IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-435

Filed: 1 November 2016

Mecklenburg County, No. 12 CRS 217628

STATE OF NORTH CAROLINA

v.

FREDDIE LEE THOMPSON

Appeal by Defendant from a judgment entered 24 November 2015 by Judge W. Erwin Spainhour in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 September 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Ann W. Matthews, for the State.

Mark L. Hayes, for the Defendant-Appellant.

HUNTER, JR. Robert N., Judge.

Freddie Lee Thompson ("Defendant") appeals following a jury verdict convicting him of first degree sexual offense by aiding and abetting. The trial court sentenced Defendant to 192 to 291 months imprisonment. On appeal, Defendant contends the trial court committed error by: (1) denying his motion to dismiss; (2) joining charges that are based upon separate acts committed against two alleged victims; and (3) committing plain error in instructing the jury on first degree sexual offense by aiding and abetting. We disagree.

I. Factual and Procedural Background

On 30 April 2012, a Mecklenburg County grand jury indicted Defendant with three counts of first degree sexual offense and one count of first degree kidnapping against "Mary."[1] These offenses appear under case numbers 13 CRS 28474–28475. In the case at issue, 12 CRS 217628, the grand jury indicted Defendant on 30 April 2012 with first degree sex offense against "Lisa."[2] The grand jury superseded this indictment on 5 October 2015 to correct the date of the offense.

On 16 November 2015, the State moved to join all of the cases for trial. On the same day, Defendant moved to sever the cases as they pertained to two distinct victims. The trial court heard the parties on the motions, denied Defendant's motion, and granted the State's motion for joinder. Defendant pled not guilty and the case was called for trial on 16 November 2015. The State's evidence tended to show the following.

First, the State called nurse Sharon Smith. Nurse Smith stated she examined Lisa on 17 April 2012 and performed a rape kit. At the start of the examination, Lisa described her sexual assault to Nurse Smith as follows:

> I went to a party with my girlfriend and a lot of people were drinking alcohol. I was not. These two guys came up to me and asked if I wanted to sing. So they took me to a room, like a studio, and they raped me. One from behind and the other in front and put my mouth on his penis. I kept saying

[1] The minor victim's name has been redacted to protect their identity. *See* N.C. R. App. Pro. 3.1(b) (2016).

[2] The victim's name has been redacted to protect their identity.

no, no.

Nurse Smith examined Lisa and found a scratch on her chin and a bruise on her left arm. Nurse Smith performed a vaginal exam and saw Lisa's vagina was "very red and inflamed," consistent with sexual assault. Nurse Smith documented her findings, sealed the results of the rape kit, and called a police officer to pick up the rape kit materials.

The State called Lisa as its witness. Lisa stated, on 14 April 2012, she attended a cookout at Freddy Roseboro's house to celebrate Roseboro's birthday. Xavier Sadler, Roseboro's nephew, invited Lisa and her friend, Mary, who knew Sadler from school. Darwin Thomas and Defendant also attended the cookout.

At the party, Roseboro asked Lisa and Mary if they could sing. Mary said she and Lisa could "sing and rap." Roseboro told the girls he had a small recording studio in a shed in his back yard. Roseboro, Thomas, and another man walked the girls to the studio shed. Inside the studio, the girls sat on a couch and spoke to the men for some time. Mary left the studio to use the bathroom inside the house. Lisa returned to the house and walked to the bathroom next to the kitchen. She saw Defendant "leaning on the wall" outside the bathroom. Lisa walked inside the bathroom where Mary was using the mirror. Thomas walked to the house, and when the girls exited the bathroom, Thomas "lead[ ]" the girls back to the studio. Defendant followed the group to the studio.

The girls walked into the studio and "that's when everything started." Mary and Thomas entered the recording booth and Mary performed oral sex on Thomas. Defendant "pulled [Lisa] by [her] hands" onto the couch, with her back facing him. He tried to move her skirt to the side and insert his penis into her vagina. Lisa told Defendant, "I'm not this type of girl . . . [o]ver and over again." Lisa fought and "wrestl[ed]" against Defendant. Defendant "was getting mad, so he was, like, f*** it" and left the studio.

Mary and Thomas exited the recording booth. Thomas grabbed Lisa by her hair, threw her into the recording booth, and pushed her up against the wall. Thomas closed the record booth door and turned the light off. Thomas told Lisa, "shut the f*** up." Lisa told Thomas to stop but he persisted and pulled her skirt and underwear down as she tried to wrestle away. Thomas bent her over, facing away from him, and pressed her hands high up on the wall. Lisa freed one of her hands and "put [it] down to try to block [Thomas] from [penetrating her from] behind." Thomas told her "put your hands on the f*****[g] wall and don't move" and penetrated her. Lisa said it felt "[h]orrible" and told him to stop.

