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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-729

No. COA22-174

Filed 1 November 2022

Pender County, Nos. 17 CRS 50882, 17 CRS 50884

STATE OF NORTH CAROLINA

v.

JAMES HARRY HINMAN, Defendant.

Appeal by Defendant from judgments entered 1 July 2021 by Judge James S. Carmical in Pender County Superior Court. Heard in the Court of Appeals 6 September 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Amy Kunstling Irene, for the State of North Carolina.

Fox Rothschild LLP, by Robert H. Edmunds, Jr., for Defendant.

JACKSON, Judge.

¶ 1 James Harry Hinman ("Defendant") appeals from the trial court's order denying his motion to suppress, and from judgments entered upon jury verdicts finding him guilty of statutory sex offense with a child less than 15 years of age, taking indecent liberties with a child, and sexual battery. For the reasons detailed below, we hold that there was no error.

I. Background

¶ 2 On 26 April 2017, 13 year old R.H.[1] woke up to find Defendant, her biological father, next to her in bed assaulting her. R.H. was being penetrated by something she described as feeling smooth. While it was dark in her room and R.H. could not see exactly what was penetrating her, she identified it as Defendant's penis. R.H. was terrified and pretended to be asleep so that Defendant would leave. Eventually, R.H. felt Defendant leave the bed and both saw and heard the door to her room open as Defendant left.

¶ 3 The next morning, R.H. texted her mother who, at the time, was living in Jacksonville, North Carolina, to tell her about the incident. R.H.'s mother instructed R.H. to go to school and find a nurse or counselor and tell them what had happened. R.H. located her school counselor and told her that something had happened to her and that it was not right and showed the text messages R.H. had sent her mother. The counselor then went to the school resource officer who helped her contact law enforcement.

¶ 4 Detective S. Clinard of the Pender County Sheriff's Office responded to the school to investigate R.H.'s report. Detective Clinard conducted a short interview of R.H., then arranged for her to be taken to the hospital to have a sexual assault

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[1] We use this pseudonym to protect the privacy of the minor child. *See* N.C. R. App. P. 42(b).

examination performed. While at the hospital, Detective Clinard sent pretextual text messages to Defendant from R.H.'s phone about the assault, to which Defendant responded, confirming that an incident had taken place. Based on R.H.'s allegations and the text message exchange, Detective Clinard determined that there was probable cause to place Defendant under arrest. Detective J. Leatherwood, with the Pender County Sheriff's Office, took out a temporary warrant for Defendant's arrest, later converted into a sworn arrest warrant, arrested Defendant at his work, and took him to Detective Clinard at the Pender County law enforcement center for questioning.

¶ 5 On 31 July 2017, Defendant was indicted with one count of statutory rape of a person who is 15 years of age or younger, one count of statutory sex offense with a person who is 15 years of age or younger, one count of taking indecent liberties with a child, and one count of sexual battery.

¶ 6 On 27 January 2020, Defendant filed a motion to suppress the statements made to Detective Clinard during questioning at the Pender County law enforcement center. A hearing was held on Defendant's motion on 28 January 2020, before the Honorable G. Frank Jones in Pender County Superior Court. Defendant's motion was denied by order on 29 January 2020.

¶ 7 Defendant was tried by jury at the 28 June 2021, Criminal Session of the Pender County Superior Court, the Honorable James S. Carmical presiding. The jury

found Defendant not guilty of statutory rape of a person who is 15 years of age or younger. The jury found Defendant guilty of statutory sex offense with a person who is 15 years of age or younger, taking indecent liberties with a child, and sexual battery. Defendant was sentenced to a consolidated term of 192 months to 291 months incarceration.

¶ 8 Defendant gave oral notice of appeal.

II. Analysis

¶ 9 Defendant makes four arguments on appeal: (1) the trial court erred in evaluating his motion to suppress solely on the basis of N.C. Gen. Stat. § 15A-401(b); (2) the trial court erred in denying his motion to suppress because the statements he made during custodial interrogation were involuntary; (3) the trial court erred in denying his motion to suppress because he invoked his right to counsel prior to being interrogated without counsel present; and (4) the trial court erred in accepting the jury verdict for statutory sex offense when the evidence at trial was not consistent with that verdict.

A. Motion to Suppress

¶ 10 Defendant first argues that the trial court erred in denying his motion to suppress statements made to investigating detectives after he was taken into custody.

