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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-479

Filed: 18 June 2019

Moore County, No. 14 CRS 52457, 52458

STATE OF NORTH CAROLINA

v.

ONTREL LATRE GILCHRIST, Defendant.

Appeal by Defendant from judgments entered 26 July 2017 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 14 November 2018.

Attorney General Joshua H. Stein, by Mary L. Lucasse, Special Deputy Attorney General, for the State.

Jarvis John Edgerton, IV, for defendant-appellant.

MURPHY, Judge.

Even when a trial court errs in failing to comply with our statute regarding the restraint of a defendant during a criminal trial, a new trial is not warranted if that error did not have a prejudicial impact on the defendant's trial. Here, the trial court did not comply with its statutory mandate in ordering Defendant, Ontrel Latre

Gilchrist, to be restrained during trial. However, upon exhaustive review we hold the error does not warrant a new trial.

Further, we will not disrupt a trial court's decisions regarding the scope of cross-examination absent an abuse of discretion. Here, we affirm the trial court's decisions regarding the scope of cross-examination because Defendant has not demonstrated that the trial court abused its discretion in choosing not to admit certain evidence and testimony under Rule 412 of the North Carolina Rules of Evidence.

BACKGROUND

Defendant was indicted on charges of first degree kidnapping, first degree burglary, felony larceny, and two counts of first degree sex offense for breaking into a house in the middle of the night and forcing the homeowner, Wendy[1], to engage in sexual acts at knifepoint. At trial, upon learning that Defendant was "in shackles when he enter[ed] the courtroom[,]" Defendant's counsel objected. The trial court overruled the objection, but did not offer any reasons to support the decision to keep Defendant restrained or explain to Defendant and his counsel the reasons he was shackled. The trial court stated only that, "[a]t this time . . . the Court will require

[1] We use a pseudonym to protect the victim's identity.

the defendant to be in leg shackles, Sheriff, with the instruction that he is not to be shown before the jury in leg shackles."[2]

The State's case involved witnesses who had spent time with Wendy on the night of the home invasion. Wendy had gone to a friend's house for dinner that evening and visited until about 10:00 P.M. Before going home, Wendy stopped to see a neighbor whose parents were visiting. After arriving home and going to sleep, Wendy was awoken around 2:00 A.M. by an intruder standing at the foot of her bed. Wendy testified that the unidentified man, holding a kitchen knife to her throat, threatened to kill her numerous times and eventually forced her to perform fellatio on him. Wendy, an officer in the United States Armed Forces, relied upon the considerable experience she had in survival, resistance, and escape training to stay as calm as possible throughout the encounter. Knowing she would be unable to provide a description of the perpetrator to police, Wendy thought, "I need to get his DNA because I did not know what he looked like." When the perpetrator ejaculated into Wendy's mouth, Wendy spit some of the perpetrator's ejaculate onto her bedspread and—after the assailant had fled—into a cup.

[2] On the day Defendant was set to testify, the trial court "ordered that the leg shackles be removed and another form of restraint be put on his leg covered by his pants leg which is not visible to the jury." The trial court also explicitly "view[ed] the [D]efendant wearing what's called a bandit on his right leg below his knee covered with his pants leg, [which] does show a bulge and nothing other than that[.]"

After the invasion and assault had concluded, Wendy realized her phone had been stolen and attempted to Skype 9-1-1. Next, she sent a Facebook message to a friend in the police force and then, around 3:00 A.M., drove to a nearby friend's house. The friend testified that Wendy was in complete disarray when she arrived, and the two immediately called 9-1-1. Police investigated the crime scene and were able to get DNA swabs from the bedspread and the cup Wendy had spit into immediately after the attack. Missing from Wendy's home were a kitchen knife and her cell phone. Wendy went to the hospital that morning for an examination, and doctors took additional DNA swabs.

