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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-647

No. COA22-11

Filed 20 September 2022

Johnston County, Nos. 19CRS57452, 20CRS104

STATE OF NORTH CAROLINA

v.

JOSEPH NGIGI KARIUKI, Defendant.

Appeal by defendant from judgment entered 1 July 2021 by Judge Claire V. Hill in Johnston County Superior Court. Heard in the Court of Appeals 9 August 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Anne J. Brown, for the State-appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Candace Washington, for defendant-appellant.

GORE, Judge.

¶ 1 Defendant, Joseph Ngigi Kariuki, appeals from his conviction for first-degree forcible rape. He raises two issues on appeal: (i) whether the trial court erred in denying his motion to dismiss for insufficiency of the evidence and (ii) whether the trial court erred in giving the State's requested jury instruction on constructive force because such instruction was either unsupported by the evidence, or alternatively,

because it impermissibly expanded the definition of constructive force. This Court has jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444 as an appeal of right from a final judgment of a superior court. Upon careful review, we discern no error.

I.

¶ 2 Defendant, a certified nursing assistant ("CNA") in the Alzheimer's ward of an assisted nursing facility, was observed having forcible vaginal sex with a 79-year-old resident suffering from late-stage Alzheimer's disease in December 2019. The victim was immobile, non-verbal, unable to feed herself, and unable to care for herself. Consequently, she had to be placed in a special wheelchair, which was equipped with devices that held her neck and entire body. To prevent injury, the assisted nursing facility designated her as a "two-person assist" patient. This mandatory protocol required two nursing staff members to provide care, which included rolling her over in her bed, changing her diaper and clothing, and getting her up from her bed and wheelchair. Due to her condition, the victim was more susceptible to bruising and bacterial infections. Despite complications related to her mental disease, before the incident giving rise to this appeal, the victim was attentive and a generally happy person.

¶ 3 Dana Oliver Webb, another CNA in the Alzheimer's ward, testified at trial that she and defendant were working together on the day the events transpired. Ms. Webb

testified she had been working with defendant as a two-person team for a few weeks after the facility instituted the "two-person assist" protocol. She also testified that defendant would frequently "go missing" during their shifts together and that she would have to go looking for him in various rooms in the facility. Ms. Webb stated defendant would not respond when she called for him, and he would remain missing for as long as 45 minutes at a time. She was also concerned about his interaction with patients after she noticed they were becoming fearful or volatile when defendant entered their rooms.

¶ 4 Ms. Webb testified that, on the day of the alleged rape, defendant once again disappeared during their shift, and she was unable to find him for two and a half hours. She eventually found him in the victim's room. She stated defendant had his hands under the victim's thighs, with her legs wrapped around him, and he was "thrusting" into her. Ms. Webb saw the victim's exposed bottom and defendant's pants down, but noticed his underwear was still on. She let out an audible gasp, which prompted defendant to flip the victim over and pull up his pants. When Ms. Webb returned to the room with another CNA, they found that defendant had cleaned and repositioned the victim. He had rolled up a pad, the victim's diaper, trash, and wipes into a bag. Ms. Webb later retrieved these items.

¶ 5 After the police arrived, the victim was transported to a hospital for examination and treatment. The victim sustained vaginal irritation and two small

tears, as well as bruising and tearing on her arms. A DNA analyst testified a sample taken from the victim's vaginal swab was consistent with DNA taken from defendant, although no matching DNA was found on the victim's skin tears. When interviewed by the police, defendant claimed his pants had come down, and the victim was wrapped around his waist, because he had been assisting the victim alone.

¶ 6 After the alleged rape, the victim became noticeably withdrawn, was "petrified" of male nurses, and developed a series of urinary tract infections that caused her health to significantly decline. The victim refused to take food from anyone other than her daughter and became so afraid of being touched that she had to be bathed in bed. Although she had not developed urinary tract infections before the alleged rape, these infections became chronic occurrences that required frequent care. With each subsequent infection, the victim's health deteriorated, and she passed away 5 months after the assault as a result of two particularly severe infections.

¶ 7 Defendant was indicted by a Johnston County Grand Jury for one count of first-degree forcible rape and one count of patient abuse and neglect. The State later dismissed the charge of patient abuse and neglect. The jury returned a verdict of guilty on the charge of first-degree forcible rape. Defendant was sentenced to a term of 240 to 348 months imprisonment and was ordered to register as a sex offender for life. Defendant entered oral notice of appeal.

