IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-431

No. COA21-598

Filed 21 June 2022

Pitt County, No. 18CRS55893

STATE OF NORTH CAROLINA

v.

MYKAEL SEBASTAIN COOPER, Defendant.

Appeal by Defendant from judgment entered 29 April 2021 by Judge Marvin K. Blount, III, in Pitt County Superior Court. Heard in the Court of Appeals 23 February 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Erin E. Gibbs, for the State.

Mark Montgomery for Defendant-Appellant.

JACKSON, Judge.

¶ 1 Mykael Sebastain Cooper ("Defendant") appeals from judgment entered after a jury found him guilty of second-degree forcible sexual offense. After careful review, we find no plain error.

I. Background

¶ 2 Evidence presented by the State at trial tended to show the following:

¶ 3 Defendant and Alice[1] met while in college in Greenville, North Carolina. They had known each other for a couple of years, sitting next to one another if they were in the same class and sometimes "hanging out" on weekends. They also shared common hobbies and Defendant would help Alice with sewing projects. Alice described their friendship as platonic but explained that Defendant would occasionally flirt with her or express romantic interest and she would tell Defendant that she only saw him as a friend.

¶ 4 On Saturday, 11 August 2018, Alice planned to go out with a group of friends and invited Defendant to join them. Prior to leaving her house for the evening, Alice consumed about four shots of tequila. Alice's roommate then drove her to downtown Greenville where Defendant picked her up and took them to a restaurant called Christy's. There Defendant and Alice both had a drink before heading to a party being hosted by Alice's friend. Alice does not remember having anything alcoholic to drink at the party.

¶ 5 Next, Defendant, Alice, and four or five other people took an Uber rideshare back to downtown. When the group arrived, Alice realized that she had left her phone at the party, so she and Defendant walked back to her friend's house, which is also where Defendant had parked his car. Alice remembered chatting and laughing on

[1] We adopt the pseudonym for the victim stipulated to by the parties in their briefs.

the six- or seven-minute walk, but she started to feel nauseous from having consumed too much alcohol. At that point, Alice decided she wanted to go home, so once they reached his car, Defendant drove Alice back to her house.

¶ 6 After they arrived, Alice vomited immediately after getting out of the car. Defendant then followed Alice inside her house. Alice presumed Defendant did so to make sure she was safe, although they did not have any discussion about him staying. Alice's roommate was at work that night so only she and Defendant were present. Alice proceeded to vomit for about 30 or 45 minutes into a trashcan in her living room. Alice sat on the living room floor while Defendant sat on the couch. At some point, Alice testified, Defendant tried to touch her private area. Even though she was having difficulty verbalizing much because she was still throwing up, Alice told him no.

¶ 7 Once Alice stopped vomiting, she went upstairs to her room and got into bed. Defendant followed Alice and laid down in bed beside her. Alice rolled over and went to sleep. At some point later, Alice woke up to Defendant performing oral sex on her. Alice told Defendant to stop, pulled up her pants, and rolled over to go back to sleep. Afterwards, Alice remembered Defendant trying to hold her hand and her telling him to stop. Additionally, Alice was on her menstrual period that night, and she testified that she prefers not to have sex or engage in oral sex while she is on her period.

¶ 8 The next morning, Alice woke up feeling shocked and confused. Alice asked

Defendant why he did not stop, and Alice recalled Defendant saying he thought she wanted the sexual contact. Defendant then left Alice's house. Alice showered and went to her workplace where a friend had dropped off her phone. While there she told coworkers about what happened the night before.

¶ 9 The following afternoon, on Monday, 13 August 2018, Alice went to the police department to make a report. She spoke with Greenville Police Sergeant R. Coggins. During the initial interview, Sergeant Coggins directed Alice to call Defendant to see if Defendant would admit to anything. Sergeant Coggins took this approach as Alice had showered multiple times making the possibility of DNA evidence unlikely. Defendant did not answer the call.

¶ 10 Alice called Defendant again a couple of days later, on 15 August 2018, and the two had a conversation about what happened over the weekend. Alice recorded the nine-minute call using a friend's phone and emailed the recording to Sergeant Coggins. During the call, Defendant maintained that he thought Alice wanted the sexual contact based on how Defendant interpreted Alice's behavior and body language, and he had stopped when she told him to stop. Defendant also stated that Alice did tell him no, he had also been drinking and his judgment had been impaired, and he was very sorry, especially for having hurt her as a friend. The recording was later admitted into evidence at trial and played for the jury.

