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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-939

Filed: 6 June 2017

Davidson County, Nos. 14 CRS 56441, 56549

STATE OF NORTH CAROLINA

v.

TAYLOR PRUITT ROBERSON

Appeal by defendant from judgments entered 18 May 2016 by Judge Kevin M. Bridges in Davidson County Superior Court. Heard in the Court of Appeals 19 April 2016.

Attorney General Joshua H. Stein, by Assistant Attorney General Jill A. Bryan, for the State.

Halscott Megaro, by Patrick Michael Megaro, for defendant.

DIETZ, Judge.

Defendant Taylor Roberson appeals her convictions for two counts of statutory rape, two counts of statutory sex offense, and two counts of indecent liberties with a child. The charges relate to various sexual acts Roberson engaged in with a minor victim over a period of several months while working in the victim's home.

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On appeal, Roberson argues that the trial court violated her constitutional rights by conferring with her attorney and the prosecutor outside her presence about whether to give a jury instruction on the defense of duress. She also argues that the trial court erred in denying her motion to suppress statements she made to a detective before her arrest. Lastly, she contends that the trial court violated her due process rights by exhibiting bias during the suppression hearing and then continuing to preside over her case.

As explained below, Roberson waived her argument concerning the court's conference outside her presence because she failed to object at trial. In any event, Roberson cannot show that her absence from that conference affected the outcome of the proceeding and thus cannot satisfy the plain error standard (to the extent it even applies). Roberson also failed to preserve her argument concerning the trial court's alleged bias. With respect to her motion to suppress, the trial court's findings established that Roberson was not in custody for purposes of *Miranda* when the officer questioned her. Accordingly, we reject Roberson's arguments and find no error in the trial court's judgments.

Facts and Procedural History

On or about 8 August 2014, Defendant Taylor Roberson, then twenty-one years old, began working in the home of the victim, Brandon.¹ Roberson provided home

¹ We use a pseudonym to protect the identity of the minor victim.

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health care services for Brandon's disabled brother. Brandon was thirteen years old. At some point between September and November of 2014, Roberson and Brandon developed a relationship that became physical. At first, they hugged and kissed, then later they engaged in anal sex on three or four occasions. Brandon testified that he thought Roberson "wanted it" because she did not say "no" or tell him to "stop." Brandon and Roberson also engaged in oral sex on three occasions and vaginal intercourse on two occasions. Brandon testified that he did not force Roberson to give him oral sex, but that she just "did it" when he asked her.

On 12 November 2014, Brandon and Roberson were engaging in vaginal intercourse in the family's basement when Brandon's mother called for them. Brandon and Roberson quickly got dressed and started doing laundry. Brandon's mother came downstairs and asked them what was going on. Brandon told his mother that nothing was going on between him and Roberson. However, that night after further questioning from his parents, Brandon gave them a note admitting that he had engaged in sexual activity with Roberson. His parents contacted the police and told them about the note. After interviewing Brandon and his parents, Detective Clayton of the Lexington Police Department planned to confront Roberson when she returned for work the next day.

The next day, Roberson unexpectedly arrived early, before Detective Clayton had arrived. Brandon's mother called the police, who dispatched two officers to "keep

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the peace” until Detective Clayton could arrive. The two officers did not have any contact with Roberson and left the scene when Detective Clayton arrived. Detective Clayton drove an unmarked car and did not use any blue lights or sirens. The detective approached Roberson and asked her if she would accompany him to his car so they could have a private conversation about an investigation. Roberson agreed and walked with the detective to his car. Roberson opened the door to the front passenger seat and sat there while Detective Clayton sat in the driver’s seat. Detective Clayton told Roberson that she was not under arrest and was free to leave at any time. The car doors were closed, but unlocked.

During their conversation in the car, Roberson admitted that she engaged in oral sex with Brandon on one occasion. Detective Clayton then arrested Roberson and drove her to the police station. Upon arriving at the police station, Detective Clayton took Roberson to an interview room, informed her she was no longer free to leave, and read her the *Miranda* warnings. Roberson indicated that she understood and signed a waiver of her *Miranda* rights. During his interview of Roberson, Detective Clayton wrote a summary of what Roberson told him, which she then reviewed and signed. The interview was recorded on video, as was Roberson’s subsequent conversation with her husband at the police station. The written statement and the recordings of Roberson’s interview and her conversation with her husband were admitted into evidence at trial without objection.

