IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1229

Filed: 17 July 2018

Mecklenburg County, No. 17 CRS 201050

STATE OF NORTH CAROLINA

v.

MARLON EDUARDO COLINDRES

Appeal by defendant from judgment entered 19 July 2017 by Judge Martin B. McGee in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 June 2018.

Attorney General Joshua H. Stein, by Outreach & Policy Counsel Hugh A. Harris, for the State.

The Law Office of Sterling Rozear, PLLC, by Sterling Rozear, for defendant-appellant.

DAVIS, Judge.

Marlon Eduardo Colindres ("Defendant") appeals from his conviction for taking indecent liberties with a child. On appeal, he argues that the trial court erred by failing to instruct the jury on the defense of voluntary intoxication. After a

thorough review of the record and applicable law, we conclude that Defendant received a fair trial free from error.

Factual and Procedural Background

The State presented evidence tending to establish the following facts: On 6 January 2017, Defendant was invited to a party by his cousin, Gustavo Cardona. The party was hosted by Jairo and Brenda Zelaya (the "Zelayas") at their apartment in Charlotte, North Carolina. A woman named Jennifer Alvarez and a man named Mauricio also attended the party.

On the evening of 6 January 2017 and into the early morning hours of 7 January 2017, there was a snowstorm in Charlotte. As a result, the roads near the Zelayas' apartment were covered in ice.

Around 11:00 p.m., Defendant arrived at the party. The Zelayas had set out a 12-pack of beer and a bottle of tequila for the party. The six adults were congregated in the dining room and the living room of the apartment. Defendant was provided with alcohol at the party despite the fact that he was — unbeknownst to the Zelayas — only 19 years old at the time.

The Zelayas' three sons — "Miguel,"[1] "Gabriel," and "Ian" — were sleeping in the children's bedroom during the party. At approximately 1:40 a.m., the adults ran out of beer, and Jairo left the apartment to walk to the nearest gas station to purchase

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

more alcohol. Once Jairo left the house, Defendant walked out of the living room and entered the children's bedroom.

Defendant lay down in the bed next to Miguel. Miguel "scoot[ed] over" in the bed because "[he] thought [Defendant] was sleepy so [Miguel] just wanted to be nice to let him sleep." Moments later, Defendant "took off his pants and touched [Miguel's] private [area]." Miguel tried to leave the bed, but Defendant grabbed his hand and told him to "go back to sleep." Miguel instead went to the bathroom where he began yelling for his parents. Defendant tried to open the bathroom door, but Miguel had locked the door.

Alvarez heard Miguel screaming and went to the bathroom to check on him. Miguel told her what Defendant had done to him. Brenda entered the bathroom soon afterwards, and Alvarez told her what had occurred. Brenda called the Charlotte-Mecklenburg Police Department and reported the incident at approximately 2:00 a.m.

Meanwhile, Defendant left the apartment and began driving away on the icy roads. As Officer James Wolfe was driving toward the apartment to answer the call, he observed Defendant's vehicle "slid[e] on the ice and hit the curb." He then followed the vehicle until he observed it crash into a light pole off the side of the road.

Officer Wolfe exited his vehicle and approached Defendant's car to see if he was hurt. He observed no visible injuries and noticed that Defendant did not have

"any problems getting out [of the vehicle] on his own." Officer Wolfe called for medical assistance to verify that Defendant was not injured and spoke to Defendant while he was waiting. While he observed that Defendant spoke with a slight accent, he did not detect any slurring in Defendant's speech. Officer Wolfe testified that he did not smell any alcohol on Defendant's breath and that although he did notice that Defendant's eyes were "a little red . . . they weren't glassy."

While speaking with Defendant, Officer Wolfe received a call from other officers indicating that Defendant matched the description of the suspect from the reported incident at the Zelayas' apartment. Defendant was arrested and subsequently charged with taking indecent liberties with a child.

A jury trial was held beginning on 17 July 2017 before the Honorable Martin B. McGee in Mecklenburg County Superior Court. Miguel, Jairo, Brenda, Alvarez, Cardona, Officer Wolfe, and two other witnesses testified on behalf of the State. Defendant did not testify.

On 19 July 2017, the jury found Defendant guilty of taking indecent liberties with a child. The trial court sentenced him to 13 to 25 months imprisonment. Defendant gave oral notice of appeal in open court.

Analysis

On appeal, Defendant argues that the trial court erred in denying his request for a jury instruction on the voluntary intoxication defense. As an initial matter, we

must address the State's argument that Defendant did not properly preserve this issue for appeal and, thus, is only entitled to plain error review. Rule 10 of the North Carolina Rules of Appellate Procedure states, in pertinent part, as follows:

> A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection; provided that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

N.C. R. App. P. 10(a)(2).

During the charge conference, the trial court provided counsel with several proposed instructions, including an instruction on the defense of voluntary intoxication. The State objected to this instruction and made arguments that the evidence did not support the instruction while Defendant's counsel argued to the contrary. Ultimately, the court determined that it would not instruct the jury on the defense of voluntary intoxication.

