IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-812

Filed: 6 October 2020

Buncombe County, Nos. 17 CRS 152-53

STATE OF NORTH CAROLINA

v.

VINSON SHANE-HILL

Appeal by defendant from judgments entered 13 June 2018 by Judge Gary M. Gavenus in Buncombe County Superior Court. Heard in the Court of Appeals 8 September 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tamara S. Zmuda, for the State.

Glover & Petersen, P.A., by James R. Glover, for defendant-appellant.

ZACHARY, Judge.

Defendant Vinson Shane-Hill appeals from judgments entered upon a jury's verdicts finding him guilty of first-degree forcible rape and assault inflicting serious injury. After review, we conclude that Defendant received a fair trial, free from error. However, because the trial court erred in calculating Defendant's prior record level, we remand for resentencing.

Background

On 7 May 2016, T.A.[1] ran into her friend Nathan at the convenience store, and he suggested that they drink their beer behind the convenience store. The two were sitting on crates, drinking beer, when T.A. and Defendant "made contact by phone." Defendant came to the convenience store, bought some beer, and started drinking with them. Nathan left at some point, and T.A. and Defendant were alone, drinking, behind the convenience store.

Defendant asked T.A. to have sex with him, which she declined. T.A. testified that although she was intoxicated and that what transpired next is "a blur," she remembered ending up in the dirt and Defendant removing her pants without her consent:

> I remember him inserting his male genitalia into my vagina. And I remember crying and telling him to get off of me, and no, and I don't want it, and stop, and hitting him. I remember telling him no, I don't want it. And I remember crying and screaming and I remember feeling a sharp cut on my left thigh and my left ear. And I know he left the scene first and I don't know which way he went. And . . . next I was in shock. I can't remember what happened. I remember feeling my left ear and I remember holding it and I looked at my hand and I was covered in blood.

Bloodied, dirty, and in shock, T.A. left the scene and ran toward the bus stop. A woman driving through the neighborhood noticed T.A., asked if she were okay, and

[1] We employ initials to protect the identity of the victim.

stated that she "need[ed] to take [her] to the hospital," which she immediately did. At the hospital, T.A. was treated by a sexual assault nurse examiner (a "SANE") and interviewed by several law enforcement officers. T.A. was covered in bruises and abrasions, had two tears in her genital area, and had a laceration and stab wound. One officer described her ear injury as "a cut stab wound." Another officer echoed this characterization of her ear injury, and added that, upon seeing T.A. in the hospital, "[s]he had an obvious wound to her leg[.]" The SANE swabbed T.A.'s vagina, cervix, and labia, and her clothing was collected. A scientist from the North Carolina State Crime Laboratory testified that testing of the swabs and T.A.'s clothing indicated fractions that were all consistent with Defendant's DNA. T.A. was able to provide law enforcement with information that led to Defendant's arrest.

On 6 February 2017, a grand jury indicted Defendant for first-degree forcible rape in which Defendant "employed or displayed a dangerous or deadly weapon," and for assault with a deadly weapon inflicting serious injury.[2] On 5 March 2018, a grand jury issued a superseding indictment alleging that with regard to the charge of first-degree forcible rape, Defendant "inflicted serious personal injury upon the victim," rather than the original indictment's allegation that he "employed or displayed a dangerous or deadly weapon." *See* N.C. Gen. Stat. § 14-27.21(a)(1)-(2) (2019).

[2] A copy of Defendant's indictment for first-degree kidnapping is not included in the record on appeal, although it is referred to at trial.

On 5 June 2018, Defendant's case came on for trial in Buncombe County Superior Court, the Honorable Gary M. Gavenus presiding. Defendant moved to dismiss all charges at the close of the State's evidence and again at the close of all evidence. The trial court granted Defendant's motion as to the first-degree kidnapping charge, but denied Defendant's motions to dismiss the charges of first-degree forcible rape and assault with a deadly weapon inflicting serious injury. The jury found Defendant guilty of first-degree forcible rape and assault inflicting serious injury, a lesser-included offense of the charge of assault with a deadly weapon inflicting serious injury.

