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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1173

Filed: 5 November 2019

Forsyth County, Nos. 15 CRS 50369, 2759

STATE OF NORTH CAROLINA

v.

SHAN D. SOUTHERN

Appeal by Defendant from judgment entered 15 February 2018 by Judge R. Stuart Albright in Forsyth County Superior Court. Heard in the Court of Appeals 24 April 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Olga E. Vysotskaya de Brito, for the State-Appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for Defendant-Appellant.

COLLINS, Judge.

Defendant Shan Dale Southern appeals from judgment entered upon a jury verdict of guilty of felony disseminating obscenity and upon his guilty plea of having attained habitual felon status. The charges against Defendant resulted from his creating a Facebook page under his ex-partner's name and publicly posting photographs of her exposed breast and genitalia on that page. On appeal, Defendant

argues the trial court erred by denying his motion to dismiss for insufficient evidence and admitting irrelevant evidence. Defendant also argues he received ineffective assistance of counsel. We discern no error.

I. Factual and Procedural Background

From 2010 to 2012, Defendant and Katie¹ were in a relationship. At some point during this time, while Katie was sleeping, Defendant took photographs of Katie's nude body without her consent. One of the photographs was of Katie's nude body and exposed bare breast ("First Photograph"). A second photograph was a close-up of Katie's vagina being spread open by Defendant's fingers ("Second Photograph"). Katie discovered these photographs on Defendant's phone, and told Defendant that she was "disturbed and disgusted." Katie asked Defendant to delete the photographs; Defendant promised to do so.

After Defendant and Katie ended their relationship, Katie began dating her future husband in 2013. On 11 January 2015, Katie's husband showed her a Facebook friend request he had received. The public Facebook profile was listed under Katie's full name. The Facebook profile picture featured the Second Photograph. The Facebook cover photo featured the First Photograph. Katie and her husband called the police and contacted Facebook, which shut down the public profile several hours later.

¹ A pseudonym is used to protect the identity of the victim and for ease of reading. N.C. R. App. P. 42 (2018).

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Officer David Smith of the Winston-Salem Police Department arrived at Katie's home and reviewed the Facebook profile in question. Katie told Smith that she recognized the phone number associated with the account as belonging to Defendant and stated that she had seen the photographs when she and Defendant were dating. Katie stated she wanted to press charges and Smith initiated the process of doing so.

Smith called his superior, Sergeant Michael Knight, to accompany him to Defendant's residence. In their recorded conversation with Defendant, he admitted to the officers that he had created the Facebook profile with Katie's full name listed as the owner. When Defendant then attempted to delete the profile, Knight seized the phone from him. Later that day, the State filed charges against Defendant and he was arrested. Defendant was indicted on 6 July 2015 for felony dissemination of obscenity, N.C. Gen. Stat. § 14-190.1 (2015), and for having attained habitual felon status, N.C. Gen. Stat. § 14-7.1 (2015).

Defendant filed a motion "to exclude everything regarding how [Katie] feels, her emotions surrounding the posting of the pictures and/or the impact the posted pictures had on [Katie's] life or career" as well as "all evidence pertaining to how [D]efendant procured the posted pictures at issue and/or his interest in doing so." Defendant's trial commenced on 13 February 2018. Prior to jury selection, the trial court heard and denied Defendant's motion. The trial court instructed Defendant to

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“make your objection during the course of the trial.” However, Defendant did not object to the challenged evidence when it was offered in front of the jury at trial.

The State’s evidence included testimony from Katie, Katie’s husband, and Officers Smith and Knight. The State submitted a recording in which Defendant admitted to creating and attempting to delete the Facebook profile. Further, an expert in digital forensic examination affirmed that the photographs had been saved on Defendant’s phone, and that the device had been used to log into the Facebook profile. The State introduced various exhibits, including Photograph One, Photograph Two, and screenshots of the Facebook profile page in Katie’s name featuring the two photographs. At the close of the State’s evidence, Defendant moved to dismiss the charge for insufficient evidence; his motion was denied. Defendant offered no evidence.

On 15 February 2018, the jury returned a verdict finding Defendant guilty of felony disseminating obscenity intentionally. That same day, Defendant pled guilty to having attained habitual felon status. The trial court entered judgment sentencing Defendant to 36 to 56 months’ imprisonment. Defendant gave proper oral notice of appeal in open court.

II. Issues

On appeal, Defendant argues that (1) the trial court erred by denying his motion to dismiss for insufficient evidence of disseminating obscenity; (2) the trial

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court erred by admitting irrelevant evidence; and (3) Defendant received ineffective assistance of counsel because his attorney failed to object to the irrelevant evidence when it was offered at trial.

1. Denial of Motion to Dismiss for Insufficiency of the Evidence

Defendant first argues that the trial court erred by denying his motion to dismiss the charge of disseminating obscenity because the State failed to present sufficient evidence that the photographs were obscene.

