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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-817

Filed: 15 May 2018

Guilford County, Nos. 13 CRS 100080, 100186-87, 14 CRS 24169

STATE OF NORTH CAROLINA

v.

RONNIE LEE FORD

Appeal by defendant from judgments entered 27 May 2016 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 23 January 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jennifer T. Harrod, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

CALABRIA, Judge.

Where attempted first-degree sexual offense is a lesser included offense of first-degree sexual offense, and lesser included offenses are permitted to be charged by a short-form indictment, the short-form indictment against defendant was sufficient, and vested jurisdiction in the trial court. Where the jury instruction and verdict sheet

showed a lack of ambiguity with respect to jury unanimity, defendant failed to demonstrate prejudice, and therefore failed to demonstrate plain error. We find no error or plain error.

I. Factual and Procedural Background

On the morning of 16 December 2013, Ronnie Ford ("defendant") approached his neighbor, Sheila, requesting that she accompany him to Wal-Mart while her eleven-year-old daughter "Donna" babysat for defendant's young son "Brad."[1] Donna went to defendant's house with her younger brother, "Damon," and Sheila, believing defendant would follow her shortly, then went to the Wal-Mart. Defendant never arrived at Wal-Mart. After some time, Sheila returned home and called defendant. Defendant did not answer. When Sheila drove to defendant's apartment, she noticed that Damon was looking out the window. She banged on the door, and when there was no answer, Sheila tried the door, which was unlocked. Inside defendant's house, Sheila found her son with dried tears on his face, but did not find her daughter. She then involved law enforcement.

When Donna arrived at defendant's home, she did not find Brad. Rather, defendant arrived shortly thereafter, to her surprise, and told Donna to go into the bathroom. After several minutes, defendant came into the bathroom, said, "We got to hurry up before your momma gets back[,]" and stripped Donna. He then took her

[1] Pseudonyms are used to protect the privacy of minors involved.

upstairs. Damon followed them, and at defendant's instruction, Donna placed Damon in Brad's room.

Donna entered defendant's bedroom, where there was a naked woman, Danielle Gilmer ("Gilmer"). Defendant introduced Gilmer as his "partner." Defendant then lit a substance in a soda can and forced Donna to inhale it. Doing so made her feel sick and dizzy. A man from the neighborhood then took defendant, Donna, and Gilmer from the residence, leaving Damon behind. They stopped for Gilmer to buy crack, and then drove to Gilmer's house.

Defendant led Donna to a bedroom, where she saw a camera. Defendant told Donna to disrobe, and defendant also disrobed. Defendant again had Donna inhale a substance from a soda can. Defendant then attempted to force Donna to perform oral sex on him, but she pushed him away. He took her into a bedroom, where Gilmer was naked, and told Donna, "[i]f you don't do this, we're both going to get killed." He then blindfolded her with his socks, and began rubbing her thighs and stomach. He licked Donna's vagina and touched her breasts.

Defendant then told Gilmer to start the camera. However, Gilmer informed defendant that the camera was broken. Defendant then instructed Gilmer to show Donna "how to suck a dick[.]" Gilmer fellated defendant, then rubbed Donna's leg and digitally penetrated her. At that point, Donna heard a knock at the door and dogs barking outside. Gilmer told Donna to get into the closet, and covered her with

trash bags and clothes. When Officer Robert Uzenski ("Officer Uzenski") arrived, he found Donna still in the closet.

Donna was taken to a hospital. Jaqueline Ann Perkins ("Nurse Perkins"), a Sexual Assault Nurse Examiner ("SANE"), testified that she interviewed and examined Donna at the hospital. She testified that she performed a physical exam which revealed bruising and contusions of the genitalia that were consistent with sexual assault. She also testified that the drug screen performed on Donna tested positive for cocaine.