Defendant walked back into the studio, and entered the recording booth while Thomas penetrated Lisa. Defendant said to Thomas, "you know what you should be making her do." Defendant turned Lisa around and bent her over facing away from him, towards Thomas. Defendant inserted his penis into Lisa's vagina and pushed

down on her back, bending her over to face Thomas's penis. Thomas grabbed Lisa's head "forc[ed]" his penis into her mouth. Lisa felt "[h]orrible" and told the men to stop. She "kept fighting . . . trying to get up and move around, and pushing [the men]." Lisa was "[s]ad, scared, [and] didn't know what to do but to keep fighting." Defendant ejaculated, zipped up his pants, and left the studio. Then, Thomas "put [Lisa] back against the wall and started [vaginally] raping [her] again."

Next, the State called Mary as its witness. Mary confirmed the events as Lisa told them. Mary detailed how Defendant and Thomas assaulted Lisa, while Roseboro assaulted her on the couch. Mary clarified that Defendant did not assault her, or assist Roseboro in assaulting her. After the assaults ended, Mary told Thomas she and Lisa had to go babysit. Thomas let the girls go, and pushed Lisa "on the back of her head," and said to Sadler "this is how you're supposed to do them."

The State called Lisa's mother, "Linda,"[3] as its next witness. Linda testified she was in Georgia on 14 April 2012, taking care of her sick mother. On 15 April 2012, Lisa called Linda and told her, "[M]ama, I need you to come here as soon as possible." Linda came home the next day. Lisa told Linda, "she was raped by two guys. That she had been tossed around like a rag doll. And that she was scared for her life . . . ." Linda took Lisa to the hospital to get a rape kit. After Nurse Smith

[3] A pseudonym is used for Lisa's mother, to protect Lisa's identity.

performed the rape kit, Detective Chris Rush, of the Charlotte Mecklenburg Police Department, spoke to Lisa and recorded her verbal statements about the rape. Lisa told Linda that Mary was raped too, and Linda went to Mary's house to speak with Mary. Mary told Linda "she was assaulted as well." Linda contacted Mary's mother. Linda, Lisa, Mary, and Mary's mother met and drove past Freddy Roseboro's house. Lisa and Mary pointed Roseboro's house out to their mothers and Linda called the police. Police officers met the girls and their mothers at a Family Dollar store parking lot, and interviewed the girls.

The State called Aby Moeykens as its witness. Ms. Moeykens is a DNA analyst at the Charlotte Mecklenburg Police crime lab. She analyzed DNA samples taken from Lisa and Defendant, and compared them to DNA found on Lisa's underwear, the night of the sexual assault. Ms. Moeykens found Defendant's DNA profile matched the "DNA profile from the sperm cell fraction [taken] from the crotch of [Lisa's] underwear."

Next, the State called Detective Chris Rush as its witness. Detective Rush met Lisa on 18 April 2012, right after Nurse Smith performed a rape kit on Lisa. Lisa did not name her attackers and told Detective Rush "the story that [she and Mary] went to the party." On 19 April 2012, Detective Rush received information that identified Roseboro as a suspect and arrested Roseboro. Detective Rush took two buccal swabs of DNA from Roseboro's mouth. On 24 April 2012, Detective Rush "locate[d]"

Defendant and Thomas. He took buccal swabs of Defendant's and Thomas's DNA, and interviewed Defendant. Defendant admitted he was at the party on 14 April 2012, and admitted to being inside the studio shed with Lisa. He contended Lisa agreed to perform oral sex on him and Thomas, and denied forcing himself on Lisa. Defendant told Detective Rush he "f****d" Lisa while she performed oral sex on Thomas. Defendant claimed he left the studio shed after he "f****d" Lisa.

The State rested its case and Defendant did not put on any evidence. Defendant moved to dismiss all of the charges for lack of sufficient evidence. The trial court dismissed the charges concerning Mary because Mary testified Defendant did not assault her or assist Roseboro in assaulting her. The court denied Defendant's motion to dismiss for the charges concerning Lisa.

After Defendant rested his case, the trial court held a charge conference. The State requested an instruction on aiding and abetting and Defendant did not object or request other proposed instructions. The State proposed using a verdict sheet that states, "We, the jury, unanimously find the Defendant: ( ) Guilty of first degree sexual offense by aiding and abetting Darwin Thomas OR ( ) Not guilty." Defendant did not object to the verdict sheet.

