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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-70

Filed 19 September 2023

New Hanover County, No. 17CRS50730

STATE OF NORTH CAROLINA,

v.

DENVER D. PITTS, Defendant.

Appeal by defendant from judgment entered 13 June 2022 by Judge R. Kent Harrell in New Hanover County Superior Court. Heard in the Court of Appeals 24 May 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sherri Horner Lawrence for the State-Appellee.

W. Michael Spivey for the Defendant-Appellant.

STADING, Judge.

Denver D. Pitts (“defendant”) appeals from judgment after a jury found him guilty of one count of forcible second-degree sexual offense. For the reasons set forth below, we hold no error.

I. Background

On 15 May 2017, defendant was indicted for one count of second-degree forcible sexual offense against Tanya.¹ A trial was held in New Hanover County Superior Court on 6 June 2022. At trial, the State's evidence tended to show that on the evening of 2 October 2016, Tanya encountered defendant in downtown Wilmington when she initiated a conversation about defendant's vintage car. Later, Tanya saw defendant at a nearby bar where she consumed a mixed alcoholic drink. Not long thereafter, she joined her friends at another bar a short distance away.

Tanya's next memory was waking up in defendant's camper, with defendant's head between her legs. Initially, Tanya was unable to move. Subsequently, Tanya regained consciousness and mobility, allowing her to locate the exit door. After leaving the camper, a couple found Tanya wandering in the road, wearing only a tee shirt. The couple observed that Tanya was upset and unaware of her surroundings. Thereafter, they called 911 and took her to a hospital. At the hospital, doctors completed a sexual assault examination and testing revealed defendant's DNA on vaginal swabs taken from Tanya.

After further investigation, Wilmington police identified defendant as the perpetrator. During the investigation, police obtained a warrant to search

¹ To protect the victim's identity, the parties have agreed to refer to her by this pseudonym.

defendant's camper and executed the search on 28 October 2016. During the search, police took photographs of the camper. Before trial, defendant filed a motion in *limine* to exclude all photographs taken during search. The trial court deferred ruling on the motion until other evidence was offered at trial. The State sought to admit the photographs in evidence at trial, and defendant objected to two of the photographs: State's exhibit thirty-six, a photo of condom packages and pills, and State's exhibit forty-two, a photo of bottles of alcohol on a counter in the camper.

On 13 June 2022, the jury found defendant guilty of committing one count of forcible second-degree sexual offense. He was sentenced to imprisonment for a minimum term of 60 months and a maximum term of 132 months. Defendant entered his notice of appeal to this Court on 22 June 2022.

II. Jurisdiction

This Court has jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2021).

III. Analysis

In his brief to this Court, defendant's appellate counsel states that "[a]fter careful and repeated review of the record and applicable law . . . [he] is unable to identify any issue with sufficient merit to support a meaningful argument on appeal." Defendant's appellate counsel concluded that the trial court's admission of certain photographic evidence "does not present a non-frivolous issue" and that he could not "make a good faith argument that the trial court erred in concluding that the evidence

was relevant or that it abused its discretion in finding that the probative value of the evidence outweighed any prejudicial effect.” To fulfill his obligation pursuant to *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), defendant’s appellate counsel requests this Court to review “anything in the record that might arguably support the appeal.”

By making the foregoing request in his brief, asking our Court to review for potential errors, advising defendant of his right to file a brief on his own behalf, and providing defendant with copies of counsel’s brief, the trial transcript, the record on appeal, documentary exhibits, and the mailing address of this Court, defense counsel fulfilled his duties under *Anders*. 386 U.S. at 744, 87 S. Ct. at 1400; *see also Kinch*, 314 N.C. at 102, 331 S.E.2d at 666–67. We note that defendant did not submit his own brief to this Court.

In light of the foregoing:

[T]his Court must now determine from a full examination of all the proceedings whether the appeal is wholly frivolous. In carrying out this duty, we will review the legal points appearing in the record, transcript, and briefs, not for the purpose of determining their merits (if any) but to determine whether they are wholly frivolous.

Kinch, 314 N.C. at 102–03, 331 S.E.2d at 667 (citation omitted).

In conducting our examination, we consider defendant’s pretrial motion in *limine*, to exclude certain photographs from evidence. As noted by defendant’s appellant counsel, defendant’s motion asserted that the State could not establish the

photographs fairly and accurately portrayed the interior of the camper on 2 October 2016 and that their prejudicial effect outweighed any probative value.

First, we review defendant's contention that admission of the contested photographs was improper as they do not fairly and accurately depict the conditions in the camper at or near the time of the offense. A witness may use a photograph to help illustrate their testimony, and the photograph may be admitted into evidence so long as it is identified as portraying the scene with sufficient accuracy. *State v. Smith*, 300 N.C. 71, 75, 265 S.E.2d 164, 167 (1980) (citations omitted). It is also not necessary "that the photographs be made at the time of the events to which it relates." *Id.* at 75, 265 S.E.2d at 168. In the present matter, the investigating detective testified that these photographs were taken during the execution of a search warrant on 28 October 2016, and that they were fair and accurate representations of the interior of the camper when searched. Further, the trial court judge instructed the jury that they were to use the photographs only for illustrative purposes. *See id.* at 75–76, 265 S.E.2d at 168.

Next, we consider defendant's assertion that, under Rule 403, the probative value of the photographs was "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ." N.C. Gen. Stat. § 8C-1, R. 403 (2021). The trial court's determination on admitting evidence under Rule 403 is reviewed for abuse of discretion. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). Here, on the first attempt by the State to admit the contested

photographs, the trial court judge initially denied admission under relevancy. However, the trial court judge later admitted these contested photographs as evidence after defendant's recorded interview with the detective was published to the jury. Moreover, as provided above, the trial court limited the use of the photographs for illustrative purposes only. Thus, in view of the record before us, we find that there is no meritorious argument that the trial court abused its discretion in admitting these photographs into evidence.

IV. Conclusion

In accordance with our duty under *Anders*, we have conducted a “full examination of all the proceedings[,]” including a “review [of] the legal points appearing in the record, transcript, and briefs, not for the purpose of determining their merits (if any) but to determine whether they are wholly frivolous.” *Kinch*, 314 N.C. at 102-03, 331 S.E.2d at 667. After examination of the entire proceedings, we find that there are no issues with sufficient merit to support a meaningful argument on appeal. We conclude the appeal is wholly frivolous and therefore shall be dismissed. *See id.* at 106, 331 S.E.2d at 669.

DISMISSED.

Judges TYSON and ZACHARY concur.

Report per Rule 30(e).