II.

¶ 8 Defendant argues the trial court erred in denying his motion to dismiss the charge of first-degree rape. Specifically, he contends the State presented insufficient evidence of serious personal injury. We disagree.

¶ 9 Following the State's presentation of evidence, the defense moved to dismiss the charge of first-degree rape for insufficiency of the evidence. The State argued evidence of serious personal injury was presented based on bruising, skin tears, vaginal tears, urinary tract infections, and emotional injury. The trial court denied the motion to dismiss, and the defense renewed the motion at the close of all evidence. Accordingly, this issue is properly preserved for appellate review. *See State v. Golder*, 374 N.C. 238, 246, 839 S.E.2d 782, 788 (2020) ("Rule 10(a)(3) provides that a defendant preserves all insufficiency of the evidence issues for appellate review simply by making a motion to dismiss the action at the proper time.").

¶ 10 This Court reviews the trial court's denial of a motion to dismiss *de novo*. *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982). "It is well settled that in ruling on a motion to dismiss, the trial court must determine whether there is substantial evidence of each essential element of the crime and whether the defendant is the perpetrator of that crime." *State v. Everette*, 361 N.C. 646, 651, 652 S.E.2d 241, 244 (2007) (*purgandum*). "As to whether substantial evidence exists, the question for the trial court is not one of weight, but of the sufficiency of the evidence."

State v. Harris, 361 N.C. 400, 402, 646 S.E.2d 526, 528 (2007) (citation omitted).

¶ 11 "Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion." *State v. McNeil*, 359 N.C. 800, 804, 617 S.E.2d 271, 274 (2005) (quotation marks and citation omitted). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted). "If the evidence adduced at trial gives rise to a reasonable inference of guilt, it is for the members of the jury to decide whether the facts shown satisfy them beyond a reasonable doubt of defendant's guilt." *State v. Jones*, 303 N.C. 500, 504, 279 S.E.2d 835, 838 (1981) (citation omitted).

¶ 12 Defendant was charged with one count of first-degree forcible rape under N.C. Gen. Stat. § 14-27.21. The statute provides in pertinent part:

> A person is guilty of first-degree forcible rape if the person engages in vaginal intercourse with another person by force and against the will of the other person, and does any of the following:
>
> (1) Uses, threatens to use, or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon.
>
> (2) *Inflicts serious personal injury upon the victim or another person*.

> (3) The person commits the offense aided and abetted by one or more other persons.

N.C. Gen. Stat. § 14-27.21 (2021) (emphasis added).

¶ 13 Defendant argues the State presented insufficient evidence tending to show he inflicted serious personal injury on the victim, which "may be met by a showing of physical injury as well as mental injury . . . ." *State v. Lilly*, 117 N.C. App. 192, 194, 450 S.E.2d 546, 548 (1994) (citation omitted). "[W]hether such serious injury has been inflicted must be determined according to the particular facts of each case." *Id.* (quotation marks and citation omitted).

¶ 14 Defendant asserts the physical injuries suffered by the victim in this case are unlike the physical injuries this Court has previously held sufficient to survive a motion to dismiss. *See State v. Rogers*, 153 N.C. App. 203, 210, 569 S.E.2d 657, 662 (2002); *see also Lilly*, 117 N.C. App. at 193, 450 S.E.2d at 547. Defendant further contends the urinary tract infections suffered by the victim after the rape were neither serious personal injuries nor sufficiently shown to have been "inflicted" by defendant.

¶ 15 Defendant also argues the victim did not suffer a serious mental injury. In order to show sufficient evidence of a serious mental injury, "the State must ordinarily offer proof that such injury was not only caused by the defendant but that the injury extended for some appreciable time beyond the incidents surrounding the

crime itself." *State v. Baker*, 336 N.C. 58, 62, 441 S.E.2d 551, 555–56 (1994) (citation omitted). The harm must also be "more than the "*res gestae* " results present in every forcible rape." *Id.* at 63, 441 S.E.2d at 554. "*Res gestae* results are those 'so closely connected to [an] occurrence or event in both time and substance as to be a part of the happening.'" *Id.* (quoting *Black's Law Dictionary* 1305 (6th ed. 1990)) (alteration in original).