¶ 11 In addition to the recorded phone call, Sergeant Coggins obtained security

camera footage showing Defendant and Alice together in downtown Greenville. One video captured the moment Defendant, Alice, and her friends got out of an Uber vehicle downtown. Alice is seen stumbling a few times. Sergeant Coggins testified that based on his 20 years of law enforcement experience, Alice appeared very intoxicated in the videos. The footage was later admitted into evidence at trial and played for the jury.

¶ 12 On 26 May 2020, Defendant was indicted by a Pitt County grand jury on a charge of second-degree forcible sexual offense, specifically that he engaged in a sex offense with Alice, who was physically helpless at the time. The matter came on for trial on 28 April 2021 in Pitt County Superior Court before the Honorable Marvin K. Blount. The jury found Defendant guilty and determined via a special verdict form that Alice was physically helpless on the basis of (1) being unconscious and (2) being physically unable to communicate unwillingness to submit to a sexual act.

¶ 13 The trial court imposed a mitigated sentence of 44 to 113 months of imprisonment. Defendant timely filed notice of appeal on 29 April 2021.

II. Analysis

¶ 14 On appeal, Defendant argues that the trial court erred by not instructing the jury that Defendant's reasonable belief, even if mistaken, that Alice consented to sex was a complete defense to the charge. In the alternative, Defendant contends that he was denied effective assistance of counsel because his trial counsel failed to

request such an instruction.

A. Standard of Review

¶ 15 At trial, Defendant's counsel did not request a jury instruction on reasonable belief in consent as a defense. Defendant now argues the trial court was required to give this instruction, even absent a request, because a defense raised by the evidence presented at trial is a substantial feature of the case and trial courts are required to instruct on all substantial features of a case. Defendant contends that we should construe this case as the trial court failing to *sua sponte* instruct the jury on the defense of reasonable belief in consent and therefore should apply a *de novo* standard of review.

¶ 16 To support this proposition, Defendant primarily relies on N.C. Gen. Stat. § 15A-1232 and two cases, *State v. Smith*, 59 N.C. App. 227, 296 S.E.2d 315 (1982), and *State v. Hudgins*, 167 N.C. App. 705, 606 S.E.2d 443 (2005).[2] In both cases, the relief given for the trial court's failure to instruct on a substantial feature of a case, even absent a request, was based not on constitutional due process grounds, but on statutory grounds. *See Smith*, 59 N.C. App. at 228, 296 S.E.2d at 316; *Hudgins*, 167

[2] Defendant also cites *State v. Clark*, 324 N.C. 146, 377 S.E.2d 54 (1989), to assert the trial court is required to instruct on defenses that are supported by legally sufficient facts. In *Clark*, however, the defendant *had* requested that the trial court instruct on the inability to form specific intent to kill as a defense and therefore our Supreme Court was only evaluating the requested instruction and the evidence presented "first for the legal principles it implicates, and second for the sufficiency of the evidence itself." *Id.* at 161, 377 S.E.2d at 63.

N.C. App. at 708, 606 S.E.2d at 446 (citing *State v. Ward*, 300 N.C. 150, 155, 266 S.E.2d 581, 585 (1980) (interpreting N.C. Gen. Stat. § 15A-1232 to hold that the trial court erred by failing to instruct on a substantial feature of intentional homicide)).

¶ 17 However, the relevant statute, N.C. Gen. Stat. § 15A-1232, no longer exists in the form upon which a lineage of cases—including *Smith* and *Hudgins*—developed the rule that a trial court's failure to instruct on a substantial feature of a case, even absent a request, constitutes reversible error to warrant a new trial. *See State v. Williams*, 315 N.C. 310, 323 n.1, 338 S.E.2d 75, 83 n.1 (1986) ("We note that N.C.G.S. § 15A-1232 was recently amended so as to no longer require trial judges to state, summarize, or recapitulate the evidence or to explain the application of the law to the evidence.").

¶ 18 In 1985, N.C. Gen. Stat. § 15A-1232 was rewritten in a way that no longer supports Defendant's argument. Prior to the 1985 amendment, N.C. Gen. Stat. § 15A-1232 provided:

> In instructing the jury, the judge must declare and explain the law arising on the evidence. He is not required to state the evidence except to the extent necessary to explain the application of the law to the evidence. He must not express an opinion whether a fact has been proved.

N.C. Gen. Stat. § 15A-1232 (1983). Following the amendment and as it stands today, the statute provides: "In instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved and shall not be required to state,

summarize or recapitulate the evidence, or to explain the application of the law to the evidence." N.C. Gen. Stat. § 15A-1232 (2021). Accordingly, given the elimination of the requirement that the judge must declare and explain the law arising on the evidence, the trial court was not obligated to *sua sponte* instruct the jury on the defense of reasonable belief in consent.

