

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-953

Filed: 7 April 2015

Rowan County, Nos. 11 CRS 53241-42, 13 CRS 1777

STATE OF NORTH CAROLINA

v.

CHARLES GILBERT GILLESPIE

Appeal by defendant from judgment entered 31 October 2013 by Judge Hugh B. Lewis in Rowan County Superior Court. Heard in the Court of Appeals 4 February 2015.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth J. Weese, for the State.

Kevin P. Bradley for defendant-appellant.

DIETZ, Judge.

Defendant Charles Gilbert Gillespie appeals from convictions stemming from a brutal attack and sexual assault on a female victim. Gillespie repeatedly punched the victim in the face, threatened her with a kitchen knife, forced her to submit to anal sex, and choked her when she attempted to fight him off. A jury convicted Gillespie of assault inflicting serious injury by strangulation, second degree kidnapping, and second degree sexual offense. The trial court sentenced him to 146-185 months in prison.

On appeal, Gillespie argues that it was either plain error or ineffective assistance of counsel for the trial court to admit without objection the testimony of a law enforcement officer who described the victim’s demeanor. He also argues that it was either plain error or ineffective assistance of counsel for the trial court to strike without objection the testimony of a defense witness who stated that the alleged crimes “just don’t fit [Gillespie’s] M.O.” Finally, Gillespie argues that his sentence should be vacated and remanded because the judgment form mistakenly lists a conviction for assault with a deadly weapon, a charge of which he was acquitted.

For the reasons set forth below, we hold that Gillespie did not receive ineffective assistance of counsel because his trial counsel’s failure to object to the officer’s testimony and failure to object to the striking of the defense witness’s testimony did not prejudice him. We likewise hold that the trial court’s admission and striking of that testimony did not constitute plain error. Because there is a clerical error on the “Additional File No.(s) and Offense(s)” form attached to the judgment—which did not affect Gillespie’s sentence—we remand for correction of the clerical error in the judgment.

Facts and Procedural History

Gillespie and Jane Doe¹ had known each other since around 1994 or 1995 and previously had a consensual sexual relationship. On 16 May 2011, Ms. Doe’s neighbor

¹ We use a pseudonym to protect the victim’s privacy.

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gave Ms. Doe and Gillespie a ride to the grocery store to buy food and beer. Gillespie and Ms. Doe then returned to her apartment where they drank the beer. Ms. Doe testified that Gillespie became angry when he realized that there was no more beer in the refrigerator. He told her that he was going to “f--- [her] in [her] a--” and began “punching” and “smacking” her in the face. Ms. Doe attempted to get away from Gillespie by running into the bathroom. She got in the shower to clean the blood off of her face. Gillespie followed her into the bathroom, pulled the shower curtain back, and made her take a shower while he watched.

When Ms. Doe finished showering and left the bathroom wearing only a towel, she saw Gillespie “come walking towards [her] with three knives, like a butcher knife and two small steak knives.” He said, “Don’t think I won’t do it to you.” Ms. Doe ran back into the bathroom and locked the door, but Gillespie broke through the door. Once inside the bathroom, Gillespie again hit Ms. Doe.

Gillespie then put the knives away and took Ms. Doe into the bedroom. Gillespie told her to take her towel off and get on the bed. She complied because she was “scared for [her] life.” Gillespie got cocoa butter and baby oil from the bathroom and rubbed them on his penis. He then started having anal sex with Ms. Doe against her will. She “told him to stop,” that “he was hurting [her],” but he told her to “shut up.” Ms. Doe kicked him in the chest to get him off of her, but he pulled her onto the

floor and started choking and hitting her. When Gillespie was choking her, Ms. Doe was unable to breathe and felt “[l]ike [she] was going to die.”