¶ 11 We review a trial court's denial of a motion to suppress to determine whether

the findings of fact are supported by competent evidence, and whether those findings of fact support the trial court's ultimate conclusions of law. *State v. Cabe*, 136 N.C. App. 510, 512, 524 S.E.2d 828, 830, *appeal dismissed*, 351 N.C. 475, 543 S.E.2d 496 (2000).

1. Sufficiency of Defendant's Affidavit

¶ 12 First, we address the State's argument that the affidavit accompanying Defendant's motion to suppress did not comply with N.C. Gen. Stat. § 15A-977(a), and therefore Defendant has waived his right to contest on appeal the admission of evidence on statutory or constitutional grounds. We agree with the State on this point.

¶ 13 North Carolina General Statute § 15A-977(a) requires that a motion to suppress be "accompanied by an affidavit containing facts supporting the motion. The affidavit must be based upon personal knowledge, or upon information or belief, if the source of the information and the basis for the belief are stated." N.C. Gen. Stat. § 15A-977(a) (2021).

¶ 14 Defendant contends that, because his motion was not summarily denied, and instead there was a hearing where evidence was presented to the trial court, any error in failing to comply with the requirements of N.C. Gen. Stat. § 15A-977(a) was remedied because sufficient evidence was before the trial court for it to decide the motion. We disagree.

¶ 15 A defendant is not absolved of his procedural obligations under § 15A-977(a) simply because he presents further evidence supporting his motion to suppress. *See State v. Holloway*, 311 N.C. 573, 319 S.E.2d 261 (1984). In *Holloway*, our Supreme Court held that "because the defendant failed to file an affidavit to support the general information and belief alleged in his motion, he waived his right to seek suppression on constitutional grounds of the evidence seized pursuant to the search warrant." *Id.* at 577-78, 319 S.E.2d at 264 (cleaned up). While the defendant had set forth the factual basis for his motion in the body of the motion itself, and an evidentiary hearing was held, this did not change the longstanding principle that "defendants by failing to comply with statutory requirements set forth in N.C.G.S. § 15A-977 waive their rights to contest on appeal the admission of evidence on constitutional or statutory grounds." *Id.* at 578, 319 S.E.2d at 264.

¶ 16 We reaffirmed this principle in *State v. Phillips*, 132 N.C. App. 765, 513 S.E.2d 568 (1999). In *Phillips*, the defendant submitted an affidavit supporting his motion to suppress, but the affidavit did not satisfy the statute. *Id.* at 769, 513 S.E.2d at 571. The affidavit filed in *Phillips* stated:

> 1) My name is Edward A. Fliorella, Jr. I am attorney actively engaged in the practice of criminal law for the past ten years.
>
> 2) I have reviewed the discovery provided by the State with my client and, based upon those specific facts, as alleged in this Motion to Suppress, it is the opinion of the

> undersigned that the relief requested should be granted.
>
> 3) That this affidavit is being filed pursuant to N.C.G.S. §§ 15A-977.

Id. We held that this affidavit contained no facts in support of the defendant's motion to suppress, and therefore the motion was properly denied by the trial court. *Id.*

¶ 17 The affidavit submitted by Defendant in this case reads:

> The undersigned being first duly sworn, deposes and says:
>
> 1. That he is a duly licensed and authorized to practice law in the State of North Carolina and is the attorney for the above-named Defendant in the above-captioned case.
>
> 2. I have received and thoroughly reviewed all discovery disclosed thus far by the State. Included in the discovery are documents that set forth the procedural history of the investigation of the crimes alleged in this matter.
>
> 3. Based on the facts as they are set forth in the discovery by the state, and personal factual and legal research, there is a good faith basis to believe that evidence was obtained in violation the laws of the State of North Carolina as well as the United States Constitution, and that suppression is required as set forth in Defendant's motion.

¶ 18 This affidavit is just like the one that we held did not satisfy § 15A-977(a) in *Phillips*. It contains no facts in support of Defendant's motion to suppress, in contravention of the express mandate of § 15A-977(a). The affidavit does not state how Defendant's constitutional rights were violated, nor does it provide any explanation or expand on the bare assertion that suppression is warranted.

Defendant's affidavit therefore fails to meet the mandatory requirements of § 15A-977. Accordingly, we hold that he has waived any argument related to error in the admission of his interrogation.

2. Trial Court's Order

¶ 19 However, assuming *arguendo* that the affidavit in support of Defendant's motion to suppress satisfied the relevant statute, we hold that his argument related to whether the trial court erred by evaluating the motion to suppress on the basis of N.C. Gen. Stat. § 15A-401(b) is without merit.