The trial court delivered the charge to the jury and instructed the jury on, *inter alia*, N.C.P.I. Crim.—207.10 and N.C.P.I. Crim. —202.20, without objection. The jury deliberated for several hours and returned a unanimous guilty verdict finding

Defendant guilty of first degree sexual offense by aiding and abetting Thomas. The trial court sentenced Defendant to 192 to 291 months imprisonment and required Defendant to register as a sex offender. Defendant timely entered his notice of appeal.

II. Standard of Review

First, "[t]his Court reviews the denial of a motion to dismiss in a criminal trial *de novo*." *State v. Smith*, 186 N.C. App. 57, 62 (2007). "'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.'" *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890 (2000). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

Second, with regard to joinder, Defendant moved pre-trial to sever the charges and try the cases separately as they related to Lisa and Mary. The trial court denied Defendant's pre-trial motion and Defendant did not renew his objection to joinder

"before or at the close of all the evidence." *State v. Wood*, 185 N.C. App. 227, 230, 647 S.E.2d 679, 683 (2007) ("if a defendant's pretrial motion for severance is overruled, he may renew the motion on the same grounds before or at the close of all the evidence. Any right to severance is waived by failure to renew the motion.") (citing N.C. Gen. Stat. § 15A-927(a)(2)). Accordingly, Defendant waived his objection to joinder. *See Id.* When a defendant so waives his right to severance, this Court "is limited to reviewing whether the trial court abused its discretion in ordering joinder at the time of the trial court's decision to join." *Id.* "An abuse of discretion will be found only where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Locklear*, 180 N.C. App. 115, 122, 636 S.E.2d 284, 289 (2006) (internal quotation marks and citations omitted). No such abuse of discretion exists here.

Third, Defendant did not object to the first degree sex offense by aiding and abetting jury instruction, which he now complains of on appeal. "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); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835 (2008). The North Carolina Supreme Court "has elected to 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).

III. Analysis

Defendant contends the trial court committed error by denying his motion to dismiss the charges concerning Lisa, and committed plain error in instructing the jury on first degree sexual offense by aiding and abetting. We disagree.

N.C. Gen. Stat. § 14-27.26, "First-degree forcible sexual offense" provides the following:

> (a) A person is guilty of a first degree forcible sexual offense if the person engages in a sexual act with another person by force and against the will of the other person, and does any of the following:
>
> (1) Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon.
>
> (2) Inflicts serious personal injury upon the victim or another person.
>
> (3) The person commits the offense aided and abetted by one or more other persons.
>
> (b) Any person who commits an offense defined in this section is guilty of a Class B1 felony.

N.C. Gen. Stat. § 14-27.26 (2016).[4] Here, the State did not present any evidence of a deadly weapon or any serious injury inflicted upon Lisa. Therefore, the sole issue is whether the State presented substantial evidence showing Defendant aided and abetted Thomas in committing a sexual offense against Lisa.

To carry its burden and get to the jury under an aiding and abetting theory, the State must present evidence "'(1) that the crime was committed by another; (2) that the defendant knowingly advised, instigated, encouraged, procured, or aided the other person; and (3) that the defendant's actions or statements caused or contributed to the commission of the crime by the other person.'" *State v. Marion*, 233 N.C. App. 195, 203, 756 S.E.2d 61, 68 (2014), *disc. review denied*, 367 N.C. 520, 762 S.E.2d 444 (2014) (quoting *State v. Bond*, 345 N.C. 1, 24, 478 S.E.2d 163, 175 (1996), *cert. denied*, 521 U.S. 1124 (1997)).

Reviewing the evidence in the light most favorable to the State, the record discloses Thomas was in the process of vaginally raping Lisa when Defendant joined them in the recording booth. Defendant stated, "you know what you should be making her do" and spun Lisa around, with her back facing him, pushed her back down, causing her to bend over with her face towards Thomas's penis. Then, Thomas grabbed Lisa's head and forced his penis into her mouth while Defendant vaginally

[4] Defendant was indicted under the former statute for first degree sexual offense, N.C. Gen. Stat. § 14-27.4, which was remodified to the current statue by S.L. 2015-181, § 8(a) as of 1 December 2015.

penetrated her from behind. This evidence shows: (1) another, Thomas, committed a sexual offense, forced fellatio, against Lisa; (2) Defendant verbally and physically aided and abetted Thomas by advising Thomas, instigating the offense, encouraging and procuring the offense, by physically repositioning Lisa, bending her over, and forcing her face towards Thomas's penis; and (3) Defendant's words and actions caused and contributed to Thomas's sexual offense against Lisa. *See Marion*, 233 N.C. App. at 203, 756 S.E.2d at 68 (internal quotation marks and citation omitted). Therefore, the State carried its burden to get to the jury by putting on substantial evidence of each element of its aiding and abetting theory and the first degree sexual offense committed against Lisa.

