IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-889

No. COA22-141

Filed 20 December 2022

New Hanover County, No. 19 CRS 54532

STATE OF NORTH CAROLINA

v.

WAYNE EDWARD SOLLER, Defendant.

Appeal by Defendant from judgments entered 20 May 2021 by Judge G. Frank Jones in New Hanover County Superior Court. Heard in the Court of Appeals 20 September 2022.

Attorney General Joshua H. Stein, by Solicitor General Fellow Samuel W. Magaram, for the State of North Carolina.

Christopher J. Heaney for Defendant-Appellant.

JACKSON, Judge.

¶ 1 Wayne Edward Soller ("Defendant") appeals from the trial court's denial of his motion in limine and grant of the State's motion in limine, and from judgments entered upon jury verdicts finding him guilty of second-degree rape, first-degree sexual offense, and first-degree burglary. For the reasons detailed below we affirm in part and reverse and remand in part.

I. Background

¶ 2 Early in the morning of 28 September 1996, S.M.[1] woke up in her apartment in Wilmington, North Carolina, to find someone on top of her. The person put a pillow over her head, and S.M. started screaming. The assailant then hit S.M. in the head and told her to shut up. The assailant told S.M. that he had a knife and that he "just wanted to get laid." He then cut S.M.'s underwear off, performed oral sex on her, and raped her. Afterwards, S.M. lay with the pillow over her face for a period of time because she was unsure if the man had left. S.M. did not see the assailant at any point during the assault.

¶ 3 Eventually, S.M. removed the pillow from her face and got up. She called a friend who told her not to shower and to call 911. S.M. called the police.

¶ 4 After S.M.'s friend arrived, S.M. was transported to New Hanover Regional Medical Center. The medical staff conducted a rape kit, tested for sexually transmitted diseases, and took a vaginal swab for DNA testing.

¶ 5 At the time of S.M.'s assault, the State Crime Lab only tested rape kits once a suspect was identified and there was DNA available for a comparison. Because there was no initial suspect in S.M.'s case, her rape kit was not tested at the time of the assault. The State Crime Lab changed its policy in 2007 and began testing rape kits

[1] We use this pseudonym to protect the identity of the victim. *See* N.C. R. App. P. 42.

even when there was no suspect DNA available for comparison. After learning of this change, and that her rape kit was never tested, S.M. contacted the Wilmington Police Department in 2018 and asked that her kit be tested.

¶ 6 Once tested, the DNA collected from S.M.'s vagina and from the nightshirt S.M. was wearing the night of the assault matched Defendant's DNA, which had been taken and entered into a national database in 2014 following an unrelated arrest.

¶ 7 Law enforcement investigated Defendant and determined that he was in Wilmington at the time of the assault and had been temporarily staying at the same apartment complex as S.M.

¶ 8 On 10 June 2019, Defendant was indicted on one count of first-degree rape, one count of first-degree burglary, and one count of first-degree sexual offense.

¶ 9 Defendant filed a motion in limine for determination of admissibility of evidence on 6 April 2020. Defendant sought to admit evidence contained in S.M.'s medical records about S.M.'s sexual activity prior to the rape. Defendant also sought to admit evidence of a statement that S.M. made to law enforcement in 2019 regarding her sexual activity prior to the rape, asserting that this statement was inconsistent with S.M.'s statements in 1996 in her medical records. Defendant further sought to introduce DNA evidence recovered from S.M.'s bedding that was consistent with DNA of two unknown males. On 6 August 2020, the State filed a motion in limine pursuant to North Carolina Rule of Evidence 412 to prohibit

Defendant from introducing evidence of S.M.'s prior or subsequent sexual behavior**.** On 25 September 2020 the State filed a motion to redact information contained in S.M.'s medical records pursuant to Rule 412.

¶ 10 A hearing was held on the motions in limine on 28 September 2020. By order on 12 October 2020, the trial court denied Defendant's motion, found that evidence of S.M.'s prior sexual history was inadmissible under Rule 412, and granted the State's motion to redact S.M.'s medical records to delete references to S.M.'s prior sexual behavior.

¶ 11 Defendant was tried by jury at the 10 May 2021 Criminal Session of New Hanover County Superior Court. On 20 May 2021, the jury found Defendant guilty of second-degree rape, first-degree burglary, and first-degree sexual offense. The trial court sentenced Defendant to 288 to 355 months for second-degree rape and first-degree sexual offense, and a concurrent sentence of 77 to 102 months for first-degree burglary. Defendant was also ordered upon release from imprisonment to register as a sex offender for the rest of his natural life.