¶ 20 The arresting officer, Detective Leatherwood, informed Defendant that there was a warrant for Defendant's arrest when, in actuality, there was only an unsworn temporary warrant at the time of Defendant's arrest. Later that same day, while Defendant was being questioned, Detective Leatherwood went before a magistrate and took out a sworn warrant with an identical factual basis and the same charges as the temporary warrant. The crux of Defendant's argument is that the trial court should have evaluated the due process implications of being told that there was a valid arrest warrant and the effect that had on Defendant's state of mind during questioning.

¶ 21 The trial court's order denying Defendant's motion to suppress contained the following mixed conclusions of law and findings of fact:

> 2) With respect to the due process considerations, the

> Court considers the totality of the circumstances including all relevant circumstances further including but not limited to
>
> a) defendant was given his Miranda v. Arizona warnings on two occasions on 27 April 2017, by detectives Leatherwood and Clinard prior to any police questioning,
>
> b) although defendant was in custody at the Pender County sheriff's office, he was not handcuffed or restrained,
>
> c) with respect to the interrogation at the Pender Count sheriff's office by Detective Clinard, Detective Clinard was not during the course of the interrogation abusive or threatening in words or conduct,
>
> d) The defendant's verbal and nonverbal responses suggest that he did not feel coerced, threatened, or intimidated,
>
> e) Defendant further did not present any apparent evidence of physical or mental impairment nor during the course of the interrogation at the Pender County sheriff's office display to this court characteristics suggest he was vulnerable to pressure, and
>
> f) A one and one-half hour interrogation was not unusually long given a consideration of the age of the alleged victim, coupled with the nature of the alleged offense.

¶ 22 Where the trial court has made "specific conclusions of law concerning the denial of a defendant's motion to suppress," but has failed to make specific findings of fact to support those conclusions, "the appropriate findings may be inferred by the

trial court's conclusions and ultimate denial of the motion to suppress." *State v. Rollins*, 200 N.C. App. 105, 111, 682 S.E.2d 411, 415 (2009). "So long as there is not a material conflict in the evidence before the trial court, the absence of specific findings does not amount to prejudicial error *per se*." *Id.*

¶ 23 A review of the portions of the trial court's order quoted above reveals that the trial court fully considered Defendant's due process arguments and examined the totality of the circumstances surrounding Defendant's interrogation for the existence of any coercive pressures or impairment, ultimately finding none. Were Defendant to have properly preserved his argument related to the denial of his motion to suppress because his statements were coerced, we would still affirm the order of the trial court.

3. Voluntariness of Defendant's Statements

¶ 24 Defendant next asserts that his statements to Detective Clinard were involuntary. Specifically, Defendant contends that Detective Leatherwood's misrepresentation of the existence of a valid arrest warrant constituted a due process violation, and that Detective Clinard's questioning was deceptive.

a. Arrest Warrant

¶ 25 In general, "an arrest is constitutionally valid whenever there exists probable cause to make it." *State v. Chadwick*, 149 N.C. App. 200, 202, 560 S.E.2d 207, 209 (2002). The parties here do not contest that there was probable cause to arrest

Defendant. Rather, Defendant's argument is that telling Defendant there was a valid warrant for his arrest when there was not amounts to a level of coercion such that his subsequent statements were involuntary. We disagree.

¶ 26 Defendant would have this court rely on the Supreme Court of the United States's decision in *Bumper v. North Carolina*, 391 U.S. 543 (1968). We decline to do so under these facts. *Bumper* addressed a situation where an officer asserted that he had a warrant to search a home, when he in fact did not. *Id.* at 550. The Court held that this was, in effect, an announcement to the occupant that she had no right to resist the search and was inherently coercive. *Id.*

¶ 27 We have held that "for the principles from *Bumper* to apply, there must be a search." *State v. Young*, 186 N.C. App. 343, 352, 651 S.E.2d 576, 582 (2007). Here, there was no search. Further, in *Bumper*, the Court's concern was that when the occupant was informed there was a search warrant for her home when there was not, she was deprived of her right to refuse the officer's request to search. *Bumper*, 391 U.S. at 549-550. Here, there was probable cause to arrest Defendant even without a warrant, as Defendant concedes. Defendant was not denied or coerced into giving up his right to refuse being arrested because he had no such right.

b. Detective Clinard's Questioning

¶ 28 Defendant also asserts that his statements to Detective Clinard were involuntary because Detective Clinard used deception in his questioning and that it

was inherently coercive. We disagree.