Defendant was indicted for attempted first-degree sexual offense, first-degree sexual exploitation of a minor, first-degree sexual offense with a minor, and first-degree kidnapping. The grand jury subsequently entered a superseding indictment, charging felony first-degree kidnapping. Defendant was also indicted for attempted first-degree sexual exploitation of a minor. At the commencement of the trial, the State moved to amend the indictments for attempted first-degree sexual offense and first-degree sexual offense. Those indictments arose under N.C. Gen. Stat. § 14-27.4A(a)[2], titled "Sexual Offense with a Child; Adult Offender." The State moved to

[2] N.C. Gen. Stat. § 14-27.4A was later repealed and recodified in N.C. Gen. Stat. § 14-27.28, which represents its current form. We will refer to the statute under its form at the time of trial. We further note that this Court held N.C. Gen. Stat. § 14-27.4A(c) to be unconstitutional, but explicitly declined to address the constitutionality of any other section of the statute. *See State v. Singletary*, ___ N.C. App. ___, 786 S.E.2d 712 (2016).

instead charge them as violations of N.C. Gen. Stat. § 14-27.4(a)(1)[3], titled "First-Degree Sexual Offense," which is a lesser included offense under N.C. Gen. Stat. § 14-27.4A. *See* N.C. Gen. Stat. § 14-27.4A(d) (2013). Defendant did not object to this amendment when asked. At the close of the evidence, the State voluntarily dismissed the charge of first-degree sexual exploitation of a minor.

The jury ultimately found defendant guilty of attempted first-degree sexual offense (fellatio), first-degree sexual offense (cunnilingus), first-degree kidnapping, and attempted first-degree sexual exploitation of a minor. The trial court sentenced defendant to a minimum of 338 months and a maximum of 466 months for the offense of first-degree sexual offense, a minimum of 250 months and a maximum of 360 months for attempted first-degree sexual offense, a minimum of 120 months and a maximum of 156 months for first-degree kidnapping, and a minimum of 100 months and a maximum of 180 months for attempted first-degree sexual exploitation of a minor. Defendant's sentences were to be served consecutively in the custody of the North Carolina Department of Adult Correction. The trial court further entered judicial findings on defendant's status as a sex offender, requiring defendant to complete sex offender treatment and register as a sex offender for 30 years.

Defendant appeals.

II. Indictment

[3] N.C. Gen. Stat. § 14-27.4 was later repealed and recodified in N.C. Gen. Stat. § 14-27.26, which represents its current form. We will refer to the statute under its form at the time of trial.

In his first argument, defendant contends that the short-form indictment for attempted first-degree sexual offense was insufficient to charge the offense. We disagree.

A. Standard of Review

"An attack on an indictment is waived when its validity is not challenged in the trial court." *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000). "However, where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *Id.*

B. Analysis

Defendant contends that it was erroneous to permit the trial court to proceed on the charge of attempted first-degree sexual offense in the indictment, as amended, because the indictment was a short-form indictment.

Our statutes authorize a short-form indictment for sexual offenses. Specifically, pursuant to N.C. Gen. Stat. § 15-144.2(a) (2017), an indictment is "sufficient in describing a sex offense to allege that the accused person unlawfully, willfully, and feloniously did engage in a sex offense with the victim, naming the victim, by force and against the will of such victim and concluding as is now required by law." According to that same subsection, this language will be sufficient with

respect to the offenses of "a sex offense in the first degree, a sex offense in the second degree, an *attempt to commit a sex offense* or an assault." N.C. Gen. Stat. § 15-144.2(a) (emphasis added).

However, defendant notes that the language of subsection (b) of that section, which pertains to sexual offenses against a child under the age of 13, does not include any language that references attempted sexual offense, instead merely permitting a short-form indictment with respect to "a sex offense against a child under the age of 13 years and all lesser included offenses." N.C. Gen. Stat. § 15-144.2(b). Defendant contends that since the attempt language in subsection (b) is excluded, a short-form indictment cannot be used to charge a defendant with attempted sexual offense against a child under the age of 13 years.

Defendant's argument fails. Subsection (b) explicitly states that a short-form indictment is permitted with respect to "a sex offense against a child under the age of 13 years *and all lesser included offenses*." N.C. Gen. Stat. § 15-144.2(b) (emphasis added). It is remarkable to us that we must say this explicitly, but for defendant's benefit, we shall: Attempt to commit an offense is a lesser included offense of that offense. By way of illustration, attempt to commit a first-degree sexual offense is a lesser included offense of first-degree sexual offense. *See e.g. State v. Bellamy*, 172 N.C. App. 649, 665, 617 S.E.2d 81, 93 (2005) (implicitly recognizing that attempted first-degree sexual offense is a lesser included offense of first-degree sexual offense).

