob's statement and showed him a similar photographic lineup. Kalob also identified Defendant as Kimberly's rapist.

Detective Adams also testified regarding the statement Defendant gave after his arrest on 20 December 2013. After recounting his exchange with Defendant regarding Defendant's right to counsel, Detective Adams authenticated the video recording of the interview. The State then played the recording of the interview and published the transcript to the jury. Defendant objected to both, preserving the issue for appeal.

Michelle Hardin, a forensic scientist with the North Carolina State Crime Laboratory, testified as an expert witness. She analyzed the swabs taken from Kimberly's mouth and vagina and found sperm in both samples. However, the oral sample contained only a single sperm cell.

Mackenzie DeHaan, another forensic scientist with the state crime lab, also testified as an expert witness. She performed DNA analysis of the samples taken from Kimberly's mouth and vagina. The sperm taken from the oral sample was in insufficient quality or quantity to produce a match. The sample taken from Kimberly's vagina contained sperm that matched Defendant's DNA profile.

Following Ms. DeHaan's testimony, the State rested its case. Defendant did not make a motion to dismiss at the close of the State's evidence.

In his opening argument, defense counsel conceded Defendant's presence in Kimberly's apartment on 18 December 2013, but argued Kimberly consented to have sex with him. The Defense first called Defendant's cousin, Tatanisha Davis ("Tatanisha"), who testified she saw Defendant that night at a birthday party across the street from Kimberly's house. The party lasted from 8:30 to 11:30 p.m. Although she did not see him leave, Tatanisha only saw Defendant "at the beginning half and then at the ending half [of the party]." When Defendant returned to the party, he did not seem upset or scared, and had a conversation with Tatanisha.

Defendant next called another of his cousins, Lashonda Barrett ("Lashonda"). Lashonda was at the same party as Tatanisha. She also saw Defendant at the party, and told the court Defendant was there the entire time, with the exception of a five to ten minute span.

Lashonda also testified she spoke with Kalob about what happened on 18 December 2013. She told the court Kalob told her on the night of the rape, Defendant and Kimberly "was [sic] messing around" and had been caught by Elias. Lashonda also testified Kalob was "basically saying [Defendant and Kimberly] was messing around before all that happened."

Finally, Defendant called his aunt, Monique Barrett ("Monique") who also testified she was at the same party with Tatanisha and Lashonda. Monique saw

Defendant at the party, and testified he was out of her sight for no more than ten minutes that night.

Monique also testified she spoke with Kalob about what happened on the night of the rape. Monique testified Kalob told her Defendant and Kimberly "were talking, and . . . they was [sic] messing around and [Elias] then came back in and caught them."

After hearing from Monique, the defense rested. After the close of evidence, the State decided not to proceed on one of the first degree sex offense charges for lack of evidence. Defendant subsequently moved to dismiss all charges for insufficiency of the evidence. After hearing argument from both sides, the trial court dismissed the attempted first degree sex offense and the first degree kidnapping charges.

At the charge conference, Defendant requested on the basis of Kalob, Lashonda, and Monique's testimony the trial court instruct the jury that evidence had been presented of Kimberly's prior sexual conduct, and to consider that evidence as it may have tended to show Kimberly's consent to sex with Defendant. The trial court denied defense counsel's motion. Defendant objected to the ruling both before and after jury instructions.

The jury found Defendant guilty of one count of first degree rape, one count of first degree sex offense, two counts of second degree kidnapping, and one count of

robbery with a dangerous weapon. The jury found Defendant not guilty of a second count of first degree sex offense.

Defendant was sentenced to two terms of 216 to 320 months on the first degree rape and first degree sex offense convictions, one term of 57 to 81 months on the robbery conviction, and two terms of 22 to 39 months on the two second degree kidnapping convictions, with each sentence to run consecutively. Defense counsel issued notice of appeal orally after the verdict.

II. Jurisdiction

Defendant appeals from a final judgment of the superior court where he was found guilty of a non-capital offense. Therefore, jurisdiction is proper in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2015).

III. Standard of Review

Defendant argues the trial court erred by admitting his interview with Detectives Adams and Bethea into evidence in violation of his Fifth Amendment rights. We review constitutional issues *de novo*. *Piedmont Triad Reg'l Water Auth. v. Sumner Hills Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001).

