

NO. COA14-782

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

STATE OF NORTH CAROLINA

v.

Buncombe County
No. 10 CRS 55849, 55852-53

JOSEPH ORTIZ

Appeal by defendant from judgments entered 20 September 2013 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 3 November 2014.

Attorney General Roy Cooper, by Assistant Attorney General Joseph L. Hyde, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Paul M. Green, for Defendant.

BELL, Judge.

Defendant Joseph Ortiz appeals from a judgment sentencing him to life imprisonment for his conviction of first degree sexual offense and a consolidated judgment sentencing him to a consecutive term of 146 to 185 months imprisonment for convictions of robbery with a dangerous weapon, felony breaking and entering, assault with a deadly weapon, and attaining habitual felon status. On appeal, Defendant raises three issues. First, Defendant contends that the trial court erred in

allowing the State to proceed on an aggravating factor that was not alleged in the indictment. Second, Defendant contends that, should this Court determine that the State was not required to include the aggravating factor in the indictment, the trial court erred in denying Defendant's motion to dismiss the aggravating factor for insufficient evidence. Third, Defendant argues that the trial court erred in entering judgment and imposing sentence for both Defendant's conviction of robbery with a dangerous weapon and the lesser-included offense of assault with a deadly weapon. In that we find error and remand Defendant's first degree sexual offense judgment for resentencing, we will not address Defendant's second argument.

I. Factual Background

A. State's Evidence

In July 2009, Stacey moved from Indianapolis, where she was getting her PhD in clinical psychology, to a downtown apartment in Asheville, North Carolina.¹ Defendant was a neighbor of Stacey's, and had made Stacey uncomfortable when they encountered each other in the common areas of the apartment complex. For example, when Stacey returned from being out of town over the Thanksgiving holiday, Defendant asked her where

¹ Stacey is a pseudonym created by this Court to protect the victim's identity.

her car had been for the number of days Stacey had been gone. Stacey thought it odd that Defendant would have paid attention to her car and had noted how long it had not been parked in the parking area.

On Friday, 21 May 2010, Stacey came home from work and took a nap prior to meeting friends for dinner. She woke up around 6:00 p.m. and went to the bathroom. While in the bathroom, Stacey heard a loud pounding at her door. When she opened the door, Defendant, wearing a ski mask and brandishing a knife, forced himself into the apartment, at which point Stacey began screaming.

Defendant told Stacey to "shut up," forced her to lay on the floor, put duct-tape over her eyes and tied her hands and feet together. Defendant then asked Stacey for her ATM card. Stacey told Defendant that she did not have a card but had cash in her wallet. Defendant then began making sexual comments towards Stacey. As Defendant began to pull down Stacey's pants, she told Defendant, falsely, that if he was going to have sex with her, he should use a condom because she was HIV positive. At that point, police officers, responding to a domestic disturbance call, knocked on Stacey's apartment door and identified themselves. Defendant forced Stacey into her

bathroom where he held the knife to Stacey's throat and threatened to kill her if she said anything. After hearing no response from inside the apartment, the officers left.

Defendant then put a pillowcase over Stacey's face, cut off her clothing and, over the course of three hours sexually assaulted her by performing cunnilingus on her, rubbing vodka on her body and sucking her breasts. Defendant drank approximately three-fourths of the bottle of vodka, and eventually became so intoxicated that he passed out. After Defendant passed out, Stacey ran from her apartment, got in her car, called 911, and drove to the police station. Upon arriving at the police station, Stacey gave her keys to officers, who returned to her home to find Defendant passed out, face down, on her living room floor. Defendant awoke after handcuffs were placed on him. As a result of the sexual assault by Defendant, Stacey had to report to a hospital to receive prophylactic HIV treatment for a total of thirty days.

B. Defendant's Evidence

Defendant, who was age 53 at the time of his trial, moved into the same apartment complex as Stacey in 2009. According to Defendant, he and Stacey developed a sexual relationship. Defendant would go to Stacey's apartment and the two would role-

play and then perform oral sex on each other. They devised a "signal," consisting of Stacey parking in front of Defendant's apartment, by which Defendant would know Stacey was interested in a sexual encounter.