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The State indicted Roberson on two counts of statutory rape, two counts of statutory sex offense, and two counts of indecent liberties with a child. Before trial, Roberson moved to suppress the statements she made to Detective Clayton in his car before her arrest. The trial court denied the motion, concluding “[t]hat the defendant was never in formal custody nor was she deprived of her freedom or restrained in any way so as to trigger warnings pursuant to *Miranda*.” As part of its findings, the trial court concluded that Roberson’s testimony “was not credible.”

During trial, the prosecutor and Roberson’s counsel met with the trial judge in chambers and discussed whether Roberson’s therapist, Pamela Millan, would be permitted to testify. The parties also discussed whether a jury instruction on duress would be given and concluded that it was not appropriate. When they returned to open court, the trial court stated

COURT: Let the record reflect that the Court did meet for a moment with the attorney for the State and the attorney for the defendant to discuss testimony from Pamela Millan. The Court thought it prudent to allow the attorneys to review the pattern jury instruction that specifically deals with issues concerning coercion and duress. After reviewing that, it appears that that is not an instruction that would be suitable for the facts of this case. And I believe counsel for the defendant acknowledges that would not be appropriate based on the facts of this case; is that correct?

[ROBERSON’S COUNSEL]: That is correct.

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Roberson testified that Brandon forced her to engage in the sexual acts against her will and that she did not tell anyone, including the police after she was arrested, because she was ashamed and afraid she would go to jail. After hearing Roberson's testimony, the trial court reconsidered its ruling with respect to Pamela Millan's testimony and allowed her to testify for the purpose of corroboration. Millan then testified that Roberson told her Brandon forced her to engage in sexual acts against her will.

The proposed jury instructions did not include a duress instruction, Roberson did not request a duress instruction, and Roberson did not object to the jury instructions given. The jury convicted Roberson of all charges. The court sentenced her to two consecutive 200-300 month terms in prison. Roberson timely appealed.

Analysis

Roberson raises several arguments on appeal. First, she argues that the trial court erred by conferring with the prosecutor and her attorney outside her presence. Second, she contends that trial court erred in denying her motion to suppress statements she made to a police detective before she received a *Miranda* warning. Finally, she argues that the trial court violated her due process right to a fair trial because the court exhibited bias at her suppression hearing. We address these arguments in turn.

I. Court conference outside Roberson's presence

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Roberson first challenges the trial court's decision to meet with the prosecutor and Roberson's counsel outside her presence. As explained below, Roberson's argument is both waived and meritless.

As an initial matter, Roberson focuses her argument on the Confrontation Clause of the United States Constitution, which guarantees a criminal defendant "the right to personal presence at all critical stages of the trial." *Rushden v. Spain*, 464 U.S. 114, 119 (1983). Even if we were to assume that the Confrontation Clause prohibited the trial court from meeting privately with the lawyers to discuss a legal issue, as happened here, neither Roberson nor her counsel objected to the meeting at the time.

It is well-settled that, in criminal proceedings, "[c]onstitutional issues not raised and passed upon by the trial court will not be considered for the first time on appeal." *State v. Lloyd*, 354 N.C. 76, 86–87, 552 S.E.2d 596, 607 (2001). As a result, "[e]ven alleged errors arising under the Constitution of the United States are waived if defendant does not raise them in the trial court." *State v. Haselden*, 357 N.C. 1, 10, 577 S.E.2d 594, 600 (2003). Because Roberson did not object to the trial court's decision to meet privately with the lawyers, we cannot consider this issue for the first time on appeal.

Roberson argues that the Court should review this unpreserved issue for plain error. But plain error applies only to unpreserved instructional or evidentiary errors.

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State v. Wiley, 355 N.C. 592, 615, 565 S.E.2d 22, 39–40 (2002). By contrast, unpreserved constitutional error “will not be considered for the first time on appeal, not even for plain error.” *State v. Gopal*, 186 N.C. App. 308, 320, 651 S.E.2d 279, 287 (2007), *aff’d per curiam*, 362 N.C. 342, 661 S.E.2d 732 (2008).

In any event, even if we were to review this issue for plain error, we would find none. “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.* In other words, the defendant must show that, “absent the error, the jury probably would have returned a different verdict.” *Id.* at 519, 723 S.E.2d at 335.

