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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-142

Filed: 6 February 2018

Franklin County, No. 14 CRS 49

STATE OF NORTH CAROLINA

v.

DEAN PAUL WHITE

Appeal by defendant from judgment entered 10 June 2016 by Judge Donald W. Stephens in Franklin County Superior Court. Heard in the Court of Appeals 2 November 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Elizabeth J. Weese and Assistant Attorney General Natalie Whiteman Bacon, for the State.

Braswell Law PLLC, by Ira Braswell, IV, for defendant-appellant.

DAVIS, Judge.

Dean Paul White ("Defendant") appeals from his convictions for second degree sexual exploitation of a minor and third degree sexual exploitation of a minor. On appeal, he argues that the trial court erred by denying his motion to suppress statements obtained from him in violation of his *Miranda* rights and his rights under

N.C. Gen. Stat. § 15A-211. After a thorough review of the record and applicable law, we conclude that Defendant received a fair trial free from prejudicial error.

Factual and Procedural Background

The State presented evidence tending to establish the following facts: In March of 2013, A.K. ("Annie")[1] was seventeen years old, had an IQ in the low 70s, and was suffering from a schizoaffective disorder. On 15 March 2013, Annie left her parents' home at night without permission. That same night, Annie's younger sister ("Susan") also left the house without permission to visit her boyfriend. As Susan was driving home with her boyfriend at 4:00 a.m. the next morning, she noticed Annie sitting in front of a local convenience store.

Susan instructed her boyfriend to pull the car over and asked Annie why she was sitting outside in the cold. Annie told Susan that she was waiting for a friend named "Larry" to pick her up. Annie got into the car with Susan and her boyfriend to keep warm. Approximately fifteen minutes later, Defendant drove up to the store. Annie got out of the car and left with Defendant.

On the morning of 16 March 2013, Annie's parents discovered she was not at home and called the Wake County Sheriff's Office to report a missing person. Deputy Mariah Averette of the Sheriff's Office responded to the call and talked with Annie's father to determine where she might have gone.

[1] Pseudonyms and initials are used throughout this opinion to protect the privacy of the minor children and for ease of reading.

Upon searching a computer in the house, Detective Averette discovered several email exchanges between Defendant and Annie. Based on the emails, Detective Averette discovered that Defendant — who was 47 years old at the time — had responded to a Craigslist advertisement Annie had posted in which she stated that she wanted to run away with someone for the rest of her life. Defendant's emails informed Annie of his age, physical characteristics, and job. He asked her if she would be interested in having a relationship with him. She responded affirmatively.

Based on the IP address associated with Defendant's computer and the photographs obtained from Defendant's Facebook page, Detective Averette discovered Defendant's home address. On 17 March 2013, Detective Averette met other law enforcement officers at Defendant's home with a search warrant. The officers knocked on the door, and Defendant answered. The officers found Annie inside the home with Defendant.

The officers subsequently obtained a second search warrant for computers and digital devices located in Defendant's home. Mark Schlitter, a computer forensic expert employed by the State Bureau of Investigation, discovered 22 photographs on a digital camera retrieved from Defendant's home of Annie wearing only a bra. The same photographs were discovered upon a search of Defendant's computer.

On 17 March 2013, Detective Kevin T. White of the Franklin County Sheriff's Office conducted a custodial interrogation of Defendant at the Sheriff's Office.

Defendant signed a *Miranda* waiver form entitled Advisement of Rights in the presence of Detective White. However, although Detective White had set up a tape recorder to record the interrogation, the batteries in the recorder did not function properly. During this first interrogation, Defendant told Detective White that he had never engaged in sexual intercourse with Annie.

The following day, Detective White interviewed Defendant a second time in the presence of Detective Robert Lignante. Although Defendant orally agreed to waive his Miranda rights, Detective Lignante mistakenly signed his own name to the Miranda rights waiver form instead of obtaining Defendant's signature. Once again, the batteries in the tape recorder did not work so the interview was not recorded. During this second interrogation, Detective White asked Defendant: "Did [yo]u take the pictures of her naked with the tan underwear on?" Defendant responded, "Yes." Defendant subsequently signed this statement.

On 21 January 2014, Defendant was indicted for first degree sexual exploitation of a minor, second degree sexual exploitation of a minor, and third degree sexual exploitation of a minor. On 3 June 2016, Defendant filed a motion "to suppress and exclude from evidence . . . any statements, comments, or purported confessions and admissions that he may have made at the time he was in custody of, or was being questioned by, law enforcement officers."

