IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1031

Filed: 5 June 2018

Burke County, No. 14CRS052667, 16CRS001782

STATE OF NORTH CAROLINA

v.

KURT ALLEN COREY, Defendant.

Appeal by defendant from judgment entered 15 December 2016 by Judge William R. Bell in Burke County Superior Court. Heard in the Court of Appeals 21 March 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sharon Patrick-Wilson, for the State.

Franklin E. Wells, Jr. for defendant-appellant.

BERGER, Judge.

In December 2016, a Burke County jury convicted Kurt Allen Corey ("Defendant") of sexual offense with a child and indecent liberties with a child. Defendant was sentenced as a Level V offender to life in prison without parole after the jury found the existence of an aggravating factor. Defendant entered timely notice of appeal.

Defendant does not challenge the underlying convictions in the guilt-innocence phase of his trial. Rather, Defendant alleges the trial court erred at sentencing by (1) failing to conduct a charge conference before submitting the aggravating factor to the jury, and (2) finding the Michigan conviction for fourth-degree sexual misconduct was substantially similar to the North Carolina offense of indecent liberties with a child. We hold that the trial court did not err when finding that the Michigan conviction was substantially similar to the corresponding North Carolina statute. However, Defendant was materially prejudiced by not having the opportunity to object at the charge conference. Accordingly, we vacate Defendant's sentence and remand for a new trial on the existence of the aggravating factor.

Factual and Procedural Background

On August 16, 2014, eleven-year-old Shannon[1] informed her grandmother that her step-father, Defendant, had engaged in sexual activity with her since she was six years old. Defendant would force Shannon to perform oral sex, vaginal intercourse, and anal sex while her mother was at work. On August 18, 2014, Shannon's mother reported the allegations to the Caldwell County Sheriff's Office. Detective Shelly Hartley conducted an investigation and gathered evidence regarding Shannon's allegations. Social Worker Kimberly Arnette interviewed Shannon at length about the allegations. Defendant was subsequently indicted for two counts of rape of a

[1] A pseudonym is used to protect the identity of the juvenile victim pursuant to N.C.R. App. P. 4(e).

child, two counts of sexual offense with a child, and two counts of indecent liberties with a child.

Defendant was convicted of one count of sexual offense with a child and one count of indecent liberties with a child. After the verdicts, the trial court submitted an aggravating factor to the jury pursuant to N.C. Gen Stat. § 15A-1340.16. The jury deliberated and found as an aggravating factor that Defendant took advantage of a position of trust or confidence to commit the offense.

Defendant's criminal history included a conviction for fourth-degree sexual misconduct from the state of Michigan. The trial court determined that the Michigan offense was substantially similar to North Carolina's Class F felony of indecent liberties with a child. The Michigan offense was assigned four points on Defendant's sentencing worksheet. Based in part on that classification, the trial court determined Defendant was a prior record level V, and Defendant was sentenced to life in prison. Defendant gave oral notice of appeal in open court.

Analysis

Defendant alleges the trial court erred by (1) failing to conduct a charge conference before submitting the aggravating factor to the jury, and (2) finding the Michigan conviction for fourth-degree sexual misconduct was substantially similar to the North Carolina offense of indecent liberties with a child. We address each argument in turn.

I. Aggravating Factor

Defendant contends the trial court erred by failing to conduct a charge conference before submitting the aggravating factor to the jury and was materially prejudiced. We agree.

"The State bears the burden of proving beyond a reasonable doubt that an aggravating factor exists . . . ." N.C. Gen. Stat. § 15A-1340.16(a) (2017). Where a defendant chooses not to admit to the existence of an aggravating factor, "only a jury may determine if an aggravating factor is present in an offense." N.C. Gen. Stat. § 15A-1340.16(a1). The jury may consider whether "[t]he defendant took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense" as an aggravating factor pursuant to N.C. Gen. Stat. § 15A-1340.16(d)(15).

