IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-1103

Filed: 17 November 2020

Onslow County, No. 17 CRS 57635

STATE OF NORTH CAROLINA

v.

QUONSHE MARQUISE BRIMMER

Appeal by defendant from judgment entered 9 May 2019 by Judge Phyllis M. Gorham in Onslow County Superior Court. Heard in the Court of Appeals 20 October 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Brenda Menard, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for defendant-appellant.

BRYANT, Judge.

Where the State introduced evidence of defendant's conduct as a juvenile which, if committed by an adult, would have constituted a Class B1 felony, the trial court did not err, let alone commit plain error, in admitting it. In light of the evidence against defendant, the admission of victim impact evidence at trial was not so prejudicial as to rise to the level of plain error. Where defendant failed to obtain a ruling upon a putative constitutional argument at trial, it is unpreserved, and we

decline to hear it on appeal. Where defendant failed to appeal the order imposing satellite-based monitoring (SBM), in our discretion, we deny defendant's petition for writ of certiorari to review the SBM order.

Defendant Quonshe Marquise Brimmer turned 16 years old in January of 2010. One of his younger female cousins, Crissy,[1] turned 6 years old in September of 2010. At least seven times between April and November of 2010, defendant placed his penis into Crissy's vagina or anus. After assaulting her, defendant informed Crissy that if she told anyone about the abuse, "[p]eople wouldn't love [her] anymore." Prior to his abuse of Chrissy, defendant also sexually abused another of his younger cousins, Dehlia, who was between 10 and 11 years old, by penetrating her vaginally. Dehlia informed her mother of the abuse, and some family members accused her of lying. As a result of both defendant's threats and the family's treatment of Dehlia, Crissy resolved not to disclose her abuse. However, in 2014, defendant pleaded guilty to sexual battery for his rape of Dehlia.

When Crissy was approximately 12 years old, her mother noticed unusual behavior, and confronted her. Crissy disclosed that defendant raped her when she was younger. Crissy's mother brought her to the Child Advocacy Center in Jacksonville, where, during a forensic interview, Crissy disclosed the details of the

[1] Pseudonyms are used to protect the identity of the child-victims and for ease of reading.

abuse by defendant. After disclosing the abuse, Crissy became depressed and attempted suicide.

Defendant was indicted for the first-degree rape, first-degree sexual offense with a child, and taking indecent liberties with a child, Crissy. The matter proceeded to trial, after which the jury found defendant guilty on all three counts. The trial court sentenced defendant to a minimum of 472 months and a maximum of 576 months, in the presumptive range, for first-degree rape; a minimum of 472 months and a maximum of 576 months, in the presumptive range, for first-degree sexual offense with a child; and a minimum of 33 and a maximum of 40 months, in the presumptive range, for taking indecent liberties with a child; to be served concurrently in the custody of the North Carolina Department of Adult Correction. Additionally, the trial court entered judicial findings on defendant's sex offender status, finding that defendant committed a sexually violent offense, that defendant was a recidivist, that the offense was an aggravated offense, and that the offense involved the physical, mental, or sexual abuse of a minor. Accordingly, the trial court ordered that defendant register as a sex offender and enroll in SBM for the remainder of his natural life.

Defendant appeals from his criminal conviction. Although defendant did not properly preserve an appeal from the trial court's order to enroll in SBM, he has filed

a petition for certiorari with this Court to review that order. In our discretion, we deny certiorari for the purpose of reviewing the SBM order.

On appeal, defendant contends in his first and second arguments that the trial court committed plain error in its admission of evidence. We disagree.

> 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). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id*. (citation and quotation marks omitted).

404(b) Evidence

Defendant filed a motion *in limine*, pursuant to Rule 404(b) of the North Carolina Rules of Evidence, to exclude evidence of prior bad acts, specifically his conviction of sexual battery involving Dehlia. After the jury was impaneled but before the start of trial, the trial court heard and denied this motion. Specifically, the trial

court found that "this evidence has probative value that is—that substantially outweighs the danger of unfair prejudice to the defendant[,]" and allowed the State to offer evidence "for the purpose of opportunity, intent, plan, identity, and for other such permissible purposes. . . ." Defendant concedes that he failed to object at the time the evidence was offered at trial, and therefore failed to preserve such objection for appellate review. However, he nonetheless contends the admission of his prior conviction constituted plain error.

Rule 404(b) provides generally that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C.R. Evid. 404(b). However, exceptions to this rule exist. The rule notes, for example, that such evidence may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." *Id.* Further, admissible evidence "may include evidence of an offense committed by a juvenile if it would have been a Class A, B1, B2, C, D, or E felony if committed by an adult." *Id.*

Defendant contends the evidence admitted by the trial court, that he touched Dehlia inappropriately, was not admissible under Rule 404(b) because "none of the touching described by Dehlia arose to the level of a serious felony." He further contends that his conviction for assaulting Dehlia was likewise inadmissible, because he pleaded guilty to misdemeanor sexual battery, not rape.