Gillespie eventually left the bedroom and Ms. Doe quickly put some clothes on and ran next door to her neighbor’s apartment. Ms. Doe had blood on her face and arms, a swollen eye, and a hurt ankle. The neighbor called 911. The neighbor testified that Ms. Doe was “really upset” and “shaking,” and said Ms. Doe told her that Gillespie had sexually assaulted her, trapped her in the bathroom, and “beat on her.” Throughout the evening, the neighbor had heard “a lot of banging” coming from Ms. Doe’s apartment.

Rowan County Sheriff’s Deputy Timothy Cook responded to the 911 call. He discovered Ms. Doe sitting in front of her neighbor’s apartment and complaining that she thought she had a broken ankle. Deputy Cook observed that Ms. Doe had bruises on her body and was very upset. Ms. Doe told Deputy Cook that her boyfriend had beaten her up. Deputy Cook searched Ms. Doe’s apartment, but did not find Gillespie. Ms. Doe did not tell Deputy Cook that Gillespie had sexually assaulted her. Ms. Doe testified that she did not tell Deputy Cook about the sexual assault because she “didn’t like that cop” and “[h]e was real rude, like I was faking or something.” Deputy Cook called EMS and Ms. Doe was taken to the hospital by ambulance. Ms. Doe was treated for her injuries at the hospital, but testified that she did not tell hospital personnel about the sexual assault because she was embarrassed and ashamed.

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When Ms. Doe's mother picked her up from the hospital, she told her mother what had happened, including that Gillespie had forced her to have anal sex with him against her will. Ms. Doe and her mother went to the Rowan County Sheriff's Office and met with Deputy J.R. Wietbrock. Ms. Doe told Deputy Wietbrock what had happened, including the sexual assault, and then made a written statement.

Gillespie was charged as a habitual felon with first degree sexual offense, first degree kidnapping, assault by strangulation, and assault with a deadly weapon. The case went to trial on 29 October 2013. At trial, the State asked Deputy Wietbrock to compare Ms. Doe's demeanor during her initial police statement and during her trial testimony. Deputy Wietbrock testified:

That day she was – I would say that she was more scared and, you know, wanted to let me know everything that had happened. Today she's, in my opinion, trying to remember things that have happened, and she's not scared or anything today or upset like she was.

Gillespie's counsel did not object to this testimony.

Wilbert Horton, Jr., an acquaintance of Gillespie, testified on Gillespie's behalf. Horton testified that he did not believe his friend Gillespie had committed the acts charged. When the State asked Horton why he believed "this is something that I don't think [Gillespie] could do," Horton testified that the charged offenses "just don't fit [Gillespie's] M.O." The State then requested a *voir dire* examination with Horton outside the presence of the jury. During this *voir dire*, the State questioned Horton

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about his knowledge of Gillespie's prior convictions, including multiple prior assault convictions. Gillespie's counsel objected to the cross-examination of Horton regarding Gillespie's prior convictions. In response, the trial court sustained the objection to cross-examination, but also struck some of Horton's testimony, instructing the jury that

[T]here were statements made by this witness that "this is something I don't think he could do," referring to the defendant, "this is not part of his M.O.," and other statements such as that. . . . Any statements by this individual as to his opinion of whether or not the defendant could or could not have done these acts that are at issue in this trial are not to be considered by you in any form or fashion during your deliberation.

Gillespie's counsel did not object to the striking of Horton's opinion.

The jury convicted Gillespie of second degree sexual offense, second degree kidnapping, and assault by strangulation, but acquitted him of assault with a deadly weapon. He then entered a plea agreement, acknowledged by the trial court at sentencing, that provided that his three convictions would be consolidated into one sentence for second degree sexual offense, a Class C felony. However, the "Additional File No.(s) and Offense(s)" form attached to the judgment erroneously indicated that "Assault with a Deadly Weapon" was a charge for which Gillespie had been convicted. Gillespie did not seek to correct this error in the trial court. He then appealed his conviction and sentence to this Court.