Defendant received the "signal" on the day of the incident and went to Stacey's apartment as, he contends, he and Stacey had agreed. While in Stacey's apartment, Defendant drank vodka, which after interacting with certain medications he was taking, caused him to pass out. When Defendant awoke, he was surprised to find himself in handcuffs and explained to police officers that the encounter between he and Stacey was consensual.

B. Procedural Facts

Warrants for Defendant's arrest were issued on 22 May 2010. On 12 July 2010, the Buncombe County grand jury returned bills of indictment charging Defendant with felonious breaking and entering, robbery with a dangerous weapon, assault with a deadly weapon, first degree kidnapping, first degree sexual offense, and attaining habitual felon status. Superseding indictments were entered on 2 August 2010 on Defendant's first degree kidnapping and first degree sexual offense charges, adding a sentencing enhancement under N.C. Gen. Stat § 15A-1340.16(d)

based upon the allegation that defendant committed these acts by using, displaying or threatening a knife as a deadly weapon.

On 15 August 2011, the State filed a motion requesting that the trial court allow it to file a notice of a non-statutory aggravating factor under seal due to a potential conflict between N.C. Gen. Stat. § 15A-1340.16(a6), requiring the State to provide a defendant with written notice of its intent to prove an aggravating factor, and N.C. Gen. Stat. § 130A-143, which prohibits the public disclosure of the identity of persons with certain communicable diseases that are subject to the reporting requirements of N.C. Gen. Stat. § 130A-143. The parties appeared before the trial court on 17 August 2011 to address the State's motion, as well as other issues. The trial court closed the proceedings at the request of the State and with the consent of Defendant. The trial court then heard the State's motion to file notice of an aggravating factor under seal. The State sought to assert as a non-statutory aggravating factor the fact that Defendant committed the sexual offense against Stacey knowing that he was HIV positive and could transmit the AIDS virus to Stacey, causing serious bodily injury or death. According to the State, it could not file the statutorily required written notice due to the provisions of

N.C. Gen. Stat. § 130A-143, which prohibit the disclosure of the identity of persons with certain communicable diseases, including HIV/AIDS. The defense objected to the State's request to submit the aggravating factor on the basis that the 30-day notice requirement had expired. The court opined that it did not "necessarily" see a conflict between the statute requiring notice of aggravating factors to be filed and the statute prohibiting the disclosure of certain medical information given the exception provided in N.C. Gen. Stat. § 130A-143(6) allowing for the information to be disclosed by court order. However, the court granted the State's motion to file the notice under seal and noted Defendant's objection.

Although the case was set to be tried on 29 August 2011, the State moved to continue the case due to potential discovery issues. During a pre-trial hearing on 10 September 2013, Defendant waived his right to have the trial proceedings closed. Defendant's case came on for trial during the 16 September 2013 Criminal Session of Buncombe County Superior Court. The jury returned guilty verdicts on all charges. The State then sought to proceed on the non-statutory aggravating factor and Defendant objected. The trial court overruled Defendant's objections and allowed the State to present evidence of the aggravating factor

to the jury. The jury returned a unanimous verdict against Defendant with respect to the aggravating factor. The jury also found Defendant guilty of attaining habitual felon status. On 20 September 2013, the trial court entered judgments against Defendant sentencing him in the aggravated range to life imprisonment without parole for his conviction of first degree sexual offense²; to a consecutive term of 146 to 185 months imprisonment for his conviction of first degree kidnapping; and a second consecutive term of 146 to 185 months imprisonment for his convictions of robbery with a dangerous weapon, breaking and entering, assault with a deadly weapon, and attaining habitual felon status. Defendant gave notice of appeal to this Court.