Following the verdicts, the State offered evidence of the presence of an aggravating factor with regard to sentencing on Defendant's conviction for first-degree forcible rape.[3] The State alleged that the Post-Release Supervision and Parole Commission found Defendant, during the ten-year period prior to commission of the first-degree forcible rape, to be in willful violation of a condition of parole or post-release supervision imposed pursuant to release from incarceration. *See id.* § 15A-1340.16(d)(12a). At the conclusion of the State's evidence—which included the testimony of two probation and parole officers—Defendant moved to dismiss the aggravating factor. The motion was denied. Defendant elected not to offer any

[3] Prior to trial, the State timely provided defense counsel with notice of its intent to prove the existence of an aggravating factor for sentencing purposes. *See generally* N.C. Gen. Stat. § 15A-1340.16.

evidence, and again moved to dismiss the aggravating factor. Once again, the motion was denied. After a short deliberation, the jury found the existence of the aggravating factor.

For the offense of first-degree forcible rape, the trial court sentenced Defendant in the aggravated range to life imprisonment without the possibility of parole in the custody of the North Carolina Division of Adult Correction. For the offense of assault inflicting serious injury, the trial court sentenced Defendant to 150 days' imprisonment upon the expiration of his sentence for first-degree forcible rape. Defendant gave notice of appeal in open court.

Discussion

On appeal, Defendant argues that the trial court erred by: (1) denying his motion to dismiss the charge of first-degree forcible rape; (2) denying his motion to dismiss the aggravating factor; and (3) sentencing Defendant as a prior record level V offender.

I. First-Degree Forcible Rape

Defendant first contends that the trial court erred by denying his motion to dismiss the charge of first-degree forcible rape "because the evidence was insufficient to prove beyond a reasonable doubt that the alleged victim suffered a serious personal injury," an element of first-degree forcible rape. *See id.* § 14-27.21(a).

A. Standard of Review

"In considering a motion to dismiss, it is the duty of the court to ascertain whether there is substantial evidence of each essential element of the offense charged. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted). "In this determination, all evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence. The defendant's evidence, unless favorable to the State, is not to be taken into consideration[.]" *State v. White*, 261 N.C. App. 506, 510, 820 S.E.2d 116, 120 (2018).

On appeal, the question of "[w]hether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo." *State v. Crockett*, 368 N.C. 717, 720, 782 S.E.2d 878, 881 (2016).

B. Serious Personal Injury

Under North Carolina law, "[a] person is guilty of first-degree forcible rape if the person engages in vaginal intercourse with another person by force and against the will of the other person, and . . . inflicts serious personal injury upon the victim or another person." N.C. Gen. Stat. § 14-27.21(a)(2).

Our Supreme Court has explained that "[i]n determining whether serious personal injury has been inflicted, the court must consider the particular facts of each case." *State v. Herring*, 322 N.C. 733, 739, 370 S.E.2d 363, 367 (1988).

> The element of infliction of serious personal injury is satisfied when there is a series of incidents forming one continuous transaction between the rape or sexual offense and the infliction of the serious personal injury. Such incidents include injury inflicted on the victim to overcome resistance or to obtain submission, injury inflicted upon the victim or another in an attempt to commit the crimes or in furtherance of the crimes of rape or sexual offense, or injury inflicted upon the victim or another for the purpose of concealing the crimes or to aid in the assailant's escape.

Id. (quoting *State v. Blackstock*, 314 N.C. 232, 242, 333 S.E.2d 245, 252 (1985)).

Here, Defendant asserts that T.A.'s physical injuries did not constitute serious physical injury, and that therefore the trial court erred in denying his motion to dismiss the charge of first-degree rape. However, upon review of the evidence offered at trial, we conclude that the State presented substantial evidence that Defendant inflicted serious personal injury to T.A. The jury heard T.A.'s account of being held down in the dirt and raped by Defendant, leaving her bloodied and with numerous injuries. The SANE, Traci Zema, testified that she examined T.A. at the hospital and found that she had a laceration, a stab wound, two genital tears, and was covered in abrasions and bruises. Nurse Zema documented the following injuries: a laceration to T.A.'s left ear, which required stitches and was painful; an "incise wound" on her left leg, which required stitches and was painful; tears in the posterior fourchette (of

the vulva) and the fossa navicularis (area of the urethra); multiple abrasions on her right hand, left elbow, left hand, her back, her right leg, her left leg, her left inner thigh, and her left knee; and multiple bruises on her upper right thigh, her left lower leg, the right side of her bottom, her left inner thigh, and her right lower leg. Moreover, T.A. testified at trial that she had two scars from the cuts to her ear and thigh. Indeed, immediately after the rape, T.A. was so bloody and injured that a passerby stopped, asked if she were okay, stated that she needed to drive T.A. to the hospital, and did so.

