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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-570

Filed: 7 April 2020

Moore County, Nos. 15 CRS 53314; 16 CRS 143

STATE OF NORTH CAROLINA

v.

JAMES LEE THOMAS, Defendant.

Appeal by Defendant from judgments entered 29 November 2018 by Judge Thomas H. Lock in Moore County Superior Court. Heard in the Court of Appeals 4 February 2020.

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

Michael E. Casterline for Defendant-Appellant.

DILLON, Judge.

Defendant James Lee Thomas appeals from judgments entered upon guilty verdicts for three sexual crimes. After careful review, we find no error.

1. Background

STATE V. THOMAS

Opinion of the Court

On Friday 13 November 2015, Defendant's 14-year old granddaughter Darcy (a pseudonym) and her father and stepmother came to Defendant's home for a visit. Defendant and Darcy's father consumed liquor that night.

In the early morning hours of Saturday 14 November 2015, Darcy moved from her father's room to the couch in the living room. Defendant was in the living room in the recliner. Defendant and Darcy had a conversation before Darcy fell asleep.

At some point, Darcy woke up to the Defendant's "hands stroking [her] shins." Defendant then "forced [her] legs open and he started kissing and mouthing the inside of [her] thighs" before eventually inserting his fingers into her vagina. Defendant removed his hand and apologized to Darcy. Defendant left the living room and walked outside before returning to the couch and trying to force Darcy's legs apart again. Darcy resisted by squeezing her legs shut until Defendant gave up. Defendant's breath smelled of alcohol while he was assaulting her. He subsequently passed out on the living room floor.

After Defendant passed out, Darcy went to her father's room to tell her father and her stepmother what had happened. They contacted the police. Darcy's father and stepmother confronted Defendant after Darcy's report, noticing that Defendant appeared drunk. A police officer who responded to their home testified that in response to asking Defendant his name, Defendant said, "I'm drunk."

STATE V. THOMAS

Opinion of the Court

A detective interviewed Darcy, her stepmother, and the Defendant in response to the report. Defendant's interview lasted approximately 20 minutes. The interview was played to the jury at trial. In the interview, Defendant admitted to rubbing Darcy's feet and legs and having a conversation on the couch with her but denied that anything else happened.

The detective testified that had he suspected that Defendant was impaired, protocol would have required him to notify the detention center where he would have been tested with a breathalyzer to see if he needed medical treatment. However, the detective found Defendant to be coherent during the interview and did not otherwise find Defendant to be impaired. Defendant was confined after the interview.

Three days after the assault, Defendant was interviewed by a child protective services social worker. He told the social worker that on the night in question, he had started drinking around 7:30 p.m. and had taken a "pretty strong" pain pill for a headache that night. He repeated that he had rubbed Darcy's feet and legs but denied remembering anything else from that night.

Defendant was indicted on one count of statutory sex offense and two counts of taking indecent liberties with a minor. A jury convicted Defendant of all charges. Defendant was sentenced in the presumptive range of 216 to 320 months for the statutory sex offense conviction with a concurrent sentence of 16 to 29 months for the indecent liberties convictions. Defendant timely appealed.

II. Analysis

On appeal, Defendant makes two arguments. We address each argument in turn.

A. Curative Instruction

Defendant first argues that the trial court erred by failing to give a curative instruction concerning a statement made by the prosecutor during closing arguments regarding Defendant's decision not to testify at trial.

"The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002).

"A criminal defendant may not be compelled to testify, and any reference by the State regarding his failure to testify is violative of his constitutional right to remain silent." *State v. Baymon*, 336 N.C. 748, 758, 446 S.E.2d 1, 6 (1994). However, our Supreme Court has noted that a prosecutor may comment on a defendant's inability to produce evidence to rebut the State's case without offending his right to remain silent. *State v. Richardson*, 342 N.C. 772, 785-86, 467 S.E.2d 685, 693 (1996).

For instance, our Supreme Court has held that a prosecutor did not violate a defendant's right not to testify where he said during his closing argument that there were "many unanswered things about what happened." *State v. Fletcher*, 348 N.C.

292, 321-23, 500 S.E.2d 668, 685 (1998). Likewise, that Court held that a prosecutor did not cross the line by stating that “‘only the defendant can tell you’ his intent when he attacked the victim” and “not one person had come forward for defendant,” reasoning that the “prosecutor was addressing defendant’s failure to refute the State’s theory of the case while acknowledging that some questions remained unanswered.” *State v. Rogers*, 355 N.C. 420, 452, 562 S.E.2d 859, 879 (2002).

