IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-680

Filed: 3 April 2018

Wake County, No. 14 CRS 227618

STATE OF NORTH CAROLINA

v.

CHRISTOPHER B. SMITH

Appeal by Defendant from judgments entered 8 July 2016 by Judge Reuben F. Young in Superior Court, Wake County. Heard in the Court of Appeals 27 November 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Tiffany Y. Lucas, for the State.

Yoder Law PLLC, by Jason Christopher Yoder, for Defendant.

McGEE, Chief Judge.

Christopher Nathaniel Smith[1] ("Defendant") appeals from judgments entered after a jury found him guilty of two counts of sexual activity with a student.

[1] The indictment and jury verdict form in this case refer only to Christopher Smith. However, various other documents refer to Christopher B. Smith, including the trial court's judgments and orders sentencing Defendant. Christopher B. Smith is Defendant's father and the correct defendant is Christopher Nathaniel Smith. The caption of this case will continue to reflect the name on the trial court's judgment.

Defendant argues that the trial court erred: (1) by denying Defendant's motion to dismiss because the evidence presented at trial failed to establish Defendant was a "teacher" within the meaning of N.C. Gen. Stat. § 14-27.7(b) (2013), and (2) sentencing Defendant to a period of probation longer than the maximum allowable under N.C. Gen. Stat. § 15A-1343.2(d) (2013), without making required findings of fact.

I. Factual and Procedural History

Defendant testified at trial that he began working as a substitute teacher at Knightdale High School ("the school") in August 2014 with the goal of becoming a full-time physical education teacher. During Defendant's time as a substitute teacher, he met D.F., a student at the school. Both Defendant and D.F. testified that D.F. went to Defendant's home on 29 October 2014. D.F. testified that during that visit the two engaged in sexual activity. Defendant testified that no such contact occurred and that he asked D.F. to leave his home when she made unwanted advances toward him.

D.F.'s father became suspicious of the relationship between D.F. and Defendant and brought it to the attention of the school. After a brief investigation, the school's resource officer reported the matter to the Raleigh Police Department.

Defendant was indicted for two counts of engaging in sexual activity with a student pursuant to N.C.G.S. § 14-27.7 (2013).[2]

A jury returned verdicts of guilty as to both counts of sexual activity with a student. The trial court sentenced Defendant to consecutive sentences of twelve to twenty-four months for the first count, followed by thirteen to twenty-five months for the second count. The trial court suspended the sentence on the second count and ordered thirty-six months of probation to commence after completion of Defendant's active sentence for the first count.

II. Analysis

Defendant argues the trial court erred in denying his motion to dismiss the charges against him because he does not fall within the definition of "teacher" under N.C.G.S. § 14-27.7(b). Specifically, Defendant argues that N.C.G.S. § 14-27.7(b) lays out three separate offenses – one that concerns "teachers," and two others that concern "other school personnel" – and that the State's evidence at trial was insufficient to support his conviction for the "teacher"-related offense. In the alternative, Defendant contends that his motion to dismiss should have been granted because there was a fatal variance between the allegations in the indictment and the proof at trial because the indictment alleged Defendant was a "teacher," but in reality

[2] N.C.G.S. § 14-27.7 was recodified as N.C. Gen. Stat. § 14-27.32, effective 1 December 2015. However, this Court applies the version of N.C.G.S. § 14-27.7 that was in effect when the alleged crimes occurred.

his status as a substitute teacher fell within the definition of "school personnel" for the purposes of N.C.G.S. § 14-27.7(b). Finally, Defendant argues that the trial court erred by sentencing him to thirty-six months of probation, which was in excess of the statutory maximum of thirty months under N.C.G.S. § 15A-1343.2(d), without making any findings of fact in support of the extension.

A. Motion to Dismiss

As an initial matter, we must determine whether Defendant's arguments concerning his motion to dismiss were preserved for appellate review. The appellant bears the burden of showing to this Court that the appeal is properly before this Court. *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338 (2005). "In order to preserve an issue 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) (emphasis added). N.C. R. App. P. 10(a)(3) states "a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action, or for judgment as in case of nonsuit, is made at trial."