At trial, expert witness Deborah Haller ("Haller") testified that she tested a swab taken from Wendy's mouth at the hospital and the fluid found in the cup attempting to identify any DNA profiles in the samples. Haller explained that the oral cavity is "constantly turning over the fluids within the mouth with the saliva[,]" so if semen was spit into a cup after being held in the mouth for an extended period of time she would expect to find a mixture of semen and saliva. When she tested the swab of the fluid found in the cup, however, "the only DNA [Haller] found was that from [Defendant]. [She] did not pick up any traces of [Wendy] in that sample." The DNA profiles Haller recovered from the swabs were submitted to CODIS and, after testing, were consistent with Defendant's DNA profile.

Defendant testified that he and Wendy had been involved in a consensual sexual encounter in Wendy's car outside a Hickory Tavern restaurant and bar on the night in question, and that he had never broken into her house. This was in direct opposition to State's witnesses that testified to Wendy's whereabouts on the night in question. Defendant argued Wendy's entire story was a lie and a false allegation. Defendant's counsel informed the court that he planned to "introduce evidence on cross-examination pursuant to Rule 412" of the North Carolina Rules of Evidence and moved to cross-examine Wendy regarding an investigation report compiled in the early 2000s when Wendy was a cadet in the Armed Forces.

The trial court conducted an *in camera* review—as is required by Rule 412—and determined Wendy's testimony regarding a previous sexual assault allegation and the military's report on the matter were "not admissible pursuant to Rule 412." During the *in camera* review, the State argued Rule 412 was an improper basis for potentially admitting the evidence in question and that the real argument hinged upon the evidence's general relevance. Defendant did not offer any exception to Rule 412 under which this evidence might be admissible.

At the conclusion of the evidence, the jury unanimously found Defendant guilty on all charges. Defendant timely appeals.

ANALYSIS

A. Leg Restraints

Defendant first argues the trial court erred by failing to comply with the statutory mandate under N.C.G.S. § 15A-1031 when it required Defendant to wear shackles during trial. Before a defendant or witness may be restrained during trial, the presiding judge must:

> (1) Enter in the record out of the presence of the jury and in the presence of the person to be restrained and his counsel, if any, the reasons for his action; and
>
> (2) Give the restrained person an opportunity to object; and
>
> (3) Unless the defendant or his attorney objects, instruct the jurors that the restraint is not to be considered in weighing evidence or determining the issue of guilt.
>
> If the restrained person controverts the stated reasons for restraint, the judge must conduct a hearing and make findings of fact.

N.C.G.S. § 15A-1031 (2017).

The trial court failed to follow the statutory mandate under N.C.G.S. § 15A-1031 by not entering the reasons for its decision to restrain Defendant or instructing the jurors as to what they should make of the leg restraint. "The propriety of physical restraints depends upon the particular facts of each case, and the test on appeal is whether, under all of the circumstances, the trial court abused its discretion." *State v. Tolley*, 290 N.C. 349, 369, 226 S.E.2d 353, 369 (1976). We have held an error in carrying out the statutory mandate does not require reversal where the record indicates that error did not have a prejudicial impact on Defendant's trial. *State v. Lee*, 218 N.C. App. 42, 51-52, 720 S.E.2d 884, 891 (2012).

In *Lee*:

> The trial court clearly did not follow the well-established law on this issue: the statutory procedures were not complied with, nor can we determine from the record that the trial judge considered any of the material factors enumerated in our case law in making his determination. In addition, the trial court did not provide defendant any explanation outside the presence of the jury for why it was requiring defendant to remain in shackles during the trial, nor did the trial court state any findings in the record to support the determination.

Id. at 51, 720 S.E.2d at 891. However, the defendant in *Lee* was not granted a new trial as the error "was not fundamentally unfair and therefore harmless" in light of the evidence against him and the acquittal of one of the murder charges against him. *Id.* at 52, 720 S.E.2d at 891. Here, the trial court's failure to comply with the statute was likewise a harmless error.