"When a trial court acts contrary to a statutory mandate, the defendant's right to appeal is preserved despite the defendant's failure to object during trial." *State v. Lawrence*, 352 N.C. 1, 13, 530 S.E.2d 807, 815 (2000), *cert. denied*, 531 U.S. 1083, 148 L. Ed. 2d 684 (2001). Here, although Defendant's counsel was silent throughout the proceedings regarding the instructions to be given on the aggravating factor, Defendant's appeal on this issue is properly before us.

When a jury is called to determine the existence of aggravating factors, the trial court must conduct a charge conference concerning instructions to be given by

the court during the sentencing phase. N.C. Gen. Stat. § 15A-1231(b) (2017); *see State v. Hill*, 235 N.C. App. 166, 170-71, 760 S.E.2d 85, 89, *writ denied, disc. rev. denied*, 367 N.C. 793, 766 S.E.2d 637 (2014). As established in *State v. Hill*, there is no requirement that a separate charge conference occur during the sentencing phase; rather, a charge conference concerning sentencing may occur at any time prior to charging the jury, even during the guilt-innocence charge conference. *Hill*, 235 N.C. App. at 172, 760 S.E.2d at 89-90.

" '[T]he failure of the judge to comply *fully* with the provisions of [Section 15A-1231(b)] does not constitute grounds for appeal unless his failure, not corrected prior to the end of the trial, materially prejudiced the case of the defendant.' " *Id.* at 172, 760 S.E.2d at 90 (quoting N.C. Gen. Stat. § 15A-1231(b)) (brackets omitted). However, this Court has held that material prejudice exists where a trial court fails to conduct any charge conference addressing aggravating factors to be submitted to the jury. *Hill*, 235 N.C. App. at 172-73, 760 S.E.2d at 90.

> The purpose of a charge conference is to allow the parties to discuss the proposed jury instructions to insure that the legal issues are appropriately clarified in a manner that assists the jury in understanding the case and in reaching the correct verdict, and to enable counsel to know what instructions will be given so that counsel will be in a position to argue the facts in light of the law to be charged to the jury.

Id. at 170, 760 S.E.2d at 89 (citations and internal quotation marks omitted).

In *Hill*, this Court found material prejudice because defense counsel was not given an opportunity to object to the instructions before they were given to the jury. *Id.* at 172-73, 760 S.E.2d at 90. Such is the case here. In reviewing the transcript, it is evident that defense counsel never had the opportunity to object. The trial court did not address aggravating factors during the guilt-innocence phase, and never advised the parties of the instruction to be given during the sentencing phase. Moreover, after the trial court instructed the jury during the sentencing phase, the court went directly into consideration of substantial similarity of the Michigan conviction discussed below.

Whether defense counsel should have been more assertive in protecting Defendant's procedural rights is not the question before this Court. Based on our precedent, Defendant was materially prejudiced because the trial court did not give him the opportunity to object to the instruction on the aggravating factor, therefore this matter is remanded for a new jury trial to determine the existence of the aggravating factor. *See Hill*, 235 N.C. App. at 172-73, 760 S.E.2d at 90.

Finally, because of our ruling on this issue, we will not address Defendant's contention that the trial court erred by giving an incomplete instruction on the aggravating factor. We do note, however, that the jury was not provided instruction or an option for what it should do if it did not find the existence of the aggravating factor.

II. Substantial Similarity

Defendant contends the trial court erred in finding his fourth-degree sexual misconduct conviction from the state of Michigan was substantially similar to the North Carolina offense of indecent liberties with a child. We disagree.

"[D]etermination of whether the out-of-state conviction is substantially similar to a North Carolina offense is a question of law involving comparison of the elements of the out-of-state offense to those of the North Carolina offense." *State v. Sanders*, 367 N.C. 716, 720, 766 S.E.2d 331, 334 (2014) (citation and brackets omitted).

An out-of-state misdemeanor conviction is generally classified as a Class 3 offense for structured sentencing purposes. N.C. Gen. Stat. § 15A-1340.14(e) (2017). However,

> [i]f the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points.