¶ 19 Additionally, we note that while *Hudgins* was decided in 2005, two decades after N.C. Gen. Stat. § 15A-1232 was amended, the Court included the rule that a trial court must instruct on substantial features of a case even absent a request by quoting a 1980 decision by our Supreme Court, *State v. Ward*, 300 N.C. 150, 266 S.E.2d 581 (1980). Furthermore, *Hudgins* itself is distinguishable from the case at bar as the defendant in *Hudgins* had, in fact, requested an instruction on the defense of necessity but the trial court had refused to give the instruction, presumably because the instruction as requested was an incorrect statement of the law. *Hudgins*, 167 N.C. App. at 710, 606 S.E.2d at 447.

¶ 20 This Court explained that the trial court was not relieved of its duty to give an instruction on the defense of necessity simply because the requested instruction was incorrect. *Id.* at 710-11, 606 S.E.2d at 447. The defendant had presented substantial evidence to support the defense and therefore the trial court was required to give an instruction on the defense of necessity, albeit not the exact instruction the defendant had requested. *Id.*

¶ 21 Accordingly, in the case at bar, because the trial court was not required to *sua sponte* instruct on the reasonable belief in consent as a defense, we do not apply a *de novo* standard of review as Defendant suggests. Instead, given that Defendant's trial counsel did not request an instruction, we apply plain error review. *State v. Campbell*, 340 N.C. 612, 640, 460 S.E.2d 144, 159 (1995). To obtain relief under plain error review, a "[d]efendant must show that the error was so fundamental that it had a probable impact on the result reached by the jury." *Id.*

B. Reasonable Belief in Consent

¶ 22 Having determined the appropriate standard of review, the question becomes whether the trial court committed plain error by not giving an instruction on the reasonable belief in consent as a defense to second-degree forcible sexual offense.

¶ 23 In *State v. Yelverton*, 274 N.C. App. 348, 851 S.E.2d 434 (2020), our Court examined whether a trial court erred by failing to provide a jury instruction on the reasonable belief in consent as a defense to second-degree forcible rape. *Id.* at 351-52, 851 S.E.2d at 436-37. As Defendant concedes, the Court held that a reasonable belief in consent is not recognized in North Carolina as a defense against rape nor is a mistaken belief in consent recognized as a defense.[3] *Id.* at 353, 851 S.E.2d at 438.

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[3] Defendant contends that our Court recognized "a defendant's reasonable belief in consent is a defense to rape" in *State v. Ginyard*, 122 N.C. App. 25, 468 S.E.2d 525 (1996). However, the issues in *Ginyard* involved evidence of the complaining witness's prior sexual

¶ 24 However, irrespective of whether the reasonable belief in consent is available as a defense to second-degree forcible sexual offense, the case at bar is resolved by the jury's special verdict regarding Alice's physical helplessness. For the jury to find Defendant guilty of second-degree forcible sexual offense, the State had to prove beyond a reasonable doubt that: (1) Defendant engaged in a sexual act with Alice; (2) Alice was physically helpless; and, (3) Defendant knew or should reasonably have known that Alice was physically helpless. *See* N.C. Gen. Stat. § 14-27.27 (2021). As the trial court instructed the jury, "[a] person is physically helpless if that person is unconscious or physically unable to resist a sexual act or physically unable to communicate unwillingness to submit to a sexual act[.]" *See* N.C.P.I. – Crim.

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behavior and interpreting Rule 412 of the North Carolina Rules of Evidence. *Id*. at 31-32, 468 S.E.2d at 529-30. The Court explained that

> [e]vidence of a distinctive pattern of sexual behavior is relevant to the issue of consent. The pattern may either establish that (1) the complainant consented to have sex with this defendant, because of the manner in which their sexual encounter took place or (2) because of the complainant's pattern, this defendant reasonably believed the complainant consented to have sex with him. In order for a defendant to have a reasonable belief that a complainant consented to sex, based upon a pattern of sexual behavior, the defendant must have knowledge of the pattern.

Id. at 32, 468 S.E.2d at 530 (internal citations omitted). Accordingly, *Ginyard* did not establish a reasonable belief in consent defense generally but rather specifically delineated the admissibility of evidence of prior sexual behavior being used by a defendant to prove defendant had a reasonable belief in consent based on a pattern of sexual behavior.

207.65A. *See also* N.C. Gen. Stat. § 14-27.20(3)(a), (b) (2021).