Second, we review the plain error Defendant assigns to the trial court's first degree sexual offense jury instruction. Plain error arises 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) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018 (1982)). "Under the plain error rule, 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).

It is the trial court's duty to "instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549

(1988). A trial court's failure "to instruct upon all substantive or material features of the crime charged is error." *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989). "[W]here a party fails to object to jury instructions, 'it is conclusively presumed that the instructions conformed to the issues submitted and were without legal error.'" *Madden v. Carolina Door Controls, Inc.*, 117 N.C. App. 56, 62, 449 S.E.2d 769, 773 (1994) (quoting *Dailey v. Integon Gen. Ins. Corp.*, 75 N.C. App. 387, 399, 331 S.E.2d 148, 156 (1985)).

The "'preferred method of jury instruction'" is for a trial court to use the North Carolina Pattern Jury Instructions. *Henry v. Knudsen*, 203 N.C. App. 510, 519, 692 S.E.2d 878, 884 (2010) (quoting *In re Will of Leonard*, 71 N.C. App. 714, 717, 323 S.E.2d 377, 379 (1984)). Here, the trial court delivered the pattern jury instruction for first degree sexual offense, N.C.P.I. Crim.—207.40, along with N.C.P.I. Crim.—202.20, the pattern jury instruction for aiding and abetting. The trial court instructed the jury as follows:

> [THE COURT]: For you to find the defendant guilty of first degree sexual offense because of aiding and abetting the State must prove three things beyond a reasonable doubt.
>
> First, that the crime of first degree sexual offense was committed by some other person; again, namely Darwin Thomas. The elements of first degree sex offense are as follows:
>
> (a) That Darwin Thomas engaged in a sexual act with the victim. Sexual act means fellatio, which is any touching of the lips or tongue of one person to the male sex organ of another;

> (b) That Dar[w]in Thomas used or threatened to use force sufficient to overcome any resistance the victim might make. The force necessary to constitute sexual offense need not be an actual physical force. Fear or coercion may take the place of physical force; and
>
> (c) That the defendant did not consent, and it was against her will. Consent induced by fear is not consent at all.
>
> Secondly, the State must prove that the defendant knowingly advised, instigated, encouraged, procured, or aided the other person, Darwin Thomas, to commit that crime. The person is not guilty of a crime merely because the defendant was present at the scene, even though the defendant may silently approve of the crime and secretly intended to assist in its commission. To be guilty the defendant must aid or actively encourage the person committing the crime, or in some way communicate to this person the defendant's intention to assist in its commission.
>
> And thirdly, that the defendant's actions or . . . statements caused or contributed to the commission of that, of that crime by that other person.

Here, the State presented evidence showing: (1) another person, Thomas, committed the sexual offense against Lisa; (2) Defendant knowingly advised, instigated, encouraged, procured, and aided Thomas in committing the sexual offense against Lisa by telling him "you know what you should be making her do" and bending Lisa over towards Thomas's penis; and (3) Defendant's actions and statements caused or contributed to the commission of Thomas's sexual offense against Lisa. *See Marion*, 233 N.C. App. at 203, 756 S.E.2d at 68 (quoting *Bond*, 345 N.C. at 24, 478 S.E.2d at 175 (1996)). Therefore, the State put on substantial

evidence to present its aiding and abetting theory to the jury. *See Id.* Second, the trial court employed the preferred method of instruction by using the pattern jury instructions. *Henry*, 203 N.C. App. at 519, 692 S.E.2d at 884 (quoting *In re Will of Leonard*, 71 N.C. App. at 717, 323 S.E.2d at 379). The trial court instructed the jury "on all substantial features of [the] case raised by the evidence[,]" including the State's aiding and abetting theory of guilt. *Shaw*, 322 N.C. at 803, 370 S.E.2d at 549. Therefore, the trial court's instruction does not constitute error, much less plain error.

IV. Conclusion

For the foregoing reasons, we hold the trial court did not commit error.

NO ERROR.

Judges McCULLOUGH and DIETZ

Report per Rule 30(e).