IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-910

Filed: 4 June 2019

Mecklenburg County, No. 16CRS20916, 16CRS217718-22, 16CRS217727-29, 16CRS217731-33, 16CRS217736

STATE OF NORTH CAROLINA

v.

CHARLES FITZGERALD HARRIS, Defendant.

Appeal by Defendant from judgments entered 28 March 2018 by Judge Nathaniel J. Poovey in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 April 2019.

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

Jarvis John Edgerton, IV, for Defendant-Appellant.

INMAN, Judge.

Defendant Charles Fitzgerald Harris ("Defendant") appeals his conviction following a jury verdict finding him guilty of first-degree forcible sexual offense.[1]

[1] Defendant was convicted on multiple counts for first-degree forcible sexual offense as well as other crimes. However, Defendant appeals from his conviction on one particular sexual offense count and does not raise issues related to the others.

Defendant argues that: (1) the State failed to produce sufficient evidence to support a guilty verdict; and (2) he was denied effective assistance of counsel. After careful review of the record and applicable law, we hold that Defendant has failed to demonstrate error.

I. FACTUAL AND PROCEDURAL BACKGROUND

The evidence introduced at trial tended to show the following:

In 2016, SA and her eleven-year-old son, MC,[2] were living in Charlotte, North Carolina in a Salvation Army shelter after moving from Detroit, Michigan. That same year, she met Defendant, who identified himself as "Cyrus."[3] They exchanged phone numbers and started communicating and sporadically spending time together. Defendant would occasionally drive SA and MC around in his pickup truck to run errands and take them out to eat. Although Defendant inquired about having a romantic relationship with SA, she told him she was not interested.

SA then moved out of the shelter and relocated to transitional housing. Soon thereafter, SA suspected that Defendant was following her and continually driving by her house in his truck. She decided to reduce her communications with him. SA also changed her work shifts so Defendant could not know her work schedule.

[2] We use the above pseudonyms to preserve the victim's and the child's anonymity.

[3] SA referred to Defendant by this name throughout her testimony.

On 10 May 2016, Defendant telephoned SA. Although she had not answered Defendant's phone calls over several days before then, she answered the call because Defendant had sent her a text saying his mom was in the hospital. SA told Defendant that she and MC were flying to Detroit the next day to visit friends. Defendant offered to drive the two of them to the airport, and SA accepted.

Between 3:00am and 4:00am the following morning, Defendant picked up SA and MC in his pickup truck in time to reach the airport for them to board an early morning flight. Rather than driving directly to the airport, Defendant stopped at his house, telling SA he needed to "get some papers." Defendant invited SA into his house but she declined and waited in the truck with MC. After Defendant got back on the road, he continued driving past the airport exit, saying to SA that he needed to stop for gas. Upon leaving the gas station, Defendant did not get back on the freeway and his demeanor changed. He told SA "we going to play your game." SA called 911 but Defendant punched her directly above her left eye, causing her to drop her phone.

Defendant pulled over on the side of the road, got out of the truck, and walked to the passenger's side door. When SA was trying to get her luggage out of the back of the truck, Defendant grabbed the lanyard around her neck and pulled her toward him. MC became frantic and also pulled the lanyard to try and wrest SA free from Defendant. Defendant started to choke SA and told her to tell MC to get back in the truck. After MC got into the truck, Defendant took SA to the back of the truck, where

he put his hands in SA's pants and digitally penetrated her vagina. Defendant and SA then got back into the front of the truck and Defendant started driving on the freeway.

Defendant again exited off the freeway, parked on the side of the road, got out of the truck, walked to the passenger's side and opened the door, and asked SA if she "want[ed] it in front of [MC] or you want it in the back?" SA exited the passenger seat while MC stayed in the cab of the truck, and both Defendant and SA went to the back bed of the truck. Defendant forced SA to perform oral sex on him, and he then proceeded to have nonconsensual vaginal and anal intercourse, and digitally penetrated her vagina. After a car drove by, Defendant said they needed to go into the woods. SA, fearing that she would be killed if they entered the woods, told Defendant that they should go back to his house because Defendant's mother was not there. Defendant agreed, but took out a knife, put it to her throat, and threatened to kill her and MC if she attempted to make noise or escape.

When they entered the house, Defendant was still holding the knife and told MC to sit on the couch in the living room and watch television. Defendant and SA went into his bedroom and closed the door. After SA got undressed at the behest of Defendant, he engaged in many instances of nonconsensual vaginal and anal intercourse with her, and digital penetration, and forced her to perform oral sex on

him multiple times. Defendant also recorded having vaginal intercourse and receiving oral sex from SA on his camera.