Since an attempted sexual offense against a child under the age of 13 is necessarily a lesser included offense, the statute, on its face, permits the short-form indictment. We hold, therefore, that the indictment was sufficient to vest jurisdiction in the trial court.

III. Jury Instruction

In his second argument, defendant contends that the trial court erred in its jury instructions. We disagree.

A. Standard of Review

> In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C.R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008).

"Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

B. Analysis

Defendant contends that the trial court erred "by instructing the jury in the attempted first-degree sexual exploitation of a minor case in a way that allowed the

jury to convict [defendant] based on allegations not contained in the indictment and that created the risk of a non-unanimous verdict."

Defendant also contends that the trial court's instructions to the jury constituted plain error. Specifically, he notes that the indictments against him alleged, *inter alia*, that defendant "did attempt to record and film . . . a minor child, . . . engaged in sexual activity of engaging in oral intercourse with the defendant[.]" By contrast, he alleges that the jury instructions merely required that the jury find the films to depict "a minor's [sic] engaged in sexual activities[.]" He argues that the State's evidence suggested multiple forms of sexual activity, not only oral intercourse, and that this could have permitted the jury to find him guilty of the offense based upon conduct that was not alleged in the indictment.

In support of his position that this was prejudicial, and therefore constituted plain error, defendant argues that "it is error, generally prejudicial, for the trial judge to permit a jury to convict upon some abstract theory not supported by the bill of indictment." *State v. Tucker*, 317 N.C. 532, 537-38, 346 S.E.2d 417, 420 (1986) (quoting *State v. Taylor,* 301 N.C. 164, 170, 270 S.E.2d 409, 413 (1980)). Indeed, our Supreme Court has held that "it would be difficult to say that permitting a jury to convict a defendant on a theory not legally available to the state because it is not charged in the indictment or not supported by the evidence is not plain error even

under the stringent test required to invoke that doctrine." *Id.* at 540, 346 S.E.2d at 422.

Defendant further contends that this error is one of a constitutional nature, in that it created ambiguity as to whether the jury, confused by this inconsistency, returned a unanimous verdict. And while normally unpreserved constitutional error is not appropriate for appellate review, even pursuant to plain error review, defendant correctly notes, and we have previously held, that "the failure to object to alleged errors by the trial court that violate a defendant's 'right to a trial by a jury of twelve' does not waive his right to raise the question on appeal." *State v. Holden*, 160 N.C. App. 503, 507, 586 S.E.2d 513, 516 (2003) (quoting *State v. Ashe,* 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985)), *disc. review allowed, writ allowed,* 358 N.C. 238, 593 S.E.2d 786, *aff'd per curiam,* 359 N.C. 60, 602 S.E.2d 360 (2004).

Ultimately, however, defendant's argument is misguided. Defendant's position, in essence, is that the jury could have found him guilty of conduct other than that alleged in the indictment; that this possibility creates a risk of ambiguity with respect to jury unanimity; and that said risk mandates a new trial. However, we are not limited to considering the language in the jury instruction on which defendant focuses.

This Court has held that, when the issue of ambiguity as to a unanimous jury verdict is raised, " 'we must examine the verdict, the charge, the jury instructions,

and the evidence to determine whether any ambiguity as to unanimity has been removed.' " *State v. Brewer*, 171 N.C. App. 686, 692, 615 S.E.2d 360, 364 (2005) (quoting *State v. Petty,* 132 N.C. App. 453, 461-62, 512 S.E.2d 428, 434, *disc. review denied,* 350 N.C. 598, 537 S.E.2d 490 (1999)). We have further held that "there is no unanimity problem if it is possible to match a jury's verdict of guilty with a specific incident after reviewing the evidence, indictment, jury charge, and verdict sheets." *State v. Bates*, 179 N.C. App. 628, 633, 634 S.E.2d 919, 922 (2006) (citations and quotation marks omitted). Here, the verdict sheets addressed not only attempted sexual exploitation of a minor, but also explicitly stated that defendant was found "Guilty of First Degree Sexual Offense (Cunnilingus)[.]" Moreover, despite defendant's contentions about the jury instructions, the trial court explicitly instructed the jury that "oral intercourse is sexual activity[,]" thereby clarifying specifically what sexual activity was being alleged with respect to the charge of attempted sexual exploitation of a minor.