We review de novo a trial court's denial of a motion to dismiss a criminal charge for insufficient evidence. *State v. Crockett*, 368 N.C. 717, 720, 782 S.E.2d 878, 881 (2016) (citation omitted). "In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 549 (2018) (quotation marks and citations omitted). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *Id.* (quotation marks and citation omitted). The trial court "consider[s] 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." *Id.* at 492, 809 S.E.2d at 549-50 (quotation marks and citation omitted).

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“In order to convict a defendant of disseminating obscenity, the State must prove that the defendant 1) disseminate[d], in any manner described by [N.C. Gen. Stat. §] 14-190.1(a)(1-4); 2) material which is obscene; and 3) that the defendant acted intentionally and with knowledge of the contents of the material.” *State v. Wilds*, 88 N.C. App. 69, 71, 362 S.E.2d 605, 607 (1987) (citing N.C. Gen. Stat. §14-190.1) (other citations omitted).

Defendant’s sole argument with regard to his sufficiency of the evidence challenge is that the State failed to offer substantial evidence that the material is obscene. We disagree.

Material is “obscene” if:

- (1) The material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (c) of this section; and
- (2) The average person applying contemporary community standards relating to the depiction or description of sexual matters would find that the material taken as a whole appeals to the prurient interest in sex; and
- (3) The material lacks serious literary, artistic, political, or scientific value; and
- (4) The material as used is not protected or privileged under the Constitution of the United States or the Constitution of North Carolina.

N.C. Gen. Stat. § 14-190.1(b) (2018). “[S]exual conduct” is the “lewd exhibition of uncovered genitals[.]” N.C. Gen. Stat. § 14-190.1(c)(2) (2018). When analyzing whether the material is patently offensive and appeals to the prurient interest, the jury must use a “contemporary community standard.” *State v. Watson*, 88 N.C. App.

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624, 627, 364 S.E.2d 683, 685 (1988) (citations omitted). When analyzing whether the material lacks serious literary, artistic, political, or scientific value, the jury must be use a “reasonable person” standard. *Id.* at 628, 364 S.E.2d at 685 (citation omitted). “A juror is entitled to draw on his own knowledge of the views of the average person in the community . . . for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a ‘reasonable’ person in other areas of the law.” *State v. Johnston*, 123 N.C. App. 292, 298, 473 S.E.2d 25, 29 (1996) (quoting *Hamling v. United States*, 418 U.S. 87, 104-05 (1974)) (quotation marks and emphasis omitted).

“Although the burden is upon the State to prove that the material is obscene, the State is not required to offer affirmative testimony concerning each of the statutory criteria; the materials themselves are sufficient evidence for a determination of the question of obscenity.” *Wilds*, 88 N.C. App. at 72, 362 S.E.2d at 607 (citing *Paris Adult Theatre I v. Slaten*, 413 U.S. 49 (1973)); *see also Watson*, 88 N.C. App. at 629, 364 S.E.2d at 686 (“In [obscenity] cases, . . . the sole or primary evidence offered by the State of the obscenity of materials is usually the materials themselves, the very effect or significance of which must be decided by the jury based upon the instructions it receives as to the legal definition of obscenity.”). Thus, the State need not provide additional evidence of obscenity if the materials themselves are admitted into evidence and the fact-finder views them. *See State v. Anderson*,

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322 N.C. 22, 27, 366 S.E.2d 459, 463 (1988) (explaining that the State does not need to furnish expert testimony to prove materials are obscene if they are submitted to the trial court because “[t]he materials themselves are the best evidence of what they represent”); *State v. Horn*, 18 N.C. App. 377, 381, 197 S.E.2d 274, 277 (1973) (holding that magazines depicting images of people engaged in sexual activity were “conclusive autoptical proof of obscenity and filth” and determining that pictures alone can be “so obscene . . . that the fact is incontrovertible”) (citation and quotation marks omitted).

In the present case, the Second Photograph was admitted into evidence and published to the jury. The photograph depicted “sexual conduct” as defined by N.C. Gen. Stat. § 14-190.1(c) in that it depicted a “lewd exhibition of uncovered genitals”; little else, if anything, was depicted. As Defendant argued at trial, “when it gets down to it, it’s up to the jury to look at the pictures and figure out whether or not they were obscene.” Viewing the evidence in the light most favorable to the State, as is required upon a defendant’s motion to dismiss criminal charges, *Chekanow*, 370 N.C. at 492, 809 S.E.2d at 549, we hold that the Second Photograph itself furnished substantial evidence from which a jury could reasonably find that it was obscene within the meaning of N.C. Gen. Stat. § 14-190.1(b). *See Wilds*, 88 N.C. App. at 72, 362 S.E.2d at 607. Accordingly, the trial court did not err by denying Defendant’s motion to dismiss.

2. *Relevancy of Evidence*

Defendant next argues that the trial court plainly erred by admitting evidence of how Defendant obtained the photographs and Katie's emotional reaction to their publication.

Defendant acknowledges his failure to object at trial to the admission of the testimony and, pursuant to N.C. R. App. P. 10(a)(4), specifically argues that the trial court's admission of the testimony constitutes plain error. Under plain error review, a "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).