Defendant also contends the trial court improperly failed to instruct the jury there had been prior sexual contact between him and Kimberly. We review challenges to the trial court's decisions regarding jury instructions *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). Under *de novo* review, we consider

matters with new eyes, and freely substitute our judgment for the judgment of the lower court. *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008).

IV. Analysis

A. Fifth Amendment Violation

Defendant argues the trial court erred by admitting Defendant's interview with Detectives Adams and Bethea into evidence in violation of his Fifth Amendment rights. After careful review, we disagree.

The Supreme Court of the United States has required law enforcement to provide those taken in for custodial interrogations with a series of warnings of their constitutional rights, including the right to have an attorney present at such custodial interrogations. See *Miranda v. Arizona*, 384 U.S. 436 (1966). If an individual invokes their right to an attorney during an interrogation, the interrogation must cease until the individual has an attorney present. *Edwards v. Arizona*, 451 U.S. 477, 484-485 (1981).

However, a defendant must unambiguously invoke his right to counsel before police are required to cease interrogation. *Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010); *State v. Hyatt*, 355 N.C. 642, 655, 566 S.E.2d 61, 70 (2002). Statements such as "maybe I should talk to a lawyer" or "I probably would want a lawyer" are not sufficiently unambiguous to invoke the right to counsel. *Davis v. United States*, 512 U.S. 452, 459-62 (1994); *State v. Boggess*, 358 N.C. 676, 687, 600 S.E.2d 453, 460

(2004). Moreover, law enforcement officers are not required to clarify ambiguous requests. *Davis*, 512 U.S. at 459-60.

In this case, detectives explained each of Defendant's rights in detail and attempted to obtain waiver of each right by providing Defendant with a written copy of his rights and having him initial next to each right he agreed to waive. Defendant contends the statement "I want a lawyer, but I want to talk – too" is an unambiguous invocation of his right to counsel. However, Defendant's statement came in the midst of an exchange with the detectives about whether he could later request counsel if he initially waived his rights. Defendant was discussing his rights with the detectives, trying to better understand the situation he would be in should he decide to waive his right to counsel. Furthermore, the detectives clarified Defendant's ambiguous statement by further explaining his rights, a duty they were not required to fulfill. Ultimately, after being advised of his rights, Defendant chose to sign the waiver and talk to the detectives.

As Defendant's statement was not an unambiguous invocation of the right to counsel, the detectives did not violate Defendant's rights. The interview was obtained lawfully, and the trial court did not commit error by admitting the contents of the interview into evidence.

B. Jury Instructions

Defendant also argues the trial court committed error by refusing to instruct the jury that evidence had been presented of Kimberly's prior sexual conduct, as it tended to show Kimberly's consent to sex with Defendant. After careful review, we disagree.

When a defendant attempts to assert an affirmative defense that lies "beyond the essentials of the legal definition of the offense itself," he bears the burden of proof in establishing its existence. *State v. Caddell*, 287 N.C. 266, 288-89, 215 S.E.2d 348, 362 (1975) (quoting *State v. Davis*, 214 N.C. 787, 794, 1 S.E.2d 104, 108 (1938)). Thus, "where 'a specifically requested jury instruction is proper and supported by the evidence, the trial court must give the instruction, at least in substance.'" *State v. Jones*, 337 N.C. 198, 206, 446 S.E.2d 32, 36 (1994) (quoting *State v. Ford*, 314 N.C. 498, 506, 334 S.E.2d 765, 770 (1985)).

If the trial court refuses to provide a requested instruction, the defendant must show on appeal "the proposed instruction was not given in substance, and that *substantial* evidence supported the omitted instruction, with [s]ubstantial evidence [being] that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Clapp*, 235 N.C. App. 351, 360, 761 S.E.2d 710, 717 (2014) (internal quotation marks omitted) (emphasis added) (quoting *State v. Thompson*, 118 N.C. App. 33, 36, 454 S.E.2d 271, 273 (1995)). Whether the

evidence presented rises to the level of "substantial evidence" is a question of law. *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982).