On 6 June 2016, a jury trial began before the Honorable Donald W. Stephens in Franklin County Superior Court. Although the trial court denied Defendant's motion to suppress, the court stated that it could "not permit the defendant's statement to law enforcement officers to be received into evidence because there was not full compliance with [N.C. Gen. Stat. §] 15A-211 if the State proceed[ed] on the Class C felony involving a sex offense, because the statute requires fairly strict guidelines to be complied with for Class A, B-1, B-2, and Class C felonies." Thus, the trial court dismissed the charge of first degree sexual exploitation of a minor (a Class C felony) "as a sanction for the State's failure to comply with 15A-211." With respect to the other charges, the trial court denied the motion to suppress, finding that "the waiver was knowing . . . and intelligently made[,] . . . was a voluntary statement, [and] not subject to any kind of coercion or improper inducement."

The State presented testimony from Annie's parents, Detective White, Detective Averette, four other detectives, and three forensic experts and technicians from the North Carolina State Crime Laboratory, including Schlitter. Defendant offered testimony from eleven witnesses but did not testify himself.

On 10 June 2016, the jury found Defendant guilty of second degree sexual exploitation of a minor and third degree sexual exploitation of a minor. The trial court sentenced Defendant to 20 to 84 months imprisonment and ordered him to register as a sex offender upon his release. Defendant gave oral notice of appeal.

Analysis

Defendant argues that the trial court erred by denying his motion to suppress the statements he made during his two custodial interrogations. Specifically, he contends that the admission of these statements constituted (1) reversible error because he did not knowingly and voluntarily waive his *Miranda*[2] rights; and (2) plain error because the State failed to comply with N.C. Gen. Stat. § 15A-211. We address each argument in turn.

I. Waiver of *Miranda* Rights

Defendant first argues that the admission of his statements to Detective White constituted a violation of his *Miranda* rights. The State asserts that he has failed to preserve this argument for appeal because he did not renew his objection to this evidence during trial.

Our Supreme Court has held that where a defendant's motion to suppress a statement made to law enforcement officers is denied, he is barred from raising the issue on appeal absent a renewal of his objection at trial. *See State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007). Here, Defendant did not object at trial to Detective White's testimony regarding the statements he had made while in custodial interrogation. Therefore, he has not properly preserved this issue for appellate review.

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[2] *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966).

Moreover, Defendant is not entitled to plain error review of this issue because he has not specifically and distinctly alleged plain error in his brief. *See State v. Golphin*, 352 N.C. 364, 465, 533 S.E.2d 168, 234 (2000) (because defendant "did not 'specifically and distinctly' argue plain error . . . these assignments of error are overruled" (internal citation omitted)), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001).

II. Applicability of N.C. Gen. Stat. § 15A-211

Defendant next argues that the trial court plainly erred by admitting statements made by him during his custodial interview that it had previously determined were in violation of N.C. Gen. Stat. § 15A-211.

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. 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. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations, quotation marks, and brackets omitted).

In conducting our review for plain error, we must first determine whether the trial court's actions did, in fact, violate N.C. Gen. Stat. § 15A-211. *See State v. Oxendine*, __ N.C. App. __, __, 783 S.E.2d 286, 292 ("The first step under plain error

review is . . . to determine whether any error occurred at all."), *disc. review denied*, __ N.C. __, 787 S.E.2d 24 (2016).

N.C. Gen. Stat. § 15A-211 states, in pertinent part, as follows:

> (d) **Electronic Recording of Interrogations Required.** — Any law enforcement officer conducting a custodial interrogation in an investigation of a juvenile shall make an electronic recording of the interrogation in its entirety. Any law enforcement officer conducting a custodial interrogation in an investigation relating to any of the following crimes shall make an electronic recording of the interrogation in its entirety: any Class A, B1, or B2 felony; and *any Class C felony of rape, sex offense, or assault with a deadly weapon with intent to kill inflicting serious injury.*

N.C. Gen. Stat. § 15A-211(d) (2017) (emphasis added).