Analysis

I. Admission and Striking of Witness Testimony

Gillespie first argues that it was either plain error or ineffective assistance of counsel for the trial court to admit, and for defense counsel to fail to object to, testimony from Rowan County Sheriff's Deputy J.R. Wietbrock regarding the victim's demeanor during her initial police statement and during her trial testimony. We reject this argument because Gillespie cannot show a reasonable probability that absent the alleged error, the jury would have reached a different result—the strict prejudice standard applicable to these claims.

“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.* (internal quotation marks omitted). Plain error should be “applied cautiously and only in the exceptional case” where the error “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” *Id.*

Similarly, to show ineffective assistance of counsel, a defendant must show both that “counsel’s performance was deficient” and that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding

would have been different.” *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984); *State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985). “[I]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, [this Court] need not determine whether counsel’s performance was deficient.” *State v. Phillips*, 365 N.C. 103, 122, 711 S.E.2d 122, 138 (2011) (internal quotation marks omitted).

Gillespie contends that it was error for the court to allow, and for his counsel not to object to, testimony given by Deputy Wietbrock comparing the victim’s demeanor during her police statement and during her trial testimony. The State asked Wietbrock to describe how Ms. Doe’s demeanor during her initial police statement was different from her demeanor during her trial testimony. Wietbrock responded:

That day she was – I would say that she was more scared and, you know, wanted to let me know everything that had happened. Today she’s, in my opinion, trying to remember things that have happened, and she’s not scared or anything today or upset like she was.

Gillespie asserts that these statements are inadmissible opinion testimony because Wietbrock “vouched for the veracity of [Ms. Doe’s] claims.” *See* N.C. Gen. Stat. § 8C-1, Rule 701 (2013); *State v. Gopal*, 186 N.C. App. 308, 318, 651 S.E.2d 279, 286 (2007). He argues that, because “this case turned on the credibility of the victim,” Wietbrock’s statements “must have had an impact on the jury’s determination whether [Ms. Doe]

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was remembering or fabricating her accounts of Gillespie sexually assaulting, restraining, and strangling her.”

We disagree. Ms. Doe’s testimony was supported by the testimony of her neighbor and Ms. Doe’s mother. The testimony of those witnesses was not refuted at trial. Thus, Gillespie has not met his burden of showing that, absent Deputy Wietbrock’s purportedly inadmissible testimony, the jury probably would have reached a different result.

Gillespie contends that this case is analogous to *State v. Towe*, where an expert witness made a “conclusory assertion that the victim had been sexually abused,” based only on the victim’s statements. 366 N.C. 56, 62, 732 S.E.2d 564, 568 (2012). Our Supreme Court found that the admission of this expert testimony constituted plain error because it “impermissibly bolstered the victim’s credibility” where the “case turned on the credibility of the victim, who provided the only direct evidence against defendant.” *Id.* at 62-63, 732 S.E.2d at 568. But *Towe* is readily distinguishable. There, the only testimony supporting the alleged abuse came from the victim herself. Here, by contrast, there were multiple other sources of evidence that corroborated the victim’s testimony, including the testimony of her neighbor and her mother. Accordingly, we reject this argument.

Gillespie next argues that it was either plain error or ineffective assistance of counsel for the trial court to strike, and for defense counsel to fail to object to the

striking of, testimony from defense witness Wilbert Horton, Jr., regarding Gillespie's character. Again, we must reject this argument under the applicable standard of review.

After Horton testified that he did not believe Gillespie could have committed the crimes charged and that "it just – that just don't fit his M.O.," the State sought to introduce evidence of Gillespie's prior convictions for assault. The trial court denied that request but instructed "the jury that they are to disregard the opinion of whether or not this individual could have done this or it's in his M.O."

Gillespie has not shown that, had the trial court not instructed the jury to disregard these portions of Horton's testimony, the jury probably would have reached a different result. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334; *Strickland*, 466 U.S. at 694. Gillespie does not offer any reason why the opinion of a friend of Gillespie would have made it likely that the jury would discredit the compelling testimony of the victim, the victim's mother, and the victim's neighbor. Accordingly, we reject Gillespie's argument and find no plain error or ineffective assistance of counsel at trial.