Defendant eventually let SA use the bathroom. As SA exited the bathroom, she walked over to MC who was still sitting on the couch. While she hugged MC, without allowing Defendant to overhear, SA whispered to MC to call the police. After SA returned to Defendant's room, he continued to perform more nonconsensual sexual acts on her. Sometime later, the Charlotte-Mecklenburg Police Department arrived on the scene at Defendant's house after MC called the police. When Defendant noticed that it was the police, he started choking SA until the officers entered the bedroom and arrested him.

On 16 May 2016, Defendant was indicted on two counts of first-degree kidnapping, seven counts of first-degree forcible sexual offense, three counts of first-degree forcible rape, and one count of assault by strangulation.[4] On 18 July 2016, Defendant was also indicted for attaining violent habitual felon status.

The matter proceeded to trial. At the close of the State's evidence, the trial court denied Defendant's attorney's motion to dismiss the charges arising from Defendant's actions on the side of the road. At the close of all the evidence, the State dismissed the assault by strangulation charge. The trial court denied defense

[4] The assault by strangulation charge only appears in the transcript.

counsel's renewed motion to dismiss charges arising from his actions on the side of the road. Defendant asserted no other motion to dismiss.

The jury found Defendant guilty of two counts of first-degree kidnapping, five counts of first-degree forcible sexual offense, two counts of second-degree forcible sexual offense, two counts of first-degree forcible rape, one count of second-degree forcible rape, and attaining violent habitual felon status. The trial court entered consecutive judgments of life without parole for each conviction and Defendant was given credit for 748 days for time spent in confinement.

Defendant gave oral notice of appeal.

II. ANALYSIS

A. Motion to Dismiss

North Carolina Rule of Appellate Procedure 10(a)(3) provides that a criminal 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." In conceding on appeal that his trial counsel failed to motion to dismiss any of the charges that were alleged to have been committed inside the house, Defendant requests that this Court hear his appeal by using its discretionary power under Rule 2 to review the sufficiency of the evidence for one of those charges. *See* N.C. R. App. P. 2.

Our Supreme Court has held that Rule 2 is to be utilized cautiously in exceptional circumstances. *State v. Batchelor*, 190 N.C. App. 369, 378, 660 S.E.2d 158, 164 (2008). As will be discussed below, because the State produced sufficient evidence for the jury to convict Defendant, we decline Defendant's request to suspend the rules.

B. Ineffective Assistance of Counsel

Defendant argues in the alternative that he was denied effective assistance of counsel when his attorney failed to move to dismiss one of the seven sexual offense charges. We disagree.

The State used the same language in each of the seven indictments for first-degree forcible sexual offense. The trial court emphasized to counsel for the parties that, in order to differentiate those charges for the jury, the jury instructions and verdict sheets needed to clearly signify the conduct underlying each charge. When the trial court instructed the jury, it distinguished each charge based on the location and the type of sexual act Defendant was alleged to have performed. The trial court instructed jurors regarding the fourth and seventh charges, respectively, as follows:

> As for the fourth count of first degree sexual offense . . . alleged to have taken place inside Defendant's house. . . . [T]he State must prove . . . . that the Defendant engaged in . . . . *any penetration, however slight, by an object into the anal opening of a person's body*. . . .

> [The] seventh count of first degree sexual offense is alleged to have taken place inside the Defendant's house. . . . [T]he State must prove . . . . that the Defendant engaged in . . . . *anal intercourse which is any penetration, however slight, of the anus of any person by the male sexual organ of another*.[5]

(emphasis added).

In its opening statement, counsel for the State asserted, in pertinent part, that Defendant digitally penetrated SA's anus while they were at his house. When viewing the charges in totality and the prosecutor's words used at trial, Defendant construes the fourth charge to support the State's theory that Defendant digitally penetrated her in the house. Because the State failed to offer such evidence, Defendant argues, his attorney should have motioned to dismiss that charge. Although the State rejects that interpretation, assuming without deciding Defendant's attorney performed deficiently and that the fourth charge required proof of digital penetration, we reject Defendant's argument because Defendant cannot show that the result would have been different had his attorney motioned to dismiss.

The Sixth Amendment grants every defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686-87, 80 L. Ed. 2d 674, 692-93 (1984). A defendant can prove ineffective assistance of counsel by showing that "(1) counsel's performance was deficient and (2) the deficient performance prejudiced the

[5] The verdict sheets reflect these references as well.

defense." *State v. Covington*, 248 N.C. App. 698, 706, 788 S.E.2d 671, 677 (2016) (citation omitted). Deficient performance occurs when the defendant shows "that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88, 80 L. Ed. 2d at 693. Prejudice exists when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (quotation marks and citation omitted). We need not determine whether defense counsel's performance was deficient if we can conclude that there would be no prejudice. *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 249 (1985).