We conclude that the State presented substantial evidence that T.A.'s injuries, when taken in the light most favorable to the State, constituted serious personal injury, and that the trial court properly submitted the charge of first-degree forcible rape to the jury. This argument is overruled.

II. Aggravating Factor

Defendant next argues that the trial court erred by denying his motion to dismiss the aggravating sentencing factor, and imposing a sentence in the aggravated range for first-degree forcible rape. This argument lacks merit.

A. Standard of Review

It is well settled that "[d]enial of a motion to dismiss an aggravating factor is a question of sufficiency of the evidence. Such an issue is a question of law" which this Court reviews de novo. *State v. Rivens*, 198 N.C. App. 130, 135, 679 S.E.2d 145,

149 (2009). "[W]hen, viewed in the light most favorable to the State and giving the State every reasonable inference therefrom, there is substantial evidence to support a jury finding" of an aggravating factor, the denial of a motion to dismiss is proper. *Id*. (citations and internal quotation marks omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id*. (citation and internal quotation marks omitted).

B. Willful Violation of a Condition of Probation

Although Defendant concedes that "[t]he evidence presented by the State was sufficient to establish that, within the ten-year period prior to the commission of the rape offense, the Post-Release and Parole Commission had found that [Defendant] had violated a condition of his post-release supervision," he asserts that "there was no evidence that the Post-Release and Parole Commission had found the violation of any condition to be done *willfully*." (Emphasis added).

As a general matter, "a sentencing judge may deviate from the presumptive [sentencing] range and impose a sentence in the aggravated range pursuant to N.C. Gen. Stat. § 15A-1340.17(c)(4) if one or more enumerated aggravating factors are found to exist." *State v. Hinton*, 263 N.C. App. 532, 535, 823 S.E.2d 667, 669-70 (2019) (citing N.C. Gen. Stat. § 15A-1340.16(b) (2017)). N.C. Gen. Stat. § 15A-1340.16(d) sets forth a list of aggravating factors that would justify the trial court's deviation from the presumptive range of minimum sentences. *State v. Black*, 197 N.C. App. 373, 375,

677 S.E.2d 199, 201 (2009). "The State bears the burden of proving beyond a reasonable doubt that an aggravating factor exists." N.C. Gen. Stat. § 15A-1340.16(a).

At issue here is factor (12a), which provides that an aggravating factor may be found where

> [t]he defendant has, during the 10-year period prior to the commission of the offense for which the defendant is being sentenced, been found by a court of this State to be in willful violation of the conditions of probation imposed pursuant to a suspended sentence or been found by the Post-Release Supervision and Parole Commission to be in willful violation of a condition of parole or post-release supervision imposed pursuant to release from incarceration.

Id. § 15A-1340.16(d)(12a).

Defendant contends that the State failed to present any evidence that the Post-Release Supervision and Parole Commission found that he *willfully* violated a condition of his probation during the ten-year period prior to the commission of first-degree rape. This argument lacks merit.

This Court recently determined that

> [u]nder factor (12a), it is not for the sentencing judge to decide *whether* the defendant committed a willful violation of his probation within the past ten years, but whether the defendant *has already been found* to have committed the same. Thus, under the statutory framework, even if it were the jury's task to find the existence of factor (12a) beyond a reasonable doubt, its determination would be limited to finding the existence of the *prior adjudication* alone. Whether the jury was satisfied that the defendant had in

> fact willfully violated the terms of his probation would be of no concern.

Hinton, 263 N.C. App. at 539, 823 S.E.2d at 672-73.

Here, the State presented the testimony of two Buncombe County probation and parole officers. Officer Kathryn Rhodes testified that she served as Defendant's supervising probation and parole officer, tasked with ensuring that Defendant abided by the conditions of his parole as set forth by the State Post-Release Supervision and Parole Commission (the "Parole Commission"). Rhodes detailed Defendant's violations of numerous sex offender conditions of his parole, of which she notified the Parole Commission. Rhodes further testified that on 16 December 2015, a hearing officer from the Parole Commission conducted a hearing regarding these violations, in which she and Defendant participated. Finally, Rhodes testified that the hearing officer concluded that Defendant was in willful violation of the conditions of his parole. Michael Gier, a Chief Probation and Parole Officer in Buncombe County, testified that on 4 January 2016, the Parole Commission revoked Defendant's "parole, conditional release."

The State presented substantial evidence to support the jury's finding of this aggravating factor, and thus, the trial court properly denied Defendant's motions to dismiss. Defendant's argument is overruled.