First, there was significant evidence, DNA and otherwise, linking Defendant to the crime and corroborating Wendy's account of what happened on the night in question. Second, the trial court instructed the sheriff to ensure Defendant was "not to be shown before the jury in leg shackles." Third, when Defendant testified, the trial court took precautions to ensure the jury did not see that he was wearing a restraint. Although there was no jury instruction regarding the evidentiary value—or lack thereof—of the restraints, there is also nothing in the record indicating the jury ever saw Defendant in shackles and Defendant does not argue otherwise. *See State v. Holmes*, 355 N.C. 719, 729, 565 S.E.2d 154, 163 (2002) (reasoning where the

record indicates a defendant's "leg shackles were not visible to the jury . . . the risk is negligible that the restraint undermined the dignity of the trial process or created prejudice in the minds of the jurors by suggesting that defendant is a dangerous person").

Although the trial court failed to follow its statutory mandate, we cannot conclude that error was harmful to Defendant. As in *Lee*, "we again strongly caution trial courts to adhere to the proper procedures regarding shackling of a defendant[.]" *Lee*, 218 N.C. App. at 52, 720 S.E.2d at 891. However, given the amount of evidence against him, the trial court's instructions to the Sheriff, and the absence of anything in the record suggesting that any juror saw Defendant in a leg restraint, we hold the trial court's error does not warrant a new trial.

B. Cross-Examination

Defendant next argues the trial court abused its discretion "when it excluded credible evidence contained in an investigative report drafted by [military] investigators that [Wendy] had previously made a false accusation of sexual assault while [she was a cadet]." In contrast, the State contends "the trial court properly exercised its discretion limiting cross-examination and excluding questions regarding an inconclusive investigation into events that took place many years before."

The scope of cross-examination and relevancy determinations are left to the trial court's discretion and shall not be disturbed on appeal absent an abuse of

discretion. *State v. Herring*, 322 N.C. 733, 743, 370 S.E.2d 363, 370 (1988). "An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, 109, 493 S.E.2d 797, 802 (1997) (citation and internal quotation marks omitted). The trial court's decision here was the result of a reasoned decision and was not an abuse of discretion.

In attempting to admit the excluded exhibit and testimony, Defendant argued the excluded exhibit and testimony should be admitted under North Carolina Rule of Evidence 412, and did not provide any other grounds for its admission. As both the State and Defendant note in their briefs, Rule 412 "is only concerned with *sexual activity* of the complainant. Accordingly, the rule only excludes evidence of the actual sexual history of the complainant; it does not apply to false accusations[.]" *State v. Thompson*, 139 N.C. App. 299, 309, 533 S.E.2d 834, 841 (2000) (emphasis added; internal citation omitted). The only evidence a trial court may deem admissible pursuant to Rule 412 is evidence regarding a victim's past sexual behavior. N.C.G.S. § 8C-1, Rule 412(a)-(b) (2017).

At trial, Defendant did not offer an exception to Rule 412 under which this evidence would be admissible. Indeed, we cannot see how any of those exceptions—all of which relate to the sexual activity of the victim—are applicable to the excluded evidence, which relates to a past accusation of sexual assault made by Wendy in the

year 2000. Such evidence does not fall within any of the four categories of evidence that are potentially admissible under 412(b). Rule 412 has no bearing on the admissibility of the cross-examination or the exhibit Defendant sought to present, and Defendant's motion to cross-examine Wendy pursuant to Rule 412 was inapposite. *See Thompson*, 139 N.C. App. at 309, 533 S.E.2d at 841-42; N.C.G.S. § 8C-1, Rule 412(b). As Rule 412 was the only proffered reason to admit the evidence both at trial (and on appeal), we need not further analyze this issue.

CONCLUSION

Although the trial court failed to comply with the statutory mandate in ordering Defendant to be shackled during trial, Defendant fails to show that error was prejudicial. Defendant also failed to prove the trial court abused its discretion in excluding from evidence a report regarding a victim's previous accusation of sexual assault where Defendant failed to provide a valid ground for its admission.

NO PREJUDICIAL ERROR IN PART; NO ERROR IN PART.

Judges STROUD and DIETZ concur.

Report per Rule 30(e).