¶ 12 Defendant gave timely written notice of appeal.

II. Analysis

¶ 13 Defendant makes four arguments on appeal: (1) the trial court erred in excluding evidence under North Carolina Rule of Evidence 412 related to S.M.'s prior sexual encounters; (2) the trial court erred in excluding evidence of S.M.'s

inconsistent statements about the last time she had consensual sexual intercourse under Rule 412; (3) there was cumulative error in the trial court's erroneous exclusion of the sexual activity; and (4) the trial court erred in ordering lifetime registration for Defendant as a sex offender.

A. Trial Court's Rulings under North Carolina Rule of Evidence 412

¶ 14 Defendant first argues that the trial court erred in excluding evidence of S.M.'s prior sexual encounters, and in excluding S.M.'s inconsistent statements regarding her sexual history, under North Carolina Rule of Evidence 412. We hold that Defendant has not properly preserved these assertions of error for appellate review.

1. Preservation

¶ 15 "In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). It is not sufficient for a defendant to raise the question of admissibility of challenged evidence only at the motion in limine stage. *State v. McNeil*, 350 N.C. 657, 681, 518 S.E.2d 486, 501 (1999). "A party objecting to an order granting or denying a motion in limine, in order to preserve the evidentiary issue for appeal, is required to object to the evidence at the time it is offered at the trial (where the motion was denied) or attempt to introduce the evidence at trial (where the motion was granted)." *State v. Hill*, 347

N.C. 275, 293, 493 S.E.2d 264, 274 (1997) (quotations and citations omitted). This is because "[r]ulings on [motions in limine] are merely preliminary and subject to change during the course of trial[.]" *Id.*

¶ 16 Defendant contends that he properly preserved for appeal the issues of admissibility of S.M.'s prior sexual encounters and her prior statements regarding her sexual history because the significance of the evidence is obvious from the record, relying on our Supreme Court's decision in *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985). However, *Simpson* does not stand for the proposition that a defendant is relieved from his obligation to attempt to re-enter evidence at trial where it was excluded at the motion in limine stage if the significance of the evidence is obvious from the record. Instead, *Simpson* addresses the situation where evidence is excluded after an objection *at trial* and the party offering the evidence fails to make an offer of proof to show what the evidence would have been if allowed, or what the witnesses testimony would have been if allowed. *Id.*

¶ 17 Indeed, our Supreme Court has explicitly rejected a four-part test for preservation of evidence that is subject to a motion in limine that would find an evidentiary matter is preserved if "(1) there has been a full evidentiary hearing where the substance of the objection(s) raised by the motion *in limine* has been thoroughly explored; (2) the order denying the motion is explicit and definitive; (3) the evidence actually offered at trial is substantially consistent with the evidence explored at the

hearing on the motion; and (4) there is no suggestion that the trial court would reconsider the matter at trial[.]" *State v. Hayes*, 350 N.C. 79, 79-80, 511 S.E.2d 302, 303 (1999) (rejecting the test as set forth by this Court in *State v. Hayes*, 130 N.C. App. 154, 171, 502 S.E.2 853, 865 (1998)). Instead, our Supreme Court maintained that the only way to preserve for appeal the question of admissibility of evidence initially addressed in a motion in limine is to further object, or attempt to introduce the evidence, at trial. *Id*. at 80, 511 S.E.2d at 303.

¶ 18 *Simpson* is not applicable here because Defendant never attempted to enter the evidence of S.M.'s prior sexual encounters or prior statements regarding her sexual history at trial.

¶ 19 Defendant further argues that he properly preserved for appeal the issue of admissibility of S.M.'s inconsistent statements regarding her sexual history because, during trial, when reconstructing bench conferences that took place off the record, the trial court stated "[r]espective exceptions to the Court's indications of its rulings are noted." Defendant contends that this statement referred to the trial court's reaffirming the exclusion of S.M.'s statements, and therefore indicates that the excluded evidence was on the record and preserved. We disagree.

¶ 20 The portion of the trial cited by Defendant involved a bench conference on two different issues. The first was about the admission of State's exhibit 52, a lab report analyzing S.M.'s bedding. The State failed to redact this exhibit despite the trial

court's prior ruling on the motions in limine that references to S.M.'s prior sexual behavior be deleted. Accordingly, the trial court "expressed its intent to allow defense counsel, notwithstanding its earlier order, to make inquiry with respect to State's exhibit 52 so long as the questioning did not violate Rule 412 or make reference directly or indirectly to the alleged victim's prior sexual behavior." This statement by the trial court referred only to questioning related to State's exhibit 52, a lab report related to S.M.'s bedding that contained no statements by S.M.