¶ 16 Defendant cites decisions of this Court where symptoms such as weight loss, appetite loss, depressive episodes, sleep difficulty, nightmares, quitting work, and inability to care for a child amounted to serious mental injury. *See Baker*, 336 N.C. at 65, 441 S.E.2d at 555; *see also State v. Davis*, 101 N.C. App. 12, 23, 398 S.E.2d 645, 652 (1990). In this case, defendant contends the victim's mental injuries were merely the *res gestae* results present in any case of forcible rape and did not extend for an appreciable amount of time, with fearful behavior lasting only 5 months. However, we note the victim's injuries did not extend for longer because she died 5 months after the rape due to multiple urinary tract infections.

¶ 17 The State presented evidence tending to show the victim sustained multiple physical injuries, including two vaginal tears, bruises on the legs and arms, and a skin tear two centimeters in length. These injuries were particularly dangerous considering the victim was an elderly, bed ridden, fragile, female, suffering from late-stage Alzheimer's disease, and lacked the capacity to resist or defend herself. Prior

to the rape, the victim never suffered from urinary tract infections, but afterwards, she chronically suffered from urinary tract infections "back to back to back." Witnesses testified to a drastic change in the victim's demeanor, from being "joyous [and] happy" to "anxious and withdrawn" around anyone that was not her family. The victim refused to accept food from anyone other than her daughter, refused physical contact, and became "petrified" around male attendants.

¶ 18 Viewing the evidence in a light most favorable to the State, we hold a reasonable juror could find the victim suffered serious personal injury, physical and/or mental, which is necessary to support a conviction for first-degree forcible rape. Thus, the trial court did not err in denying defendant's motion to dismiss.

III.

¶ 19 During the charge conference, defense counsel objected to the additional instructions and asked the trial court to "stick with the jury pattern instructions." The trial court agreed to give part of the State's proposed special instruction and identified which part of the instruction would be removed. Defense counsel renewed her objection to the special instruction. Accordingly, defense counsel preserved this issue for appellate review. N.C.R. App. P. 10; *see also State v. Leaks*, 379 N.C. 57, 61-62, 2021-NCSC-123, ¶ 17.

¶ 20 Issues raised "challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458,

466, 675 S.E.2d 144, 149 (2009) (citations omitted). "Under a *de novo* review, th[is] [C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quotation marks and citations omitted).

¶ 21 "It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988) (citation omitted). "[I]t is error for the trial judge to charge on matters which materially affect the issues when they are not supported by the evidence." *State v. Jennings*, 276 N.C. 157, 161, 171 S.E.2d 447, 449 (1970). When challenging a jury instruction, defendant bears the additional burden of showing prejudice, that is, "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2021).

¶ 22 The State requested the trial court augment N.C. Pattern Jury Instruction for Criminal Cases 207.10B by adding the following language:

> Second, that the defendant used or threatened to use force such as to overcome any resistance the alleged victim might make. The force necessary to constitute rape need not be actual force. Fear or coercion may take the place of physical force.
>
> The requisite force may be established either by actual physical force or by constructive force in the form of fear, fright or coercion. Constructive force is demonstrated by

> proof of threats or other actions by the defendant which compel the victim's submission to sexual acts. Constructive force is also inherent to having sexual intercourse with a person who is deemed by law to be unable to consent. If a person engages in sexual conduct with a victim who is mentally defective and that person performing the act knew or reasonably should have known that the victim was mentally defective, then the person has engaged in such conduct by force and against the will of the victim.

¶ 23 Defendant argues the trial court erred in giving the State's requested instruction for two reasons: (i) the instruction was not supported by the evidence because Alzheimer's disease is a "brain disease" and not a mental defect; and (ii) the instruction incorrectly expanded the definition of constructive force.

A.

¶ 24 Defendant argues the trial court erred by instructing the jury on constructive force by engaging in sexual acts with a person who is mentally defective because "mentally defective" is not defined by statute, and the State presented no evidence that the victim was unable to consent due to a mental defect. While the current applicable statute does not present such a definition, the previous iteration of the statute, which was in effect at the time Defendant had vaginal intercourse with the victim, did.