Id.; *see also State v. Threadgill*, 227 N.C. App. 175, 180-81, 741 S.E.2d 677, 681, *disc. rev. denied*, 367 N.C. 223, 747 S.E.2d 539 (2013). "[T]he requirement set forth in N.C. Gen. Stat. § 15A-1340.14(e) is *not that the statutory wording precisely match*, but rather that the offense be 'substantially similar.' " *State v. Sapp*, 190 N.C. App. 698, 713, 661 S.E.2d 304, 312 (2008) (emphasis added), *appeal dismissed and disc. review*

denied, 363 N.C. 661, 685 S.E.2d 799 (2009). The statute does not require that offenses be identical to support a finding of substantial similarity.

The State introduced evidence which included a copy of the judgment for Defendant's Michigan conviction of fourth-degree sexual conduct, Michigan Criminal Law Statute § 750.520e, N.C. Gen. Stat. § 14-202.1, and a copy of *People v. Flock* from the Michigan Court of Appeals. The trial court found by a preponderance of the evidence that the Michigan offense was substantially similar to North Carolina's indecent liberties offense, and stated in open court:

> The statute, at least in the part that the defendant was convicted of, 750.520e(1)(a), states that: "A person is guilty of sexual -- of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and if any of the following circumstances exist . . . ."
>
> The circumstance under which he was convicted or pled guilty to was (a), the "other person is at least 13 years of age but less than 16 years of age, and the actor is more than 5 years older than the other person."
>
> Elements of indecent liberties with a child in North Carolina: First, the defendant at least 16 years of age and at least five years older than the child; secondly, the child was under the age of 18; third, the defendant willfully takes or attempts to take immoral, improper, or indecent liberties with the child; and, fourth, for the purpose of sexual -- arousing sexual gratification. (Inaudible) judicial notice that it doesn't have to be a touching in order to be guilty or found guilty of the charge of indecent liberties.
>
> The elements of the Michigan statute under which the defendant was convicted or pled guilty to is that the defendant is at least 18 years of age and at least five years older than the child; that the child is at least 13 years of age but less than 16 years of age; and the defendant engages in sexual contact with the child.

> The Michigan [case, *People v. Flock,*] that the State provided parrots or tracks the definitional language that, that goes along with 750.520a, sexual contact includes -- is not limited to -- but "includes the intentional touching of the victim or actor's -- victim's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that in touch -- intentional touching can reasonably be construed as being for the purpose of arousing sexual arousal or gratification."
>
> I think that's the central thrust of . . . North Carolina's indecent liberties [statute], that it's trying to prevent those acts which lead to or arouse sexual gratification.

The trial court found the statutes at issue are substantially similar because the elements of the statutes target assailants that engage in similar conduct with similar victims, i.e., assailants who engage in sexual conduct with children for the purpose of sexual arousal. All child victims who meet the age requirement for the Michigan offense of fourth-degree sexual conduct, children thirteen years old to less than sixteen years old, would meet the age requirement and could be classified as victims under N.C. Gen Stat. § 14-202.1 (2017). Moreover, the Michigan statute and case law further defining the offense seeks to prevent actions by defendants against children which lead to or arouse sexual gratification. The same is true of our indecent liberties with a child statute. We therefore conclude that the offenses are substantially similar, and the trial court did not err in classifying the Michigan offense as a Class F felony.

Conclusion

The trial court erred by failing to conduct a charge conference regarding the instruction on the existence of the aggravating factor. Therefore this matter is remanded for a new jury trial on the existence of the aggravating factor. However, the trial court did not err in finding that Defendant's conviction of fourth-degree sexual misconduct from the state of Michigan was substantially similar to the corresponding North Carolina statute.

VACATED AND REMANDED IN PART; AFFIRMED IN PART.

Judges ELMORE and INMAN concur.

Report per Rule 30(e).