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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-989

Filed: 5 June 2018

Vance County, No. 13 CRS 50790

STATE OF NORTH CAROLINA

v.

DAQUAN KEITH FOSTER

Appeal by defendant from judgment entered 19 December 2016 by Judge Robert H. Hobgood in Vance County Superior Court. Heard in the Court of Appeals 4 April 2018.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Anne J. Brown, for the State.*

*Kimberly P. Hoppin for defendant.*

DIETZ, Judge.

Defendant Daquan Keith Foster appeals his conviction for first degree rape. He contends that the trial court committed plain error by admitting a gun recovered from his room into evidence and that the trial court abused its discretion in admitting photographs of injuries to the victim's vaginal area.

As explained below, Foster has not met his burden to show plain error with respect to admission of the handgun and has not shown that the trial court abused its discretion by admitting the photographs. Accordingly, we reject Foster's arguments.

## Facts and Procedural History

On 28 March 2013, the victim, D.C.,[1] was visiting her parents in North Carolina and went on a morning walk. She testified that Defendant Daquan Keith Foster began following her, groped her in an alley, knocked her down, pulled her pants down, and began performing oral sex on her. Foster then pointed a silver gun at D.C. and forced her into some nearby woods. The victim testified that Foster forced her down into a ditch where he raped her. The victim began to bleed and once Foster noticed the blood, he got up and left. Foster threatened to kill the victim and her family if she did not stay in the woods as he escaped.

D.C. waited for Foster to leave and eventually left the woods. She found a group of older women and asked for help. One of the women was a witness at trial. She testified that when D.C. approached her, D.C. was crying and that her clothes were "bloody and muddy."

Emergency responders transported D.C. to Duke Medical Center, where she received a full examination by Theresa Arico. Arico is a sexual assault forensic nurse

[1] We use initials to protect the victim's privacy.

examiner for Duke Health System. Arico took photographs of D.C.'s injuries, including injuries to the victim's vaginal area. D.C. later identified Foster as the man who sexually assaulted and raped her.

Law enforcement searched the room where Foster stayed with his aunt and found a gun. The gun was black but had a shiny pearl glaze on the handle.

The State indicted Foster for first degree rape and second degree kidnapping. The case went to trial and the jury convicted Foster of first degree rape. The trial court sentenced Foster to 239 to 347 months in prison. Foster timely appealed.

## Analysis

### I. Challenge to Admissibility of the Gun

Foster first argues that the trial court erred by admitting the gun found in the home where he resides. Foster concedes that he did not object to the admission of the gun at trial and asks this Court to review for plain error.

"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.

Even if this Court were persuaded that admission of the gun was erroneous, Foster has not shown that the error had a probable impact on the jury's verdict. The victim testified that Foster brandished a gun to force her to have sex with him. Foster testified that he did not have a gun and that the sex was consensual. Thus, we agree with Foster that this case was largely a "credibility contest." But the victim's testimony remained consistent, and the State called many aspects of Foster's testimony into question. For example, on cross-examination, Foster acknowledged that he changed his story over time. Moreover, Foster maintained that he wore a condom when he had sex with the victim. When the State questioned how Foster's DNA was identified in semen found in the victim's vagina, Foster responded as follows:

> Q. And you wore a condom?
>
> A. Yeah, I wore a condom.
>
> Q. And the condom leaked in your pocket?
>
> A. Yeah. I pulled the condom off. I didn't want –
>
> Q. And you think that's why your DNA was inside [the victim's] vagina?
>
> A. I can't – I can't tell you how it got in her vagina. I know when we was done doing what we was doing, I pulled the condom off. I can't tell you how semen got into her or on her; I can't tell you that. I can't explain it. Get some scientist to explain it. I can't explain that.

Later, the State had Foster read a letter he sent to the District Attorney after learning of the results of the DNA testing. In that letter, Foster stated, "The only reason my DNA could of showed up was because she – (pause) – she agreed to have sex and actual – oral sex and actual sex because I would pay drugs for it. . . . Why would I have sex unprotected knowing that – why would I have sex unprotected knowing that my DNA would show if I actually was a rapist." In that letter, Foster did not assert that he wore a condom.

In light of Foster's inconsistent testimony, he has not carried his burden to show that, but for admission of the gun, the jury probably would have reached a different result. To be sure, Foster has shown that admission of the gun *might* have impacted the jury's deliberations, but that is not enough to satisfy the high bar for plain error. Accordingly, we reject Foster's argument and find no plain error in the trial court's admission of the gun.

## II. Admission of the Photographs

Foster next contends that the trial court erred by admitting photographs depicting the victim's injuries. Specifically, Foster argues the photographs were substantially more prejudicial than probative and should have been excluded under Rule 403 of the Rules of Evidence.

Rule 403 permits the trial court to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." N.C. R. Evid.

403. This Court reviews a trial court's ruling under Rule 403 for abuse of discretion. *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). We may reverse a trial court's discretionary ruling under Rule 403 only if it is "so manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.*

Here, the State introduced 23 photographs of the victim's genital injuries observed during a medical examination following the alleged rape. Those photographs plainly were relevant because the State alleged that Foster forcibly raped the victim. But Foster contends that the photographs were so "emotionally charged" that there existed a "risk of unfair prejudice not outweighed by their probative value."

"This Court has rarely held the use of photographic evidence to be unfairly prejudicial," *State v. Bare*, 194 N.C. App. 359, 364, 669 S.E.2d 882, 886 (2008), and we will not do so here. The trial court reviewed the photographs and heard a *voir dire* examination of the State's witness before determining that the photographs "are relevant, they are probative, and the probative value is not outweighed by the danger of unfair prejudice to the Defendant." This determination was well within the trial court's sound discretion and we therefore find no error in the trial court's ruling.

## Conclusion

For the reasons discussed above, we find no plain error in part and no error in part.

NO PLAIN ERROR IN PART; NO ERROR IN PART.

Judges DILLON and ARROWOOD concur.

Report per Rule 30(e).