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2018). Although a trial court's rulings on relevancy are technically not discretionary and therefore are not reviewed under the abuse of discretion standard, such rulings are given great deference on appeal. *State v. Wallace*, 104 N.C. App. 498, 410 S.E.2d 226 (1991).

Evidence of how Defendant obtained the photographs and Katie's emotional reaction to their publication is relevant to show Defendant "acted intentionally" and acted "with knowledge of the contents of the material" when he disseminated the

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photographs. *Wilds*, 88 N.C. App. at 71, 362 S.E.2d at 607 (1987) (citing N.C. Gen. Stat. §14-190.1); *Watson*, 88 N.C. App. at 631, 364 S.E.2d at 687.

Moreover, whether Katie approved of the photographs being taken or approved of the photographs being disseminated bears directly on the jury's determination of whether the photographs appealed to the prurient interest in sex - an unhealthy, abnormal, lascivious, shameful, morbid sexual interest. *Johnston*, 123 N.C. App. at 300, 473 S.E.2d at 30. Additionally, the evidence is relevant to the jury's determination of whether the material taken as a whole lacks serious literary, artistic, political, or scientific value. *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 790 (2011); *see also Hamling v. United States*, 418 U.S. at 104-05 ("A juror is entitled . . . to draw on his knowledge of the propensities of a reasonable person in other areas of the law.") (internal quotation marks and citations omitted). Accordingly, the challenged testimony was relevant and the trial court did not err by denying Defendant's motion to exclude it.

Defendant next argues that even if the testimony was relevant, the trial court abused its discretion in admitting the evidence in contravention of Rule 403. We disagree.

All relevant evidence is admissible, N.C. Gen. Stat. § 8C-1, Rule 402 (2018), and a trial court may only exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. Gen. Stat. § 8C-

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1, Rule 403 (2018). We review a trial court’s decision to allow the admission of evidence pursuant to Rule 403 for abuse of discretion. *State v. Lloyd*, 354 N.C. 76, 108, 552 S.E.2d 596, 619 (2001). This Court may reverse a trial court’s ruling “for abuse of discretion only upon a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision.” *Id.* (internal quotation marks and citations omitted).

Here, the trial court gave extensive reasoning for denying the motion to exclude the evidence. First, the trial court noted that, “[Katie’s] position with regard to whether she gave approval” could help the jury determine whether the photographs appealed to a prurient interest in sex. Additionally, the trial court explained that evidence of Katie’s reaction to the photographs could help the jury determine whether they were “posted for either artist or literary purpose[s].” The trial court further expounded:

With regard to [D]efendant and how he procured the pictures and his interests in procuring pictures, the Court notes that the prosecutor must prove beyond a reasonable doubt that the person charged intentionally disseminated obscenity.

The standard requires findings of both intent and guilty knowledge. Guilty knowledge requires not only knowledge of the character or nature of the materials, but also of their content.

I think with regard to the relevance and Rule 403 objection, I think it’s directly relevant as to how [D]efendant procured these photographs as well as his interest in doing so, with

a proper foundation directly bears on his guilty knowledge and intent.

The State, again, has to prove that he had knowledge of the content, notwithstanding what he admitted to the police officer, and I think [Katie's testimony] would bear on those issues that the State has to prove beyond a reasonable doubt.

Trial courts have the discretion to weigh the probative value of the evidence against any dangers of unfair prejudice to the defendant in their decision to exclude relevant evidence; as long as the trial court's decision is well-reasoned, there is no abuse of discretion. *State v. Lloyd*, 354 N.C. at 108, 552 S.E.2d at 619. The trial court reasoned that the evidence of how Defendant acquired the photographs and Katie's reaction to the photographs supported the elements of the offense. Accordingly, the trial court did not abuse its discretion by denying Defendant's motion and admitting the testimony. As the trial court did not err in admitting the testimony, Defendant's argument that the trial court plainly erred is without merit. *Jordan*, 333 N.C. at 440, 426 S.E.2d at 697.

3. Ineffective Assistance of Counsel

Finally, Defendant argues that his attorney's failure to object at trial to the challenged testimony constituted ineffective assistance of counsel.

A defendant's right to counsel includes the right to the effective assistance of counsel. When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective

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standard of reasonableness. In order to meet this burden defendant must satisfy a two part test.

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[]

State v. Braswell, 312 N.C. 553, 561-562, 324 S.E.2d 241, 247-248 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)) (internal quotation marks, citations, emphasis omitted).

Because we conclude the trial court did not err in determining the evidence was relevant and did not abuse its discretion in admitting the evidence under Rule 403, Defendant's counsel's performance was not deficient for failing to object at trial to the evidence. Accordingly, Defendant did not receive ineffective assistance of counsel. *See Braswell*, 312 N.C. at 562, 324 S.E.2d at 248.

III. Conclusion

For the reasons stated above, we conclude Defendant received a fair trial free from error.

NO ERROR.

Judges BRYANT and STROUD concur.

Report per Rule 30(e).