III. Prior Record Level

Defendant argues on appeal that the trial court erred in its calculation of his prior record level by including one point for a prior Idaho misdemeanor conviction. The State concedes that the trial court erred, and that Defendant was prejudiced by the error, in that "it appears that Defendant would have a prior record level of IV, instead of V." We agree.

A. Standard of Review

"The trial court's determination of a defendant's prior record level is a conclusion of law," which this Court reviews de novo. *State v. Weldon*, 258 N.C. App. 150, 160, 811 S.E.2d 683, 691 (2018). The "determination 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 omitted).[4]

B. Substantial Similarity of Out-of-State Offense

"Before sentencing a criminal defendant, the trial court must first determine the defendant's prior record level." *Weldon*, 258 N.C. App. at 160, 811 S.E.2d at 691 (citing N.C. Gen. Stat. § 15A-1340.13(b) (2016)). "The prior record level of a felony

[4] Although Defendant failed to raise an objection to this issue at sentencing, *see* N.C.R. App. P. 10(a)(1), "[i]t is not necessary that an objection be lodged at the sentencing hearing in order for a claim that the record evidence does not support the trial court's determination of a defendant's prior record level to be preserved for appellate review." *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009), *disc. review denied*, ___ N.C. ___, 691 S.E.2d 414 (2010); N.C. Gen. Stat. § 15A-1446(d)(18).

offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions[.]" N.C. Gen. Stat. § 15A-1340.14(a).

For classification of an out-of-state misdemeanor conviction, "[i]f the State proves by the preponderance of the evidence that an offense classified as a misdemeanor in the other jurisdiction is substantially similar to an offense classified as a Class A1 or Class 1 misdemeanor in North Carolina," then "the conviction is treated as a Class A1 or Class 1 misdemeanor for assigning prior record level points." *Id.* § 15A-1340.14(e). However, only certain misdemeanor traffic offenses receive points in a prior record level calculation:

> For each prior misdemeanor conviction as defined in this subsection, 1 point. For purposes of this subsection, misdemeanor is defined as any Class A1 and Class 1 nontraffic misdemeanor offense, impaired driving (G.S. 20-138.1), impaired driving in a commercial vehicle (G.S. 20-138.2), and misdemeanor death by vehicle (G.S. 20-141.4(a2)), *but not any other misdemeanor traffic offense under Chapter 20 of the General Statutes*.

Id. § 15A-1340.14(b)(5) (emphasis added).

At sentencing, the State presented evidence that in 1999, Defendant was convicted of fleeing or attempting to elude a peace officer in violation of Idaho Code § 49-1404. For sentencing purposes, the State sought to show that the Idaho conviction was substantially similar to N.C. Gen. Stat. § 20-141.5(a), which provides, *inter alia*, that "[i]t shall be unlawful for any person to operate a motor vehicle on a street, highway, or public vehicular area while fleeing or attempting to elude a law

enforcement officer who is in the lawful performance of his duties." The trial court found the two offenses to be substantially similar, and concluded that this "entitle[s] the State to Class One misdemeanor classification for that conviction." The trial court added one point to the calculation of Defendant's prior record level, giving Defendant a total of 14 points, and sentenced Defendant as a prior record level V felony offender.

Assuming, *arguendo*, that the elements of Defendant's prior Idaho offense are substantially similar to the elements of N.C. Gen. Stat. § 20-141.5(a), Defendant's prior Idaho offense should be similarly classified. N.C. Gen. Stat. § 20-141.5(a) is a Class 1 misdemeanor traffic offense, for which no prior record level points are assigned. Thus, the trial court erred by assigning one point for the Idaho misdemeanor.

A defendant with 13 sentencing points is a level IV felony offender for sentencing purposes. *Id.* § 15A-1340.14(c)(4). Here, however, Defendant was improperly sentenced as a level V offender with 14 sentencing points, to Defendant's prejudice. Thus, we remand the case for resentencing so that Defendant's prior record level can be properly calculated.

Conclusion

The State presented substantial evidence of (1) the elements of the offense of first-degree rape; and (2) the existence of an aggravating factor, and thus, the trial court did not err in denying Defendant's motions to dismiss. However, the trial court

improperly sentenced Defendant as a prior record level V felony offender, rather than level IV. Accordingly, we remand to the trial court for resentencing.

NO ERROR IN PART; REMANDED FOR RESENTENCING.

Judges BRYANT and ARROWOOD concur.

Report per Rule 30(e).