Here, Defendant was initially charged with first, second, and third degree sexual exploitation of a minor. Upon hearing his motion to suppress, the trial court determined that the State had not complied with the requirements of N.C. Gen. Stat. § 15A-211 because it could not provide an electronic recording of Defendant's interrogation. As a sanction, the trial court dismissed the charge of first degree sexual exploitation of a minor.[3]

However, this was the only one of Defendant's three charged offenses that is classified as a Class C felony. *See* N.C. Gen. Stat. § 14-190.16 (2017). Second degree sexual exploitation of a minor is classified as a Class E felony, N.C. Gen. Stat. § 14-

[3] Because the State has not cross-appealed, the issue of whether the trial court was incorrect in its belief that it was required to dismiss this charge is not currently before us.

190.17 (2017), and third degree sexual exploitation of a minor is classified as a Class H felony, N.C. Gen. Stat. § 14-190.17A (2017). Therefore, N.C. Gen. Stat. § 15A-211(d) was inapplicable to the charges of second and third degree sexual exploitation of a minor.

Moreover, even assuming *arguendo* that the trial court's admission of Defendant's pre-trial statements somehow constituted error, Defendant has failed to show that the admission of these statements rose to the level of plain error. In order to meet his burden of showing that an admission constituted plain error, Defendant must show that the evidence "had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (2012) (citations and quotation marks omitted).

Here, there was ample additional evidence of Defendant's guilt. The State offered into evidence as exhibits 22 photographs of Annie wearing only a bra and no underwear that were discovered on Defendant's digital camera and on his computer. Detective Averette testified that Annie was also discovered with Defendant in his home. An email exchange between Annie and Defendant in which Defendant informed Annie that he wanted to have a relationship with her was also introduced into evidence. Thus, Defendant has failed to establish plain error. *See State v. Tatum-Wade*, 229 N.C. App. 83, 94, 747 S.E.2d 382, 390 (2013) (". . . [E]ven assuming

arguendo that this evidence was erroneously admitted, defendant has failed to show plain error."). Accordingly, Defendant's argument is overruled.

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from prejudicial error.

NO PREJUDICIAL ERROR.

Judge ZACHARY concurs.

Judge BERGER concurs by separate opinion.

Report per Rule 30(e).

BERGER, Judge, concurring in separate opinion.

I concur with the majority opinion, but write separately to address the manner in which the trial court considered Defendant's motion to suppress, and the unauthorized "sanction" imposed by the trial court.

The recording requirements of N.C. Gen. Stat. § 15A-211 apply to custodial interrogations that are conducted in places of detention for criminal *investigations* of certain Class A through C felonies. N.C. Gen. Stat. § 15A-211 (2017). However, the remedies available for noncompliance with the statute are applicable regardless of the level of offense *charged*.

The statement at issue here was made by Defendant during the investigation of a Class C sex offense. Section 15A-211 required his statement to be electronically recorded. However, Defendant's statement was not preserved on the recording device used by law enforcement. The trial court, however, appears to have operated under the mistaken belief that noncompliance with Section 15A-211 compelled a finding that the statement must be excluded. The trial court found that "even if [*Miranda v. Arizona*] and the voluntariness of any statement has been satisfied or will be satisfied, the Court will not permit the defendant's statement to law enforcement officers to be received into evidence because *there was not full compliance* with [Section] 15A-211." (Emphasis added). Suppression of the statement is a remedy

available to a trial court if there is noncompliance with Section 15A-211. However, noncompliance does not mandate suppression. N.C. Gen. Stat. § 15A-211(f).

The statute provides three remedies for noncompliance:

> (1) Failure to comply with any of the requirements of this section shall be considered by the court in adjudicating motions to suppress a statement of the defendant made during or after a custodial interrogation.
>
> (2) Failure to comply with any of the requirements of this section shall be admissible in support of claims that the defendant's statement was involuntary or is unreliable, provided the evidence is otherwise admissible.
>
> (3) When evidence of compliance or noncompliance with the requirements of this section has been presented at trial, the jury shall be instructed that it may consider credible evidence of compliance or noncompliance to determine whether the defendant's statement was voluntary and reliable.

N.C. Gen. Stat. § 15A-211(f).

The trial court initially imposed a sanction authorized by Section 15A-211(f), i.e., suppression of Defendant's statement. However, the trial court then negotiates with the prosecutor for a remedy:

> So, I'll allow the State an option. You can either proceed without the defendant's statement coming into evidence, or the Court as a sanction for failure to comply will dismiss the Class C felony on its own motion so long as the conditions of [*Miranda v. Arizona*] and voluntariness of the statement are otherwise satisfied.