This Court recently held that a general motion to dismiss for insufficiency of the evidence preserves sufficiency arguments for all of the elements of the offense for appeal, even those not specifically argued before the trial court. *State v. Glisson*, ___

N.C. App. ___, ___, 796 S.E.2d 124, 127 (2017); *State v. Pender*, 243 N.C. App. 142, 152-53, 776 S.E.2d 352, 360 (2015).

However, in *State v. Walker*, ___ N.C. App. ___, 798 S.E.2d 529 (2017), this Court discussed *State v. Chapman*, ___ N.C. App. ___, 781 S.E.2d 320 (2016) where defense counsel's language limited the basis for a motion to dismiss to a specific element of the offense.

> The decision in *Chapman* highlighted the defense counsel's specific language at trial limiting the basis for the motion to dismiss to the specific element challenged. [*Chapman*, ___ N.C. App. at ___, 781 S.E.2d at 330] (quoting from the trial transcript, "We contend there has been no evidence showing that the manner in which it was used, in which the BB gun was used, rises to the level of being a dangerous weapon. *Based upon that*, we would ask Your Honor to dismiss the charge of robbery with a dangerous weapon.") (emphasis added). The Court explained that the specific reference to one element of the offense removed the other elements of the offense from the trial court's consideration, and therefore from this Court's consideration, because the consideration of the sufficiency of the evidence on those other elements was no longer "apparent from the context." N.C. R. App. P. 10(a)(1). A specific reference to one element contrasts with cases in which a defense counsel makes a more generalized motion to dismiss for insufficiency of the evidence. A general motion to dismiss requires the trial court to consider the sufficiency of the evidence on all elements of the challenged offenses, thereby preserving the arguments for appellate review.

Walker, ___ N.C. App. at ___, 798 S.E.2d at 530-31 (internal citations omitted).

Defendant argues that his motion to dismiss constituted a general motion to dismiss for insufficient evidence as to every element of the offense charged and

therefore was sufficient to preserve the more specific argument that there was insufficient evidence as to whether Defendant was a "teacher" under N.C.G.S. § 14-27.7(b). We disagree.

In citing *State v. Stephens*, 244 N.C. 380, 383, 93 S.E.2d 431, 433 (1956), Defendant states that when a defendant moves to dismiss at the close of all the evidence for insufficient evidence, the defendant "is not required to specify a *particular* respect in which the evidence should be held insufficient. Upon the *most generally stated* such motion, the trial court must consider whether there is *any* respect in which the evidence is insufficient to reach the jury." (emphasis added). Defendant also acknowledges that this Court "has sometimes found that a specific motion waives appellate review of other issues. This means that a defendant who makes a bare 'motion to dismiss for insufficient evidence' does a better job preserving the issues for appellate review than one who follows such a motion with specific arguments."

However, in this case, in support of his motion to dismiss, Defendant made arguments that specifically focused on the veracity of D.F.'s testimony and the lack of physical evidence supporting the allegations that any sexual conduct had occurred. At the close of the State's evidence at trial, Defendant's attorney moved to dismiss the charges against Defendant, contending that:

> Very briefly, the State hasn't met every element of the charge. I don't think there are -- I know that the Court is

> to take every inference in the light most favorable to the State but there's also case law when the State's case conflict[s] to such a degree the Court is to take that into consideration. We would argue this is that type of case, Your Honor.
>
> [D.F.] has stated that sexual intercourse lasted five minutes. She then stated the next day it was between 20 and 30 minutes. She then stated in court it was between 10 and 15 minutes. There is evidence of the victim not being credible, Your Honor.
>
> . . . There's evidence that she was interviewed by the officer and she didn't give the officer information. At first she said, well, I didn't, I wouldn't lie; I would just omit information, and then she changed that to hide information. She didn't tell information about marijuana. She was interviewed by [an officer] twice and she didn't give information about alleged oral sex occurring on November 11. She was interviewed by two officers. But then she comes here in court and says that the act did occur.
>
> Your Honor, based on this evidence we would ask that you find that the State's evidence conflicts to such a degree that the Motion To Dismiss should be granted. Thank you.

The trial court determined that "the State has presented sufficient evidence to meet the elements of this offense" and therefore denied Defendant's motion to dismiss.