II. Error on Judgment Form

Gillespie next argues that the judgment should be vacated and remanded for resentencing because the "Additional File No.(s) and Offense(s)" form attached to the judgment erroneously lists "Assault with a Deadly Weapon," a charge of which

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Gillespie was acquitted. He contends that this error renders his sentence “invalid as a matter of law” and that the judgment must be vacated because “the Superior Court did not specify which convictions were considered in pronouncing the consolidated judgment.” We reject this argument because the record unquestionably indicates that Gillespie was sentenced only for crimes he actually was convicted of committing, and the inclusion of the assault with a deadly weapon charge was a clerical error.

Here, Gillespie entered into a sentencing agreement with the State in which he admitted habitual felon status in exchange for his three convictions being consolidated into one sentence for second degree sexual offense, a Class C felony. That plea agreement expressly included only his three actual convictions, for second degree sexual offense, second degree kidnapping, and assault by strangulation. It did not include the charge of assault with a deadly weapon, for which he was not convicted. At sentencing, the trial court expressly referenced the plea agreement and described its terms, leaving no doubt that the trial court did not believe Gillespie had been convicted of assault with a deadly weapon, and leaving no doubt that Gillespie’s sentence was not affected by that acquitted charge.

Gillespie relies on *State v. Moore* for the proposition that a consolidated judgment must be remanded for resentencing where the reviewing court is “unable to determine what weight, if any, the trial court gave each of the separate convictions . . . in calculating the sentences imposed upon the defendant.” 327 N.C.

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378, 383, 395 S.E.2d 124, 127-28 (1990). But in *Moore*, one of the offenses the trial court considered at sentencing was improper and should not have been considered. Here, by contrast, we know that the trial court never considered the assault with a deadly weapon charge at sentencing because Gillespie was sentenced under a plea agreement that only included the three crimes he actually was convicted of committing. Accordingly, *Moore* is readily distinguishable.

Although the mistaken reference to “Assault with a Deadly Weapon” on an attachment to the judgment form did not affect Gillespie’s sentence, that clerical error still must be corrected. A “clerical error” is defined as “[a]n error resulting from a minor mistake or inadvertence, esp[ecially] in writing or copying something on the record, and not from judicial reasoning or determination.” *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000). “When, on appeal, a clerical error is discovered in the trial court’s judgment or order, it is appropriate to remand for correction because of the importance that the record ‘speak the truth.’” *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008).

This Court has held that an error on a judgment form which does not affect the sentence imposed is a clerical error, warranting remand for correction but not requiring resentencing. *State v. Roberts*, ___ N.C. App. ___, ___, 767 S.E.2d 543, 556 (2014); *Smith*, 188 N.C. App. at 845, 656 S.E.2d at 696-97; *see also State v. Llamas-Hernandez*, 189 N.C. App. 640, 655, 659 S.E.2d 79, 88 (2008) (Steelman, J.,

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dissenting), *rev'd per curiam for reasons stated in dissenting opinion*, 363 N.C. 8, 673 S.E.2d 658 (2009) (noting that where the error had no effect on the sentence received, “it would be unnecessary to resentence defendant”). Accordingly, we hold that Gillespie is not entitled to resentencing, but we remand the judgment to the trial court to correct the clerical error on the “Additional File No.(s) and Offense(s)” form by removing the reference to “Assault with a Deadly Weapon.”

Conclusion

For the reasons discussed above, we conclude that Gillespie did not receive ineffective assistance of counsel and the trial court did not commit plain error in admitting or striking various witness testimony in this case. Because Gillespie was sentenced in accordance with his agreement with the State, which included only those offenses he was actually convicted of committing, there is no need for resentencing. The trial court’s judgment remains undisturbed, but we remand for the limited purpose of correcting the clerical error described above.

NO PLAIN ERROR IN PART; NO ERROR IN PART; REMANDED IN PART.

Judges STEELMAN and INMAN concur.