We note, however, that the question is not what defendant plead guilty to. The question is whether the evidence presented constituted "evidence of an offense committed by a juvenile if it would have been a Class A, B1, B2, C, D, or E felony if committed by an adult." The State notes that, when defendant committed the assault of Dehlia in 2010, first-degree rape was defined as "vaginal intercourse. . . [w]ith a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim[.]" N.C. Gen. Stat. § 14-27.2(a)(1) (2009).[2] The offense was defined as a Class B1 felony. *Id*. § 14-27.2(b). The State therefore contends that defendant's assault of Dehlia, if committed by an adult, would have constituted first-degree rape, a Class B1 felony, and was therefore admissible pursuant to Rule 404(b).

The evidence at issue here is defendant's past conduct. That conduct was the vaginal intercourse by defendant, who was 16, with Dehlia, who was a child under the age of 13 years. At the time, defendant was at least 12 years old and at least four years older than Dehlia. This satisfied all of the evidentiary requirements of a first-degree rape charge. Defendant's contention that he pleaded to a misdemeanor offense is irrelevant. The conduct was what the State sought to introduce, conduct which constituted a Class B1 felony. We hold the trial court did not err, let alone commit plain error, in admitting the evidence.

[2] This statute was effective until 2015, at which time it was recodified as N.C. Gen. Stat. § 14-27.21.

Victim-Impact Evidence

At trial, Crissy testified that, as a result of defendant's assaults, she fell into a deep depression and attempted suicide. Her mother corroborated Crissy's description of her suicide attempt. Again, defendant did not preserve objections to this evidence. Defendant, nonetheless, contends that its admission constituted plain error.

Evidence of the impact of a crime upon the victim or victim's family, such as physical, psychological, or emotional injury, "is usually irrelevant during the guilt-innocence phase of a trial and must be excluded." *State v. Graham*, 186 N.C. App. 182, 190, 650 S.E.2d 639, 645 (2007). However,

> victim impact evidence which tends to show the context or circumstances of the crime itself, even if it also shows the effect of the crime on the victim and his family, is an exception to the general rule, and such evidence is relevant and therefore admissible at the guilt-innocence phase, providing, of course, that it is not subject to one of the admissibility exceptions of Rule 402.

Id. at 191, 650 S.E.2d at 646.

In the instant case, defendant contends that Crissy's and her mother's testimony concerning Crissy's depression and suicide attempt was victim impact evidence, and was therefore inadmissible. However, the State argues that, even assuming this evidence was admitted in error, it did not rise to the level of plain error.

Evidence at trial included a forensic interview, Crissy's testimony concerning the circumstances of the assaults, and evidence concerning defendant's similar rape of Dehlia. Even assuming *arguendo* that the admission of this testimony was in error,

in light of other evidence against him, defendant cannot show that "absent the error, the jury probably would have reached a different result." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. We, therefore, find no plain error.

Constitutional Argument

In his third argument, defendant contends that his sentence was unconstitutionally excessive. At trial, defendant did not raise a specific objection on this issue. Rather, at sentencing, defendant merely requested the court "to take into consideration that these offenses occurred when the defendant was 16 years old[.]" Defendant contends this constituted a constitutional objection that was obvious from its context. Even assuming *arguendo* this request constituted an objection, it was not properly preserved.

Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure requires that, "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion[.]" N.C.R. App. P. 10(a)(1). The rule further requires that "[i]t is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion." *Id.* Even if we considered defendant's statement to have been an objection, defendant failed to obtain a ruling thereupon. The trial court merely responded, "[a]ll right." The trial court therefore did not rule upon defendant's putative objection. "[A] constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on

appeal." *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982). As a result, we hold that this issue was not properly preserved for our review on appeal.

Defendant asks, in the alternative, that if we find this issue was unpreserved, we review it pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure. We decline to do so. We therefore dismiss this argument as unpreserved.

Satellite-based monitoring

In his fourth argument, defendant contends the trial court erred in failing to comply with statutorily mandated procedures during the SBM hearing. Recognizing he had not given proper notice of appeal from the trial court's order imposing SBM, defendant filed a petition for writ of certiorari requesting that we exercise our discretion and grant review of this issue. However, we decline to do so and, therefore, deny defendant's petition for writ of certiorari.

Conclusion

Accordingly, for the reasons stated herein, we hold it was not error, let alone plain error, for the trial court to admit 404(b) evidence of defendant's prior criminal conduct which—had he been an adult—would have constituted a Class B1 felony. It was likewise not plain error to introduce evidence of defendant's inappropriate touching of a prior victim. Furthermore, due to the evidence against defendant, it was not plain error to admit Crissy's testimony regarding her depression and attempted suicide. Defendant failed to obtain a ruling upon his putative

constitutional objection and thus, failed to preserve it for appeal. Defendant's petition for writ of certiorari is denied.

NO ERROR IN PART, NO PLAIN ERROR IN PART.

Judges DIETZ and HAMPSON concur.

Report per Rule 30(e).