After the jury began deliberations, the trial court asked counsel outside of the presence of the jury if either party had any objections or motions. At this point, Defendant's counsel stated that he "would once again request that [the court] instruct the jury on [the defense of voluntary intoxication]."

The State contends that because Defendant never affirmatively asked for an instruction prior to the jury retiring for deliberations, he has not preserved this issue

for appellate review. Defendant, conversely, argues that his counsel's actions in making an argument in favor of the instruction during the charge conference in addition to his request for the instruction after the jury began deliberating was sufficient to preserve this issue because the court was on notice of Defendant's request for the jury to be instructed on this defense. However, we need not resolve the question of whether this issue was properly preserved because even assuming — without deciding — that Defendant's objection was adequately preserved for purposes of Rule 10(a)(2), we conclude that he was not entitled to an instruction on voluntary intoxication.

We review challenges to jury instructions *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

> This Court reviews jury instructions contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury. If a party requests a jury instruction which is a correct statement of the law and which is supported by the evidence, the trial judge must give the instruction at least in substance.

State v. Cornell, 222 N.C. App. 184, 191, 729 S.E.2d 703, 708 (2012) (citation, ellipsis, and brackets omitted).

"The crime of taking indecent liberties with a minor is a specific intent crime. A specific intent crime requires the State to prove that defendant acted willfully or with purpose in committing the offense." *State v. Merrell*, 212 N.C. App. 502, 505-06, 713 S.E.2d 77, 79 (2011) (citation omitted). However, "[v]oluntary intoxication may negate the existence of specific intent as an essential element of a crime." *State v. Hole*, 240 N.C. App. 537, 541, 770 S.E.2d 760, 763 (2015) (citation and quotation marks omitted).

> Before the trial court will be required to instruct on voluntary intoxication, defendant must produce substantial evidence which would support a conclusion by the trial court that at the time of the crime for which he is being tried defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming [the requisite intent to commit the crime.] In the absence of some evidence of intoxication to such degree, the court is not required to charge the jury thereon.

State v. Keitt, 153 N.C. App. 671, 676-77, 571 S.E.2d 35, 39 (2002) (citation omitted), *aff'd per curiam*, 357 N.C. 155, 579 S.E.2d 250 (2003).

Our Supreme Court has held that "[e]vidence of mere intoxication is not enough to meet defendant's burden of production . . . ." *State v. Vaughn*, 324 N.C. 301, 308, 377 S.E.2d 738, 742 (1989) (citation and quotation marks omitted). Similarly, our appellate courts have consistently ruled that a defendant is not entitled to a voluntary intoxication instruction based simply on a showing that he had consumed some amount of alcohol leading up to the commission of the crime. *See,*

e.g., *State v. Geddie*, 345 N.C. 73, 95, 478 S.E.2d 146, 157 (1996) (defendant "drank some liquor" but there was "no evidence indicating that defendant was so intoxicated as to be utterly incapable of forming the intent to kill"), *cert. denied*, 522 U.S. 825, 139 L. Ed. 2d 43 (1997); *State v. Wilson-Angeles*, __ N.C. App. __, __, 795 S.E.2d 657, 666 (2017) ("Defendant had consumed some amount of some type of alcohol over some unknown period of time prior to attempting arson."); *State v. Baldwin*, 330 N.C. 446, 463, 412 S.E.2d 31, 41 (1992) (evidence that "defendant drank 'about five or six' beers and consumed an indeterminate amount of marijuana and cocaine at some time earlier in the day" was insufficient to support voluntary intoxication instruction); *see also State v. Ash*, 193 N.C. App. 569, 577, 668 S.E.2d 65, 71 (2008) (no instruction required where there was "no evidence as to exactly how much ['love boat' marijuana that defendant had] consumed prior to the commission of the crime at issue"), *disc. review denied*, 363 N.C. 130, 673 S.E.2d 363 (2009).

We find instructive our decision in *Merrell*. In that case, the defendant was a "severe alcoholic" and was "very rarely sober." *Id.* at 503, 713 S.E.2d at 78. During two separate incidents of drunkenness, the defendant sexually assaulted his youngest daughter. He was charged with, and convicted of, rape of a female under the age of thirteen and five counts of taking indecent liberties with a child. *Id.* at 503-04, 713 S.E.2d at 78-79.