¶ 25 After finding Defendant guilty of second-degree forcible sexual offense, the jury proceeded to a special deliberation to determine exactly how Alice was "physically helpless" during the commission of the offense.[4] The jury unanimously found that Alice was physically helpless by: (1) being unconscious; and, (2) being physically unable to communicate unwillingness to submit to a sexual act. The jury's special verdict means that the State established beyond a reasonable doubt that Defendant knew or reasonably should have known that Alice was physically helpless. Such a determination negates the possibility that the jury could also have found that Defendant reasonably believed Alice gave him consent, even if an instruction had been given.

¶ 26 A jury that finds a victim was both unconscious and physically unable to communicate unwillingness to submit to a sexual act cannot also find that the same victim behaved in such a manner as to allow a defendant to reasonably form a belief, even if mistaken, that the victim was consenting to the sexual act. An unconscious

[4] The evidence presented at the trial pertaining to Alice being physically helpless included her own testimony about struggling to speak when she was vomiting in the living room, being asleep and waking up to Defendant performing oral sex on her, and her level of intoxication that night. Additional relevant evidence included Sergeant Coggins's testimony about his initial interview with Alice as well as the recorded phone call in which Alice stated at one point in the conversation that she "woke up in pure shock and couldn't move . . . and then I blacked out again."

person—a person who has lost consciousness—cannot communicate verbally or physically and therefore a defendant cannot point to any statements or behaviors by that person that could have been perceived as giving consent. For example, a person who is asleep cannot give consent. *See State v. Moorman*, 320 N.C. 387, 392, 358 S.E.2d 502, 505-06 (1987) ("[T]he common law implied in law the elements of force and lack of consent so as to make the crime of rape complete upon the mere showing of sexual intercourse with a person who is asleep, unconscious, or otherwise incapacitated and therefore could not resist or give consent.").

¶ 27 The same goes for a person who is physically unable to communicate unwillingness to submit to a sexual act—such an individual cannot communicate physically and therefore a defendant cannot point to any behaviors by that person that could have been perceived as giving consent. At the very least, any belief that a person who was unconscious or physically unable to communicate unwillingness to submit to a sexual act would be unreasonable, and therefore the defense of a reasonable belief in consent would be unavailable.

¶ 28 Therefore, we hold Defendant has failed to show the trial court committed plain error by not giving *sua sponte* an instruction on the reasonable belief in consent as a defense to second-degree forcible sexual offense. Given the jury's special verdict, as well as Defendant's own admissions on the recorded phone call that Alice told him no and to stop, we cannot find that the absence of such an instruction was an error

so fundamental that it had a probable impact on the verdicts reached by this jury.

C. Ineffective Assistance of Counsel

¶ 29 Defendant argues in the alternative that he has been denied effective assistance of counsel due to his trial counsel's failure to request an instruction on the reasonable belief in consent.

¶ 30 "On appeal, this Court reviews whether a defendant was denied effective assistance of counsel de novo." *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014).

¶ 31 To establish that his trial counsel was ineffective, Defendant must satisfy the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984):

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687. The test in *Strickland* was expressly adopted by our Supreme Court in *State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985).

¶ 32 "IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures such as the appointment of

investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001). However, "[i]n general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001).

¶ 33 "A motion for appropriate relief is preferable to direct appeal because in order to 'defend against ineffective assistance of counsel allegations, the State must rely on information provided by defendant to trial counsel, as well as defendant's thoughts, concerns, and demeanor.'" *Id.* at 554, 557 S.E.2d at 547 (quoting *State v. Buckner*, 351 N.C. 401, 412, 527 S.E.2d 307, 314 (2000)).

¶ 34 At bar, Defendant's ineffective assistance of counsel claim involves a question of trial strategy by his counsel. The decision to request or not request certain jury instructions may be a matter of strategy. Particularly when a defendant's argument concerns "potential questions of trial strategy and counsel's impressions, an evidentiary hearing available through a motion for appropriate relief is the procedure to conclusively determine these issues." *Id.* at 556, 557 S.E.2d at 548.

¶ 35 As the reviewing court, we are unable to find ineffective assistance of counsel on the face of the record and therefore dismiss this claim without prejudice to Defendant's right to file a motion for appropriate relief.

III. Conclusion

¶ 36 For the foregoing reasons, we find no plain error in the trial court not giving an instruction on reasonable belief in consent and dismiss Defendant's IAC claim without prejudice to his right to file a motion for appropriate relief.

NO ERROR IN PART; DISMISSED WITHOUT PREJUDICE IN PART.

Judges TYSON and CARPENTER concur.

Report per Rule 30(e).