In reviewing motions to dismiss, "the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982) (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)). All evidence is viewed in the "light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Fritsch*, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455 (2000) (citation omitted). Our review "is the same whether the

evidence is direct or circumstantial." *Id.* "Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988) (citation omitted).

To convict a defendant for first-degree forcible sexual offense, the State must prove beyond a reasonable doubt that (1) "the person engage[d] in a sexual act with another person by force and against the will of the other person;" and (2) did any of the following:

> (1) Employ[ed] or display[ed] a dangerous or deadly weapon or an article which the other person reasonably believe[d] to be a dangerous or deadly weapon.
> (2) Inflict[ed] serious personal injury upon the victim or another person.
> (3) The person commit[ted] the offense aided and abetted by one or more other persons.

N.C. Gen. Stat. § 14-27.26(a) (2015).[6] A "sexual act" is defined as "cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse," and "means the penetration, however slight, by any object into the genital or anal opening of another person's body." N.C. Gen. Stat. § 14-27.20(4) (2015). Because Defendant argues only that the State failed to offer evidence of digital penetration inside the house, we will not discuss Section 14-27.26(a)'s other elements.

We disagree with Defendant's argument based on our review of the evidence

[6] This provision was amended in 2017. Because Defendant's actions occurred in 2016, we use the 2015 statutory version of Section 14-27.26.

in a light most favorable to the State. Although SA did not expressly testify that Defendant digitally penetrated her anus while they were inside the house, her statements to a medical provider and her other testimony at trial allow a reasonable inference that Defendant digitally penetrated her when they were in his house. Emily Bellow ("Ms. Bellow"), a SANE nurse at Presbyterian Medical Center, testified that around 9:35am on 11 May 2016, the day of the assaults, she examined and spoke with SA at the hospital. Ms. Bellow recited to the jury her notes from her conversation with SA. SA told Ms. Bellow that Defendant digitally penetrated her anus on the side of the road and that, when they arrived at the house, "[Defendant] kept doing stuff like oral sex." Ms. Bellow further testified that she performed a genital exam on SA and found breakings in the skin on her anus consistent with penile and digital penetration.

SA also testified on cross-examination comparing the amount of sexual acts Defendant performed on the side of the road and inside the house. Defendant's attorney and SA had the following exchange:

> [DEFENSE COUNSEL:] Okay. All right. Now, you said that—the State has charged my client with multiple sexual assault. And I'm just trying to figure out which one happened on the side of the road and the sequence of what had happened and how many happened inside the house because that's crucial to be able to delineate which act we need to talk about.
> So to the best of your recollection, how many of the sexual act[s] you claim happened[,] happened on the side of the road?

> [SA:] It was so many.
>
> [DEFENSE COUNSEL:] So if you are to put a number to which one is higher, is it the one that happened on the side of the road or the one that happened at the house?
>
> [SA:] I believe the house may have been more.
>
> [DEFENSE COUNSEL:] The house may have been more. All right. That's fine.

SA testified—when asked what other sexual acts occurred on the side of the road—that Defendant used "his fingers and stuff like that, it was so many different things that was [sic] going on." That testimony was followed by this exchange:

> [DEFENSE COUNSEL:] But you say if you have to put a number to it, the one that happened at the house is more than what happened on the side of the road?
>
> [SA:] Probably so.

Drawing all reasonable inferences in the State's favor, we hold that a reasonable juror could infer that Defendant digitally penetrated SA's anus both on the side of the road and inside the house. A physical examination of SA's anus showed that her injuries were consistent with digital or penile penetration. And when asked by Defendant's attorney whether Defendant performed more sexual acts on the side of the road or in the house, SA stated twice that it was likely he committed more of the aforementioned sexual acts—which includes digital penetration—inside the house. Accordingly, the State produced "more than a scintilla of evidence" to support

the fourth charge of first-degree forcible sexual offense, and it was left for the jury to weigh the credibility of SA's testimony. *Powell*, 299 N.C. at 99, 261 S.E.2d at 117 (citation omitted); *see also Fritsch*, 351 N.C. at 382, 526 S.E.2d at 457 ("[T]he fact that some evidence in the record supports a contrary inference is not determinative on the motion to dismiss.").

As the motion to dismiss would not have been granted had Defendant's attorney requested it at trial, we reject his ineffective assistance of counsel claim because he cannot establish prejudice.

NO ERROR.

Judges ARROWOOD and BROOK concur.

Report per Rule 30(e).