The trial court here simply invented a sanction, and stated, "[T]he Court will dismiss the Class C felony as a sanction for the State's failure to comply with [Section] 15A-211." Nowhere in this section has the legislature authorized dismissal of any charge by the trial court as a remedy or sanction for noncompliance with the statute. The trial court lacked statutory authority to either dismiss the Class C felony as a sanction for noncompliance, or dismiss the felony on its own motion. *See State v. Joe*, 365 N.C. 538, 723 S.E.2d 339 (2012); *State v. Parisi*, ___ N.C. App. ___, 796 S.E.2d 524, *writ denied*, *disc. review denied*, 369 N.C. 751, 799 S.E.2d 873 (2017). The statute only authorized the trial court to (1) grant or deny the motion to suppress, (2) admit evidence of the noncompliance to support Defendant's claim that the statement was neither voluntary nor reliable, and (3) provide an appropriate instruction for the jury.

The trial court subsequently implied that it had employed a sliding scale or balancing test in conducting this analysis:

> I've ruled that and the State has conceded that the law enforcement conducting this interview, this being an investigation for a class C felony, was obligated pursuant to the requirements of G-S 15A-211 to -- be being in a custodial facility was required to electronically record the interview. He failed to do that, and he also failed to use reasonable care -- Well, he failed to use reasonable care to accurately record and preserve the audio record of that interrogation. And therefore, I have determined that as a sanction for that failure to comply with that statute, that the class C felony against him would be dismissed, and I have dismissed that class C felony as a sanction.

> However, I do not believe the State is precluded from offering into the evidence the results of the interview that the officer had of the defendant to the extent that he can satisfy that he complied with the requirements of [*Miranda v. Arizona*], and that the statements made by the defendant, if any, were voluntary, *with regard to charges that are now class E and class H felonies.* And therefore, I'll hear you on your further allegation that he failed to comply with the requirements of [*Miranda v. Arizona*], and he failed to show the Court that the defendant knowingly, intelligently, waived his [*Miranda*] rights and voluntarily answered questions.

(Emphasis added).

Again, the trial court engaged in fashioning a sanction not authorized by statute. In deciding whether to grant or deny a motion to suppress pursuant to N.C. Gen. Stat. § 15A-211, the trial court is to consider whether noncompliance with recording requirements by investigators had any bearing on the voluntariness and reliability of Defendant's statements, without regard to the level of the offense charged. The trial court ultimately conducted an appropriate analysis of Defendant's statement, and denied his motion to suppress:

> All right, I'm going to find that the defendant was fully advised of his [*Miranda*] rights, that he acknowledged to Detective White that he understood his rights, and that he signed the form indicating that he had been advised of his rights, which form that he answered those questions, "Yes," that he understood he had the right to remain silent, that he understood whatever he said could be used against him in a court of law, that he understood that he had the right to speak with an attorney and have an attorney present during the course of the interview, while being questioned. He acknowledged that if he could not afford a

> lawyer, he would have one appointed before questioning would begin. And he acknowledged that upon answering questions, he had the right to stop answering at any time, then thereafter he indicated that he was willing to waive those rights and speak to Officer White.
>
> The Court finds that the waiver was knowing, and intelligently made. That the statement was a voluntary statement, not subject to any kind of coercion or improper inducement. That all the constitutional requirements of [*Miranda v. Arizona*] have been met. The statement is voluntary, and therefore let it be received into evidence.
>
> The motion to suppress is denied.
>
> It's for the jury to determine what these two pages of purported questions and answers say and mean, if anything.

In other words, noncompliance with Section 15A-211 had no bearing on the voluntariness or reliability of Defendant's statement. Once the statement was determined to be admissible, the trial court should have allowed evidence of noncompliance with Section 15A-211 to have been admitted, and instructed the jury on noncompliance. *See* N.C. Gen. Stat. § 15A-211(f).

But, the lower court failed to follow the law, and experience shows us that justice seldom flows from courts that are not constrained by the law. In essence, the trial court found noncompliance with Section 15A-211 sufficiently egregious to warrant an unlawful sanction, but not sufficiently egregious to suppress the statement. In either case, the lower court's judicial conjuring did one of two things: (1) it allowed Defendant to escape exposure to a significant period of incarceration on

the Class C felony, or (2) it led to the incarceration of a man who would otherwise be free.