II. Legal Analysis

A. Non-Statutory Aggravating Factor

It is his first argument on appeal, Defendant contends that the trial court erred in allowing the State to proceed on a non-statutory aggravating factor when it was not alleged in the

² We note that the judgment entered by the trial court indicates that the court made no written findings because the sentence was in the presumptive range. However, the court sentenced Defendant to life imprisonment without the possibility of parole on the conviction of first degree sexual offense, a B1 felony. Pursuant to the applicable sentencing chart, this sentence is only available if the court is sentencing in the aggravated range.

indictment, as required by N.C. Gen. Stat. § 15A-1340.16(a4). The State concedes that it was required by N.C. Gen. Stat. § 15A-1340.16(a4) to include the non-statutory aggravating factor in the indictment. However, the State contends that the trial court did not err in allowing the State to proceed on the aggravating factor, as the State was statutorily prohibited by the provisions of N.C. Gen. Stat. § 130A-143 from complying with N.C. Gen. Stat. § 15A-1340.16(a4). Although we commend the State's attempt to protect Defendant's privacy and comply with its understanding of the requirements of N.C. Gen. Stat. § 130A-143, we do not agree with its methodology.

The legislature enumerated twenty-eight specific aggravating factors that could, if proven beyond a reasonable doubt, allow a court to sentence a defendant in the aggravated range. N.C. Gen. Stat. §§ 15A-1340.16(a) & (d). Additionally, N.C. Gen. Stat. § 15A-1340.16 includes a catchall provision for "[a]ny other aggravating factor reasonably related to the purposes of sentencing." N.C. Gen. Stat. § 15A-1340.16(d)(20). Pursuant to N.C. Gen. Stat. § 15A-1340.16(a4), aggravating factors under subdivision (d) "need not be included in an indictment or other charging instrument"; however, any non-statutory "aggravating factor alleged under subdivision (d)(20)

. . . shall be included in an indictment or other charging instrument, as specified in G.S. 15A-924." In *State v. Ross*, 216 N.C. App. 337, 350-51, 720 S.E.2d 403, 411-12 (2011), *disc. review denied*, 366 N.C. 400, 735 S.E.2d 174 (2012), this Court reversed the defendant's judgment and remanded it for resentencing when the State "simply served [the] defendant with notice of its intent to prove the existence of" non-statutory aggravating factors but did not include them in an indictment. Although N.C. Gen. Stat. § 15A-1340.16(a4) and this Court's holding in *Ross* make it clear that the failure to include a non-statutory aggravating factor renders it unavailable for sentencing purposes, the State contends that its noncompliance with this statutory mandate should be excused because conflicting statutory provisions prevented it from following proper procedure.

The statute upon which the State relies provides, in pertinent part, that "information and records, whether publicly or privately maintained, that identify a person who has AIDS virus infection or who has or may have a disease or condition required to be reported pursuant to the provisions of this Article shall be strictly confidential" and "shall not be released or made public." N.C. Gen. Stat. § 130A-143.

According to the State, alleging in an indictment that Defendant has a reportable communicable disease would violate the provisions of N.C. Gen. Stat. § 130A-143. We disagree.

This Court finds no inherent conflict between N.C. Gen. Stat. § 130A-143 and N.C. Gen. Stat. § 15A-1340.16(a4). We acknowledge that indictments are public records, N.C. Gen. Stat. § 132-1.4(k); see also *State v. West*, 293 N.C. 18, 32, 235 S.E.2d 150, 158 (1977), and as such, may generally be made available upon request by a citizen. N.C. Gen. Stat. § 132-1(b). However, if the State was concerned that including the aggravating factor in the indictment would violate N.C. Gen. Stat. § 130A-143, it could have requested a court order in accordance with N.C. Gen. Stat. § 130A-143(6), which allows for the release of such identifying information "pursuant to [a] subpoena or court order." Alternatively, the State could have sought to seal the indictment. N.C. Gen. Stat. § 132-1.4(k) (providing that an indictment is a "public records and may be withheld only when sealed by court order"). It is perplexing to this Court that the State obtained permission from the trial court to file notice of its intent to pursue an aggravating factor under seal but did not attempt to do so for the indictment.