In renewing the motion to dismiss, Defendant's trial counsel narrowed the scope of the motion to dismiss to the issues already argued by stating: "[b]ased on that[,] we would renew our Motion To Dismiss." Defendant's motion to dismiss is similar to that in *Chapman*. It is clear from reviewing the record that neither the

State, defense counsel, nor the trial court, considered the issue of whether "teacher" and "other school personnel" were elements of separate offenses for the purposes of N.C.G.S. § 14-27.7(b). In *Walker*, this Court, in discussing *Chapman*, stated:

> [T]he specific reference to one element of the offense removed the other elements of the offense from the trial court's consideration, and therefore from this Court's consideration, because the consideration of the sufficiency of the evidence on those other elements was no longer 'apparent from the context.' N.C. R. App. P. 10(a)(1). A specific reference to one element contrasts with cases in which a defense counsel makes a more generalized motion to dismiss for insufficiency of the evidence. *See*, *e.g., State v. Glisson*, ___ N.C. App. ___, ___, 796 S.E.2d 124, 127 (2017) (holding that the defendant's challenge to the sufficiency of the evidence was preserved because the trial court referred to the challenge as a "global" and "prophylactic" motion to dismiss, thereby making apparent that the trial court considered the sufficiency of the evidence as to all elements of each charged offense).

Walker, ___ N.C. App. at ___, 798 S.E.2d at 531.

Where an element is not considered by the trial court, it is outside of this Court's appellate jurisdiction. *Walker*, ___ N.C. App. at ___, 798 S.E.2d at 531. Because Defendant's motion to dismiss at trial was limited to a single element – whether sexual activity occurred – Defendant has limited appellate review to this argument. For the same reason, Defendant's alternative argument of a fatal variance has not been preserved. *State v. Mason*, 222 N.C. App. 223, 226-27, 730 S.E.2d 795, 798-99 (2012) (holding that where a "[f]atal variance was not a basis of [defendant's] motions to dismiss," the issue was not preserved for appellate review). This Court

regularly dismisses arguments first advanced by defendants on appeal, because those arguments have been waived due to the defendants' failure to raise them in the trial court. *State v. Holliman*, 155 N.C. App. 120, 123-24, 573 S.E.2d 682, 685-86 (2002). Because Defendant has failed to properly preserve the specific arguments he now makes on appeal, they are dismissed.

B. Ineffective Assistance of Counsel

Defendant argues that if his trial counsel failed to preserve this issue for appeal, then he received ineffective assistance of counsel. We disagree. "When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *State v. Campbell*, 359 N.C. 644, 690, 617 S.E.2d 1, 29 (2005) (citing *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985)). There is a two-part test to determine whether counsel's conduct fell below an objective standard of reasonableness:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). There is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689, 80 L. Ed. 2d at 694-95 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 100 L. Ed. 83, 93 (1955)).

In the present case, defense counsel's performance was not deficient. The Sixth Amendment "guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8, 157 L. Ed. 2d 1 (2003). Defendant's counsel moved to dismiss at both the close of the State's evidence and the close of all the evidence. In both instances, counsel made reasoned arguments in light of the evidence presented. Defendant has failed to demonstrate that his counsel "made errors so serious that [he] was not functioning as the 'counsel' guaranteed [D]efendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693.

C. Sentencing

Defendant's final argument is that the trial court erred in ordering thirty-six months of community probation without making any findings under N.C.G.S. § 15A-1343.2(d). Under N.C.G.S. § 15A-1343.2(d), there is a thirty-month statutory maximum for felons sentenced to community probation. Where a trial court makes

no findings of fact to support a period of probation that exceeds the statutory maximum, the case should be remanded for resentencing. *State v. Riley*, 202 N.C. App. 299, 307, 688 S.E.2d 477, 483-84 (2010); *State v. Mucci*, 163 N.C. App. 615, 624-25, 594 S.E.2d 411, 418 (2004). The State concedes the order is in error, and we agree. We remand this matter for the trial court to either impose a probation term consistent with the statute or to make the appropriate findings of fact in support of a longer probationary period.

NO ERROR IN PART, REMANDED FOR RESENTENCING.

Judges ELMORE and MURPHY concur.

Report per Rule 30(e).