¶ 21 The second issue addressed by the trial court in its bench conference reconstruction was also unrelated to any statements made by S.M. about her sexual history. Instead, the conference was about the State's objection to a line of questioning about certain tests conducted at the hospital.

¶ 22 The above context of the trial court's statement acknowledging "respective objections" make it clear that it was not referring to its pre-trial ruling on the exclusion of S.M.'s statements. It was, instead, referring to the objections regarding the two issues before it at that time, neither of which related to S.M.'s statements about her sexual history.

¶ 23 The trial transcript is devoid of any attempt by Defendant to enter evidence of S.M.'s prior sexual encounters, or her statements about those encounters. Defendant did not attempt to cross-examine S.M. about these encounters or statements. Defendant did not attempt to cross-examine the emergency room physician who

examined S.M. after the assault on any statements S.M. made about her sexual history. Defendant did not attempt to cross-examine any testifying police officers about statements that S.M. may have made to them about her sexual history.

¶ 24 We hold that Defendant has failed to properly preserve for appellate review the question of admissibility of S.M.'s prior sexual history and statements about that history. We further hold that Defendant has failed to "specifically and distinctly" contend that the alleged errors constitute plain error, and we are therefore unable to review them under that standard. *See State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012).

B. Cumulative Error

¶ 25 Because we hold that Defendant has failed to preserve his evidentiary questions for appellate review, we are also unable to review those alleged errors for cumulative error.

C. Lifetime Registration

¶ 26 Defendant's final assertion of error is that the trial court erred in ordering Defendant to register as a sex offender for the rest of life because it erroneously relied on and applied N.C. Gen. Stat. § 14-208.6(1a), which applies to offenses committed on or after 1 October 2001, and the offense here was committed in 1996. We agree.

¶ 27 Defendant did not object to the lifetime registration during sentencing proceedings. However, in our discretion, we invoke Rule 2 of our Rules of Appellate

Procedure to relax Rule 10's issue-preservation requirements and reach the merits of Defendant's argument.

¶ 28 "On its own motion or the motion of a party, an appellate court of North Carolina may employ Rule 2 and suspend any part of the appellate rules 'to prevent manifest injustice to a party, or to expedite decision in the public interest[.]'" *State v. Bursell*, 372 N.C. 196, 200, 827 S.E.2d 302, 305 (2019) (quoting N.C. R. App. P. 2). This decision is discretionary and dependent on the specific facts and circumstances of each case. *Id.* at 201, 827 S.E.2d at 306.

¶ 29 Here, the State concedes that the trial court's sentencing of Defendant under N.C. Gen. Stat. § 14-208.6(1a) was error. We therefore hold that it is appropriate to invoke Rule 2 to prevent manifest injustice to Defendant and we proceed to the merits of his argument.

¶ 30 "Alleged statutory errors are questions of law, and as such, are reviewed *de novo*." *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721 (2011).

¶ 31 On 20 May 2021, the trial court ordered that Defendant, upon release from imprisonment, register as a sex offender for the rest of his life. The trial court checked the box under "Findings" that the offense committed by Defendant is an aggravated offense under N.C. Gen. Stat. § 14-208.6(1a).

¶ 32 North Carolina General Statute § 14-208.6(1a) became effective on 1 October 2001, and only applies to offenses committed on or after that date. *See* 2001 N.C.

Sess. Law 373, Sec. 12. Because the date of the offense committed in this case was 28 September 1996, it cannot be considered an "aggravated offense" for the purposes of section 14-208.6(1a). *See State v. Davis*, 237 N.C. App. 481, 489, 767 S.E.2d 565, 571 (2014) (holding that the trial court erred in applying N.C. Gen. Stat. § 14-208.6(1a) to a defendant's sentencing where the offense was committed before 1 October 2001). We therefore hold that the trial court erred in utilizing an inapplicable statutory provision in its order for Defendant to register as a sex offender. Accordingly, we remand for resentencing.

III. Conclusion

¶ 33 For the aforementioned reasons, we hold that Defendant failed to preserve his evidentiary assertions for appellate review. We further hold that the trial court erred in sentencing Defendant to lifetime sex offender registration under an inapplicable statute, and he is entitled to remand for resentencing on that ground.

AFFIRMED IN PART AND REMANDED FOR RESENTENCING.

Judges DIETZ and INMAN concur.

Report per Rule 30(e).