Here, Defendant argues that two specific portions of the State’s closing argument were comments on his failure to testify: (1) “But with the defendant there’s been no rest of the story. All he says is he doesn’t remember. He passed out[;]” and (2) “[E]ven the defendant’s own testimony is that he, or not testimony, the defendant hasn’t presented testimony, he admitted he went outside[.]” These comments were made almost four minutes apart.

We conclude that the first statement was a comment on the Defendant’s failure to produce evidence to rebut the State’s case rather than an improper statement on Defendant’s decision not to testify. Even if it were improper, it was not so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. See *State v. Jones*, 355 N.C. at 133, 558 S.E.2d at 107.

The second statement, in our view, appears to be a correction by the prosecutor in reference to Defendant’s previous interviews. Thus, it was not a comment on his decision not to testify, or, at worst, it was an indirect reference to his decision not to

testify. *See State v. Prevatte*, 356 N.C. 178, 248, 570 S.E.2d 440, 479 (2002) ([I]f a prosecutor's comment on a defendant's failure to testify was not extended or was a 'slightly veiled, indirect comment on a defendant's failure to testify,' there was no prejudicial violation of the defendant's rights.")

B. Voluntary Intoxication Instruction

In his second argument on appeal, Defendant contends that the trial court "committed plain error by failing to instruct on voluntary intoxication, as to the indecent liberties charges, when that instruction was supported by the evidence." We disagree. (Defendant did not request an intoxication instruction at trial.)

Our Supreme Court has held that in order to reach the level of plain error, "the error in the trial court's jury instructions must be so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993) (internal quotation marks 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. Creech*, 128 N.C. App. 592, 598, 495 S.E.2d 752, 756 (1998) (internal citation omitted). Voluntary intoxication is a defense to a specific intent crime. *State v. Cureton*, 218 N.C. 491, 494, 11 S.E.2d 469, 470-71 (1940); *State v. Bunn*, 283 N.C. 444, 457, 196 S.E.2d 777, 786 (1973).

A trial court is not required to give a voluntary intoxication instruction unless the defendant produces substantial evidence “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. *State v. Kornegay*, 149 N.C. App. 390, 395, 562 S.E.2d 541, 545 (2002) (quoting *State v. Strickland*, 321 N.C. 31, 41, 361 S.E.2d 882, 888 (1987)). “Evidence of mere intoxication ... is not enough to meet defendant’s burden[.]” *State v. Mash*, 323 N.C. 339, 346, 372 S.E.2d 532, 536 (1988).

Here, there was evidence that Defendant was intoxicated during his attack of Darcy:

- Defendant shared alcohol from a fifth of liquor bought by Darcy’s father. Defendant had also bought his own alcohol on the day of the assault.
- In an interview with a social worker, Defendant said he had started drinking at 7:30 p.m. that night.
- Defendant informed the social worker that he had taken a “pretty strong” pain pill for a headache that night.
- Darcy testified that Defendant’s breath smelled like alcohol when he was assaulting her.
- Defendant passed out on the floor after he assaulted Darcy.

However, there is ample evidence showing that Defendant was not in such a state at the time of his assault of Darcy to render him utterly incapable of forming the requisite specific intent:

STATE V. THOMAS

Opinion of the Court

- Darcy and Defendant had a 20-30 minute conversation about school around 2:00 a.m. when Darcy went to sleep on the couch, shortly before the assault.
- Defendant coherently asked Darcy after he removed his fingers from her vagina, “I’m sorry, but would you like me to stop or would you like me to continue?”
- Defendant was able to articulately complete an interview with Detective Galloway at the Moore County Sheriff’s Office about three hours after the assault.
- In interviews to the social worker and Detective Galloway given after the assault, Defendant remembered the night’s events leading up to the assault. He recounted their 20-30 minute conversation and remembered rubbing Darcy’s feet and legs.
- Darcy’s stepmother testified that when she went to bed around midnight, Defendant appeared normal and that there was nothing out of the ordinary that night.

Accordingly, while there is evidence that Defendant was intoxicated on the night in question, there is also evidence that his mind was not so “overthrown” that he could not form the specific intent necessary to assault Darcy. We therefore conclude that Defendant has not satisfied his burden of showing plain error.

III. Conclusion

We conclude that Defendant received a fair trial, free from reversible error.

NO ERROR.

Judges BRYANT and INMAN concur.

Report per Rule 30(e).