On appeal, the defendant argued that the trial court had committed plain error by failing to instruct the jury on the defense of voluntary intoxication. *Id.* at 507, 713 S.E.2d at 80. As evidence of his intoxication, he pointed to his testimony that he had "abused alcohol and drugs for so long his memory has deteriorated to a point that he cannot remember the events for which he was convicted." *Id.* The defendant also introduced evidence during trial from a law enforcement officer who had testified that "his impression was that defendant was using drugs and drinking heavily during that time and he did not remember a lot about what occurred back then." *Id.* (quotation marks omitted). However, this Court held this testimony to be insufficient to support an instruction on voluntary intoxication. We held that the defendant had "not present[ed] evidence to support a conclusion that, at the time the acts were committed, his mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming the requisite intent." *Id.*

In support of his argument, Defendant cites our Supreme Court's decision in *State v. Mash*, 323 N.C. 339, 372 S.E.2d 532 (1988). The facts of *Mash* were described by the Court as follows:

> Defendant had been seen drinking periodically from around 4 p.m. until 11 p.m. on the day of the murder. During that afternoon defendant appeared "high" while drinking more beer with another friend, and by early evening he was drinking a mixture of 190 proof grain alcohol and punch. Witnesses described defendant as "definitely drunk" and "pretty high" by 9:30 p.m. He swerved while driving his automobile to obtain more beer.

> After stopping at a package store parking lot to meet some friends, defendant left by himself for thirty or forty minutes. Upon returning, he appeared "changed all the way around" and "drunker, wilder and out of control." Defendant's eyes were dilated, his complexion had changed, he was sweating and had difficulty speaking or walking. Unprovoked, he inexplicably and viciously assaulted a girlfriend and several strangers.

Mash, 323 N.C. at 348, 372 S.E.2d at 538. Based on this evidence, the trial court instructed the jury on the defense of voluntary intoxication. *Id.* at 343, 372 S.E.2d at 535.

On appeal, the defendant argued that the trial court's instructions were flawed, but the State contended that the error was harmless because the evidence was insufficient to require any voluntary intoxication instruction. The Supreme Court held that the defendant was, in fact, entitled to such an instruction because

> [t]he manner of the assault . . . and defendant's actions immediately before and after it were, themselves, equivocal on the question of whether defendant actually deliberated and premeditated his intent to kill [the victim]. Certainly a jury could have found that he did. A jury could also have concluded, under proper instructions, that defendant was so impaired by alcohol that he formed no such intent but was simply thrashing wildly at anyone he perceived as a threat.

Id. at 348-49, 372 S.E.2d at 538.

In the present case, there was no evidence as to how much alcohol Defendant drank prior to entering Miguel's bedroom. The evidence established that the Zelayas had purchased a 12-pack of beer and a bottle of tequila for their guests. However,

while there was evidence that Jairo, Brenda, Alvarez, and Cardona drank some of the alcohol that was provided at the party,[2] there was no evidence as to how much of this alcohol was consumed by Defendant. Jairo testified that he "[did not] even remember seeing [Defendant] drink tequila[,]" and Cardona testified that he never saw Defendant "drinking tequila straight out of the bottle at any time that evening[.]" None of the witnesses testified about the number of beers that Defendant drank.

Cardona testified that Defendant was not as drunk as he had been on previous occasions where the two men would drink together. He stated that when the men were "pretty much intoxicated" they would dance together and "perform" for the group. Alvarez testified that although she believed Defendant was "drunk" on the night of the party, he did not stumble or fall down.

Evidence was presented that after Miguel entered the bathroom and started screaming for his parents, Defendant went to the bathroom in an apparent attempt to stop Miguel from alerting the Zelayas as to what had transpired. Defendant then fled from the house and drove away in his vehicle in order to escape. These actions taken immediately after the commission of the crime demonstrate that Defendant

[2] Jairo testified that he consumed two beers and two shots of tequila. Brenda stated that she drank at least one or two beers. Alvarez testified that she had at least two beers. Cardona stated that he was also drinking alcohol along with the others but did not specify how much he drank from the beer and tequila provided. There was no evidence as to how much of the beer and tequila Mauricio drank. The evidence showed that the group of six adults did, in fact, finish the 12-pack of beer before Defendant entered Miguel's bedroom. The evidence was unclear whether the group had also finished the bottle of tequila.

was able to form coherent thoughts and act on those thoughts in order to further his own self-interest.

Defendant points to the fact that he crashed his car as evidence that he was entitled to a voluntary intoxication instruction. We note that our Supreme Court has stated "[e]ven though a person's blood alcohol content is such that driving would violate the motor vehicle laws, this alone does not entitle the person to an instruction on voluntary intoxication." *Mash*, 323 N.C. at 348, 372 S.E.2d at 537. Here, the evidence does not tend to support a conclusion that Defendant's crash occurred because he was intoxicated. Although his vehicle was sliding on the road prior to the time it struck the pole, the evidence showed that the roads surrounding the Zelayas' apartment were covered in ice from the snowstorm such that it would have been difficult for anyone to drive safely under those conditions.

Moreover, Officer Wolfe testified that upon stopping Defendant's vehicle he did not form an impression that Defendant was impaired because he lacked several of the common signs of intoxication. Officer Wolfe stated that Defendant did not exhibit slurred speech, glassy eyes, the odor of alcohol, or difficulty in answering questions and providing identification. In short, the evidence does not support an inference that Defendant was intoxicated at all much less so impaired as to be entitled to receive an instruction on this defense. Accordingly, we overrule his argument.

Conclusion

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

NO ERROR.

Judges DILLON and INMAN concur.

Report per Rule 30(e).