This Court could speculate as to methods by which the State could have unequivocally complied with both statutes but that is not our role. The plain language of N.C. Gen. Stat. § 15A-1340.16(a4) requires the non-statutory aggravating factor to be included in the indictment and the State's failure to do so rendered it unusable by the State in its prosecution. Considering the plain language of N.C. Gen. Stat. § 15A-1340.16(a4), this Court's holding in *Ross*, and in the absence of authority to the contrary, we conclude that simply providing notice in compliance with N.C. Gen. Stat. § 15A-1340.16(a6) was insufficient to allow the State to proceed on the non-statutory aggravating factor and it was error for the trial court to so allow.

B. Sentencing for Armed Robbery and Assault with a Deadly Weapon

Defendant next argues that the trial court erred when it entered judgment and sentenced Defendant for both robbery with a dangerous weapon and the lesser-included offense of assault with a deadly weapon. The State contends that Defendant has not properly preserved this issue for appeal. This Court has recently noted:

As a general rule, "constitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal." *State v. Davis*, 364 N.C. 297, 301,

698 S.E.2d 65, 67 (2010) (citations, internal quotation marks, and brackets omitted) (declining to review the defendant's double jeopardy argument because he failed to raise it at trial). Furthermore, our appellate rules require a party to make "a timely request, objection, or motion [at trial], stating the specific grounds for the [desired] ruling" in order to preserve an issue for appellate review. N.C.R. App. P. 10(a)(1).

State v. Mulder, __ N.C. App. __, __, 755 S.E.2d 98, 101 (2014) (alterations in original). The defendant in *Mulder* argued that judgment should have been arrested on one of his charges because it was a lesser-included offense of another crime for which he was convicted. *Id.* at __, 755 S.E.2d at 100. The State argued that the defendant should be denied appellate review because the issue was being raised for the first time on appeal. *Id.* at __, 755 S.E.2d at 101. Relying on Supreme Court precedent, the defendant contended that the issue was reviewable as it related to a fatal error appearing on the face of the record. *Id.* This Court, however, held that the defendant's "double jeopardy argument cannot be raised for the first time on appeal on a motion for arrest of judgment because a double jeopardy problem does not constitute a fatal defect on the face of the record." *Id.* The issue was nonetheless reviewed by this Court pursuant to Rule 2 of our Rules of Appellate Procedure.

Defendant here has not requested that this Court exercise our discretion under Rule 2 to review this issue. However, we elect to do so on our on motion. See *id.* (noting that "[t]he decision to review an unpreserved argument relating to double jeopardy is entirely discretionary"). We do not think it is of significance that Defendant did not couch his argument specifically as being based on his right against double jeopardy. We recognize that "[t]he argument advanced by [D]efendant has been presented under various titles: double jeopardy, lesser-included offense, an element of the offense, multiple punishment for the same offense, merged offenses, etc.," and "choose to avoid any lengthy discussion of the appropriate title, as it is the principle of law rather than the characterization of the issue that is important." *State v. Gardner*, 315 N.C. 444, 451 340 S.E.2d 701, 707 (1986).

In the present case, Defendant was convicted and sentenced for both robbery with a dangerous weapon and assault with a deadly weapon. While Defendant argues that these convictions arose out of the same conduct, a careful review of the record supports a contrary conclusion. Stacey testified that Defendant threatened her with a knife and took her money. He then began to make sexual comments to her and started to remove her

clothing. His acts were interrupted when the police knocked on the apartment door. Defendant then forced Stacey into the bathroom and held a knife to her throat and threatened to kill her. Thus, we find that there was sufficient evidence for the jury to find that the acts necessary to convict Defendant of robbery with a dangerous weapon, as charged in the indictment, concluded before Defendant committed the acts which constituted the offense of assault with a deadly weapon, as alleged in a separate indictment and therefore support separate convictions and sentences for the two offenses. Accordingly, we find no error in the trial court's judgment.

III. Conclusion

For the reasons set forth above, this Court concludes that the trial court erred in submitting the aggravating factor to the jury and applying it in sentencing Defendant on his conviction of first degree sexual offense. We therefore must reverse and remand for resentencing.

REVERSED AND REMANDED FOR RESENTENCING.

Chief Judge MCGEE and Judge Robert C. HUNTER concur.