Following a consideration of whether the evidence presented is "substantial," an error in jury instruction mandates a new trial only if the error is prejudicial. *Clapp*, 235 N.C. App. at 360, 761 S.E.2d at 717. Error is prejudicial if a reasonable possibility exists that, but for the error in question, the trial being appealed would have reached a different result. *State v. Maske*, 358 N.C. 40, 57, 591 S.E.2d 521, 532 (2004) (citing N.C. Gen. Stat. §15A-1443(a) (2015)). The Defendant has the burden to "show that the jury was misled or misinformed by the charge as given, or that a different result would have been reached had the requested instruction been given." *State v. Carson*, 80 N.C. App. 620, 625, 343 S.E.2d 275, 278 (1986) (internal citation omitted).

Defendant requested the trial court give the following variation of the N.C.P.I. Crim. § 105.31 jury instruction:

> Evidence has been received concerning prior sexual behavior of the victim. You may consider this evidence only as it may tend to show
>
> That such behavior was between the alleged victim and defendant;
>
> That the alleged victim consented to the act(s) charged;
>
> That the alleged victim behaved in such a manner as to lead the defendant to believe that the alleged victim consented;

> If you believe this evidence, you may consider it only for the limited purpose for which it was received.

Under the language of the instruction itself, Defendant may not receive this instruction unless he has presented evidence at trial concerning *prior* sexual behavior. N.C.P.I.—Crim. 105.31 (2015). The state rules of evidence define the term "sexual behavior" as "sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial." N.C. Gen. Stat. § 8C-1, Rule 412(a) (2015).

Defendant asserts the testimony of Kalob, Lashonda, and Monique provides substantial evidence of prior sexual contact between Kimberly and the Defendant. However, none of the testimony Defendant relies upon relates to events transpiring before the night of the rape.

Kalob's testimony, while suggesting the sexual contact between Kimberly and Defendant was consensual, was confined only to the sexual acts for which Defendant had been charged. Kalob testified that Kimberly "came on to" the Defendant and they had consensual sex while Kalob and Elias watched from the hallway. Thus, Kalob's testimony referred only to acts "at issue in the indictment on trial," and as such are outside the scope of the requested instruction. N.C. Gen. Stat. § 8C-1, Rule 412(a).

Defendant also relies on Lashonda and Monique's testimony that Kalob told them Kimberly and Defendant were "messing around before all that happened."

However, like Kalob's testimony, both Lashonda and Monique's accounts do not speak to *prior* sexual contact between Kimberly and Defendant. Lashonda's testimony pertained only to the evening of 18 December 2013. She was not asked and did not volunteer information regarding sexual contact between Defendant and Kimberly before that date. Similarly, defense counsel specifically asked Monique to testify regarding what Kalob told her "about the incident that occurred on December 18th of 2013." Thus, their testimony can only be taken as evidence relating to the encounter between Defendant and Kimberly on the night of the rape. As a result, we cannot conclude there was substantial evidence in favor of the requested instruction.

Furthermore, Defendant has not shown prejudice as a result of the trial court's refusal to provide Defendant's requested jury instruction. Even without an instruction as to the prior sexual behavior of the victim, the trial court still instructed the jury to consider all the evidence presented in the case. The jury heard Kalob, Lashonda, and Monique's testimony and had the opportunity to weigh it against the rest of the evidence. Moreover, the trial court specifically instructed the jurors they had to find lack of consent to find Defendant guilty of rape and first degree sex offense. Therefore, there is no reasonable possibility the jury would have come to a different conclusion but for the trial court's refusal to give the requested instruction.

Finally, the Defendant has failed to make any showing the jury may have been misled or misinformed by the given jury instruction. *See Carson*, 80 N.C. App. at 625,

343 S.E.2d at 278. The trial court's jury instructions clearly and succinctly explained the law, the prosecution's evidentiary burden, and the jury's duty to weigh the different types of evidence presented at trial, including Kalob, Lashonda, and Monique's testimony.

As a result, we hold the trial court did not commit error in refusing to give the Defendant's requested jury instruction.

NO ERROR.

Judges McCULLOUGH and DIETZ concur.

Report per Rule 30(e).