¶ 29 "The admissibility of a confession must be decided by viewing the totality of the circumstances, one of which may be whether the means employed were calculated to procure an untrue confession." *State v. Jackson*, 308 N.C. 549, 574, 304 S.E.2d 134, 148 (1983). While the use of deception by interrogating officers is not a commendable practice, "standing alone [it] do[es] not render a confession of guilt inadmissible." *Id.*

¶ 30 Here, the evidence presented at the motion to suppress hearing was that, when questioning Defendant, Detective Clinard told him that R.H. had told him "everything." Detective Clinard asked Defendant a series of questions about possible conduct. He asked Defendant if it was possible that Defendant's fingers could have penetrated R.H. When Defendant responded, "it's possible," Detective Clinard pursued that line of questioning, including tracing Defendant's hand and asking him to mark how far his fingers would have gone. He also asked Defendant if it was possible that his penis could have penetrated R.H. There was no evidence presented that Detective Clinard told Defendant that R.H. said that Defendant penetrated her with his fingers, or with his penis. There was no evidence presented that Detective Clinard made any false statements to Defendant, promised Defendant anything in exchange for his confession, or threatened Defendant.

¶ 31 The trial court, after hearing witness testimony and argument from counsel,

and reviewing the recording of Defendant's interrogation, made specific findings about the voluntariness of Defendant's statements to Detective Clinard. We therefore hold that the trial court's findings of fact are supported by sufficient evidence and support the conclusion that, under the totality of the circumstances, Defendant's confession was voluntarily given.

4. Invocation of the Right to Counsel

¶ 32 Defendant next contends that his motion to suppress should have been granted because he invoked his right to counsel prior to being questioned by Detective Clinard. At the hearing on the motion, Defendant argued that at the time he was initially read his *Miranda* rights by Detective Leatherwood he was not willing to waive his right to an attorney and wanted to discuss the waiver with his attorney. Detective Leatherwood then terminated the *Miranda* rights reading and brought Defendant to Detective Clinard where he was re-Mirandized. Defendant asserts that this second reading of his *Miranda* rights and all the subsequent questioning violated his due process rights. We disagree.

¶ 33 "Invocation of the *Miranda* right to counsel requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." *State v. Cureton*, 223 N.C. App. 274, 285, 734 S.E.2d 572, 581 (2012) (internal quotations omitted). Ambiguous or equivocal statements that a suspect *might* be invoking the right to counsel do not require cessation of questioning.

Id. The request must be clear and unambiguous. *Id*.

¶ 34 At the hearing on the motion, Detective Leatherwood testified that he was advising Defendant of his *Miranda* rights after placing him under arrest and Defendant became confused about whether he needed a lawyer. Detective Leatherwood terminated all conversation, told Defendant to not say anything else, and took Defendant to Detective Clinard. Detective Leatherwood testified that at no time did he feel Defendant was unequivocally invoking his *Miranda* rights. Defendant never said "I want an attorney" to Detective Leatherwood.

¶ 35 Detective Leatherwood informed Detective Clinard that Defendant had some questions about his *Miranda* rights and that he might want to readvise Defendant prior to questioning. Detective Clinard re-Mirandized Defendant. Defendant verbally indicated that he understood his rights and that he was waiving them and signed the waiver form. Defendant told Detective Clinard that he was initially concerned that by waiving his rights he was giving up his ability to assert them later if he wished to, and that this was the confusion he was expressing to Detective Leatherwood. Detective Clinard informed Defendant that they could stop the questioning at any time and that signing the waiver was not a revocation of his rights. Defendant replied "ok" and confirmed he was comfortable proceeding with the questioning.

¶ 36 Defendant did not put on any evidence at the hearing on the motion.

¶ 37 Based on the uncontroverted evidence, Defendant did not unequivocally invoke his right to counsel. We therefore hold that the trial court did not err in denying his motion to suppress on that ground.

B. Inconsistent Jury Verdict and Sufficiency of the Evidence

¶ 38 Defendant finally contends that the guilty verdict for statutory sex offense of a child 15 years of age or younger was not supported by the evidence presented at trial and should have been rejected by the trial court. We disagree.

¶ 39 We first note that while Defendant asserts this error as an issue of inconsistent verdicts, and cites the appropriate standard of review, he additionally cites our standard for reviewing whether the State presented sufficient evidence of a charged offense as well as the burden that the State has for overcoming a motion to dismiss.