¶ 25 The older version, N.C. Gen. Stat. § 14-27.21, defined one who is "mentally defective" as:

> (i) a victim who suffers from mental retardation, or (ii) a victim who suffers from a mental disorder, either of which temporarily or permanently renders the victim substantially incapable of appraising the nature of his or her conduct, or of resisting the act of vaginal intercourse or a sexual act, or of communicating unwillingness to submit to the act of vaginal intercourse or a sexual act."

N.C. Gen. Stat. § 14-27.21 (1991). The current version of the statute, N.C. Gen. Stat. § 14-27.20(2a), defines a person with a mental disability in the context of sex offenses as:

> [a] victim who has an intellectual disability or a mental disorder that temporarily or permanently renders the victim substantially incapable of appraising the nature of his or her conduct, or of resisting the act of vaginal intercourse or a sexual act, or of communicating unwillingness to submit to the act of vaginal intercourse or a sexual act."

N.C. Gen. Stat. § 14-27.20(2a) (2021). As defendant notes, these versions of the statues are similar, and the legislature replaced the phrase "mentally defective" with "mental disability."

¶ 26 The evidence at trial tended to show that the victim was non-verbal, bed ridden, and designated a "two-person assist" patient due to the advanced progression of her Alzheimer's disease and the severity of her condition. Thus, the State presented evidence from which the jury could reasonably find that the victim suffered from a mental disability that "render[ed] the victim substantially incapable of . . . resisting the . . . sexual act, or of communicating unwillingness to submit to the . . . sexual act

. . . ." § 14-27.20(2a). Thus, the instruction presented to the jury regarding the victim's mental defect was supported by the evidence presented at trial.

B.

¶ 27 Defendant argues the jury instruction erroneously expanded the definition of constructive force by allowing the jury to find constructive force where a defendant had sexual intercourse with the person who is deemed by law to be unable to consent. Defendant asserts constructive force is defined only as force "in the form of fear, fright or coercion . . ." and does not include language about mental defect. *State v. Etheridge*, 319 N.C. 34, 45, 352 S.E.2d 673, 680 (1987) (citation omitted). Thus, it is defendant's contention that this incorrect definition allowed the jury to convict upon an improper basis.

¶ 28 Defendant's argument that the erroneous jury instruction warrants a new trial is meritless because the jury instruction correctly stated the applicable law. As stated, "[c]onstructive force is demonstrated by proof of threats or other actions by the defendant which compel the victim's submission to sexual acts." *Id.* "[H]aving or attempting to have sexual intercourse with another person who is mentally defective or incapacitated and statutorily deemed incapable of consenting—just as with a person who refuses to consent—involve[s] the 'use or threat of violence to the person . . . .'" *State v. Holden*, 338 N.C. 394, 406, 450 S.E.2d 878, 884 (1994). Therefore, engaging in a sexual act with a person who is mentally defective inherently involves

the use or threat of force, thus satisfying the conditions required for a showing of constructive force. The portion of the jury instruction at issue, that "[c]onstructive force is also inherent to having sexual intercourse with the person who is deemed by law to be unable to consent," correctly, albeit indirectly, states the applicable law.

¶ 29 Presuming, *arguendo*, the requested jury instruction improperly expanded the definition of constructive force, defendant fails to demonstrate prejudice.

> "[I]f there is substantial evidence that a person has engaged in prohibited sexual conduct in violation of G.S. 14-27.3 or 14-27.5, and that the victim was mentally defective, and that the person performing the act knew or reasonably should have known that the victim was mentally defective, then ipso facto, there is substantial evidence that the person has engaged in such conduct "by force and against the will" of the victim.

State v. Washington, 131 N.C. App. 156, 167, 506 S.E.2d 283, 290 (1998), *rev. denied*, 350 N.C. 105, 533 S.E.2d 477 (1999). As previously discussed, the State presented substantial evidence tending to show: (i) the victim was mentally defective due to her late-stage Alzheimer's disease; and (ii) defendant knew or should have known of her mental defect. Therefore, the State has "*ipso facto* [provided] substantial evidence that [defendant] engaged in such conduct 'by force and against the will' of the victim." *Id*. (emphasis added). Thus, defendant has failed to show that "there is a reasonable possibility . . . that a different result would have been reached at trial," § 15A-1443(a), because the jury could find the requisite element of force.

IV.

¶ 30 For the foregoing reasons, we conclude that defendant received a fair trial free from prejudicial error.

NO ERROR.

Judges TYSON and INMAN concur.

Report per Rule 30(e).