In reviewing the evidence, charge, instructions, and verdict sheets, the facts are clear. Any potential ambiguity raised by the jury instructions was addressed by the specificity of the verdict sheets, and the inclusion of the reference to oral intercourse in the jury instructions. It is unlikely that any juror looking at the verdict sheets mistakenly believed that they were finding defendant guilty of a sexual offense resulting from an incident other than oral intercourse. As this was the sexual act of

which defendant was found guilty, it is unlikely that any juror would find defendant guilty of sexual exploitation of a minor based on any other conduct. We hold that there was no ambiguity in the jury's unanimous decision, and that the trial court's jury instruction did not "permit a jury to convict upon some abstract theory not supported by the bill of indictment." We therefore hold that defendant has failed to show prejudice, and has failed to demonstrate plain error.

IV. Clerical Error

In his third argument, defendant seeks to have the judgment remanded to correct a clerical error. For the following reasons, we decline to remand.

A. Standard of Review

"When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court 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) (citation omitted).

B. Analysis

At the close of the evidence, the State voluntarily dismissed the charge against defendant captioned 13 CRS 100081, first-degree sexual exploitation of a minor. The State then filed a notice of dismissal with that caption, 13 CRS 100081. However, the name of the offense listed on that notice was "First Degree Sex Offense Minor,"

not first-degree sexual exploitation of a minor. The State concedes that this language was erroneous.

On appeal, defendant requests that this Court remand to the trial court to correct this clerical error. Defendant cites our decision in *Smith* to support his request. We note, however, that the error alleged was not an error in "the trial court's judgment or order," but rather an error in a filing by the State.

Our precedent authorizes this Court to remand to correct clerical errors of the trial court. The error in the instant case was not an error of the court, but rather an error of the State. Moreover, the clerical error at issue had no impact upon the outcome of defendant's case. We therefore decline to remand for correction of this clerical error.

NO ERROR IN PART, NO PLAIN ERROR IN PART.

Judge BRYANT concurs.

Judge BERGER concurs in a separate opinion.

Report per Rule 30(e).

BERGER, Judge, concurring in separate opinion.

I concur with the majority opinion, but write separately regarding the purported clerical error in Issue IV.

"[T]he prosecutor may dismiss any charges stated in a criminal pleading . . . by entering an oral dismissal in open court before or during the trial, or by filing a written dismissal with the clerk at any time." N.C. Gen. Stat. § 15A-931(a) (2017). A simple review of the transcript indicates the charge of first degree sexual exploitation of a minor in 13 CRS 100081 was properly dismissed by the prosecutor orally in open court.

> [Prosecutor]: Your Honor, on this indictment, 13CRS100081, the State will take a dismissal on that offense.
>
> THE COURT: You are taking a dismissal without leave?
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> [Prosecutor]: Yes, Your Honor.
>
> THE COURT: Okay.
>
> [Prosecutor]: And we will still be proceeding under 14CRS24169, which is an attempt to commit first-degree sexual exploitation of a minor.

No further action was needed or required by the prosecutor to dismiss the charge. However, the prosecutor subsequently filed a written dismissal in 13 CRS 100081 and incorrectly labeled the offense as first degree sex offense with a minor.

As a voluntary dismissal is neither a judgment nor an order entered by the trial court, this Court lacks authority to amend or otherwise modify a voluntary dismissal entered by a prosecutor. N.C. Gen. Stat. § 7A-27(b) (2017). The prosecutor unnecessarily filed a written dismissal that was not accurate. It is the prosecutor's duty alone to make the record reflect what took place in open court.