¶ 40 Defendant did not move for judgment notwithstanding the verdict, nor argue to the trial court that the verdicts returned by the jury were inconsistent with one another.

¶ 41 To the extent that Defendant is asserting that the trial court improperly accepted the jury's verdict because it was inconsistent with the evidence presented at trial, we hold that Defendant has not properly preserved this issue for appeal as he did not make any motion or objection to the trial court on the issue. N.C. R. App. 10(a)(1).

¶ 42 Defendant moved to dismiss all charges for lack of sufficiency of the evidence at the close of the State's case, specifically highlighting the charge of statutory sex offense of a child 15 years of age or younger. The trial court denied Defendant's motion.

¶ 43 To the extent that Defendant is challenging the sufficiency of the State's evidence, we hold that he properly preserved this issue by moving to dismiss at the close of the State's evidence. *See Sate v. Golder*, 374 N.C. 238, 245, 839 S.E.2d 782, 787 (2020). However, we hold that there was sufficient evidence presented at trial for the jury to find Defendant guilty of statutory sex offense of a child 15 years of age or younger.

¶ 44 Whether there is sufficient evidence of a charge to carry it to the jury is a question of law. *State v. Anderson*, 208 N.C. 771, 784, 182 S.E. 643, 651 (1935). "[W]e review questions of law *de novo*. *State v. Khan*, 366 N.C. 448, 453, 738 S.E.2d 167, 171 (2013).

¶ 45 A defendant is guilty of statutory sex offense with a person who is 15 years oof age or younger "if the defendant engages in a sexual act with another person who is 15 years of age or younger and the defendant is at least 12 years old and at least six years older than the person, except when the defendant is lawfully married to the person." N.C. Gen. Stat. § 14-27.30(A) (2015).

¶ 46 A "sexual act" for the purpose of sex offenses is "[c]unnilingus, fellatio,

analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also 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 (2019). Evidence that a defendant digitally entered the labia is sufficient evidence of a sexual act. *State v. Lopez*, 274 N.C. App. 439, 449, 852 S.E.2d 658, 664 (2020).

¶ 47 At trial, R.H. testified that on 26 April 2017, she woke up to someone in her bed with her. At the time she woke up she was being assaulted by what she described as a penis in her vagina. R.H. testified that it was dark when she woke up and she could not see what was happening, but that she knew it was a penis because it was smooth. She did not remember anything prior to waking up.

¶ 48 Colleen Mistovich, who conducted the sexual assault evidence kit on R.H., testified that she identified a tear or break in the epidermis at the bottom of R.H.'s vaginal opening. Ms. Mistovich identified this as an acute injury that was consistent with penetration, however, Ms. Mistovich could not specify whether it was penetration from a penis, finger, or other object. Ms. Mistovich testified that a finger could have caused the injury.

¶ 49 Detective Clinard testified about his interrogation of Defendant after Defendant's arrest. The video recording of the interrogation was also played for the jury. During this interrogation, Detective Clinard asked Defendant if Defendant's fingers went in between the lips of R.H.'s vagina. Defendant responded, nodding, "it's

possible." Detective Clinard asked Defendant how far his fingers would have gone in, to which Defendant responded that it would have been his fingertips, and that it would not have been in an actual "fingering" motion. Detective Clinard then traced Defendant's hand on a sheet of paper and asked Defendant to mark which finger he inserted in R.H.'s vagina, and how far the finger went in. Defendant said it would have been at his fingernail, maybe his first knuckle, and marked that on the tracing of his hand.

¶ 50 There was sufficient evidence presented to the jury of the elements of statutory sex offense with a person 15 years of age or younger. The jury could have found Defendant guilty of this charge based on Defendant's own admissions, or based on R.H.'s testimony that she woke up in the middle of being sexually assaulted, with no memory of what happened prior to waking up and that she could not see what was penetrating her, in addition to the corroborating testimony of the medical professional who examined R.H. that she sustained injuries consistent with penetration that could have been caused by a finger. The trial court did not err in allowing the charge of statutory sex offense with a person 15 years of age or younger to go to the jury.

III. Conclusion

¶ 51 For the reasons stated above, we hold that there was no error in the trial court's judgments and were the challenge to the order denying Defendant's motion to suppress properly before us, we would affirm it.

NO ERROR.

Judges ZACHARY and GORE concur.

Report per Rule 30(e).