Here, although the meeting with the lawyers took place outside Roberson’s presence, the court returned to open court and announced what took place in that conference. Importantly, after stating that there would not be a duress instruction, the trial court asked Roberson’s counsel to confirm that the duress instruction “would not be appropriate based on the facts of this case.” Counsel responded (in Roberson’s presence) by stating, “That is correct.” Thus, whatever discussion took place in the meeting outside Roberson’s presence, Roberson was present when her counsel

decided not to request the duress instruction. Roberson therefore failed to show that her absence from the conference prejudiced her in any way.

II. Denial of motion to suppress

Roberson next argues that the trial court erred in denying her motion to suppress the statements she made to Detective Clayton in his car. As explained below, we reject this argument.

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "[T]he trial court's ruling on a motion to suppress is afforded great deference upon appellate review as it has the duty to hear testimony and weigh the evidence." *State v. McClendon*, 130 N.C. App. 368, 377, 502 S.E.2d 902, 908 (1998), *aff'd*, 350 N.C. 630, 517 S.E.2d 128 (1999).

Here, Roberson challenges the trial court's determination that she was not in custody for purposes of *Miranda* and thus was not entitled to be read her *Miranda* rights. "The appropriate inquiry in determining whether a defendant is in 'custody' for purposes of *Miranda* is, based on the totality of the circumstances, whether there was a formal arrest or restraint on freedom of movement of the degree associated

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with a formal arrest.” *State v. Buchanan*, 353 N.C. 332, 339, 543 S.E.2d 823, 828 (2001).

After hearing testimony from Roberson and Detective Clayton, the trial court concluded that there was “no violation of the defendant’s rights with respect to oral statements made on 11/14/2014 in Det. Clayton’s unmarked vehicle” because “the defendant was never in formal custody nor was she deprived of her freedom or restrained in any way so as to trigger warnings pursuant to *Miranda*.”

This conclusion is supported by the trial court’s findings of fact, which in turn are supported by ample competent evidence in the record. The trial court found that Detective Clayton arrived in an unmarked car and did not use any blue lights or sirens; that Detective Clayton approached Roberson and asked her if she would speak to him in private in his car about an investigation; that Roberson agreed and voluntarily walked with him to his car; that Roberson opened the door to the front passenger seat and sat there while Detective Clayton sat in the driver’s seat; that Detective Clayton told Roberson that she was not under arrest and was free to leave at any time; and that the car doors were closed, but unlocked. All of these findings are supported by at least some competent evidence, primarily from the testimony of Detective Clayton.

To be sure, Roberson presented evidence suggesting that she was detained and was not free to leave. Specifically, Roberson testified that Detective Clayton did *not*

tell her she was free to leave; that she did not know whether the doors were locked; and that she felt that she could not leave without Detective Clayton's permission. But the trial court found that Roberson's testimony was "not credible." That credibility determination is one left soundly in the trial court's discretion, and we are bound by it on appeal. *State v. Icard*, 363 N.C. 303, 312, 677 S.E.2d 822, 828–29 (2009). Accordingly, we reject Roberson's argument and hold that the trial court did not err in denying her motion to suppress.

III. Credibility determination in ruling on motion to suppress

Finally, Roberson argues that the trial judge violated her constitutional right to a fair trial because the judge exhibited bias when he announced that Roberson's testimony during the suppression hearing "was not credible" yet the judge continued to preside over the case. As explained below, we reject this argument.

As an initial matter, Roberson failed to preserve this issue for appellate review. Roberson did not raise any objections, constitutional or otherwise, to the trial court's findings regarding her credibility, and Roberson did not move for the trial judge to recuse himself based on those statements. As noted above, "[t]his Court will not consider arguments based upon matters not presented to or adjudicated by the trial court. Even alleged errors arising under the Constitution of the United States are waived if defendant does not raise them in the trial court." *Haselden*, 357 N.C. at 10,

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577 S.E.2d at 600 (citations omitted). As a result, Roberson's argument is waived on appeal.

Moreover, even if the issue were properly before us, we would find no error. In deciding pretrial motions, "[t]he trial court determines the credibility of the witnesses who testify, weighs the evidence, and determines the reasonable inferences to be drawn therefrom." *Icard*, 363 N.C. at 312, 677 S.E.2d at 828. The trial court's challenged statements were not an indication of bias; they were simply an exercise of the trial court's duty to weigh the evidence presented on the motion to suppress. We see no indication that this finding of credibility in any way barred the trial judge from presiding over the remainder of the proceedings.

Conclusion

For the reasons discussed above, we find no error in the trial court's judgments.

NO ERROR.

Judges CALABRIA and MURPHY concur.

Report per Rule 30(e).