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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-1062

Filed 21 November 2023

Scotland County, Nos. 20 CRS 51716–20

STATE OF NORTH CAROLINA

v.

STEVEN ZACHARY ALVA, Defendant.

Appeal by Defendant from judgment entered 16 February 2022 by Judge Stephan R. Futrell in Scotland County Superior Court. Heard in the Court of Appeals 17 October 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Jason P. Caccamo, for the State.

Yoder Law PLLC, by Jason Christopher Yoder, for Defendant-Appellant.

CARPENTER, Judge.

Steven Zachary Alva (“Defendant”) appeals from judgment entered after a jury found him guilty of one count of statutory rape of a child under fifteen, two counts of statutory sex offense with a child under fifteen, seven counts of indecent liberties with a child, three counts of sex act by a substitute parent, and two counts of second-degree forcible sexual offense. On appeal, Defendant argues the trial court erred by: (1)

instructing the jury once for each crime charged, rather than separately instructing the jury for each count of each crime; and (2) allowing a witness who was not on the State's pretrial-witness list to testify. After careful review, we disagree and discern no error.

I. Factual & Procedural Background

On 22 February 2021, a Scotland County grand jury indicted Defendant for one count of statutory rape of a child under fifteen, two counts of statutory sex with a child under fifteen, seven counts of indecent liberties with a child, three counts of sex act by a substitute parent, and two counts of second-degree forcible sexual offense.

At trial, the State called the victim, who testified that Defendant had sex with her multiple times while she was less than fifteen years old. The State also called Sabrina Medlin, a nurse, to testify concerning a sexual-assault kit. Medlin, however, was not named on the State's pretrial witness list. The State needed Medlin to testify in order to establish the sexual-assault kit's chain of custody, not to establish the validity of the test. Defendant objected to Medlin testifying.

Concerning the failure to include Medlin on its witness list, the State admitted that "there was really no excuse for it other than it was an oversight." The trial court overruled Defendant's objection and concluded "there was not a bad faith attempt to sandbag the defense in its preparation and inquiry of the jurors, potential jurors, or other witnesses or to prejudice the defendant in preparing for trial."

When the trial court gave the jury instructions, it gave one instruction for each of the charged crimes, rather than giving a separate instruction for every count of each charged crime. Defendant did not object to the trial court's jury instructions. On 16 February 2022, the jury found Defendant guilty of all charges. That same day, Defendant orally appealed in open court.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Issues

The issues on appeal are whether the trial court erred by: (1) instructing the jury once for each crime charged, rather than separately instructing the jury for each count of each crime; and (2) allowing a witness who was not on the State's pretrial-witness list to testify.

IV. Analysis

A. Jury Instruction

Defendant first argues that the trial court erred by only giving one instruction for the seven counts of indecent liberties with a child, one instruction for the three counts of sex act by a substitute parent, and one instruction for the two counts of second-degree forcible sexual offense. Defendant, however, did not object to the trial court's jury instructions at trial. We disagree with Defendant's argument on appeal.

"[T]he plain error standard of review applies on appeal to unpreserved instructional or evidentiary error." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d

326, 334 (2012). To find plain error, this Court must first determine that an error occurred at trial. *See State v. Towe*, 366 N.C. 56, 62, 732 S.E.2d 564, 568 (2012). Second, the defendant must demonstrate the error was “fundamental,” which means the error probably caused a guilty verdict and “seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings.” *State v. Grice*, 367 N.C. 753, 764, 767 S.E.2d 312, 320–21 (2015) (quoting *Lawrence*, 365 N.C. at 518–19, 723 S.E.2d at 334–35). Notably, the “plain error rule . . . is always to be applied cautiously and only in the exceptional case” *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citing *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)).

“When reviewing a trial court’s charge to the jury, the instructions must be considered in their entirety.” *State v. Parker*, 119 N.C. App. 328, 339, 459 S.E.2d 9, 15 (1995). In *State v. Bullock*, the defendant was charged with eleven counts of first-degree rape, but the trial court only instructed the jury on the elements of first-degree rape once. 178 N.C. App. 460, 464–65, 631 S.E.2d 868, 872 (2006). The “defendant contend[ed] that the trial court committed plain error in failing to instruct the jury on all the necessary elements of each charge.” *Id.* at 464, 631 S.E.2d at 872. We disagreed and concluded that it was “clear from the trial court’s charge that the initial instruction on the elements of first-degree rape applied to all 11 counts.” *Id.* at 465, 631 S.E.2d at 872.

Here, the trial court instructed the jury that Defendant was charged with “seven counts of taking an indecent liberty with a child, three counts of felonious

sexual activity with a person in his custody,” and “two counts of second-degree forcible sexual offense.” In other words, the trial court instructed the jury on the elements of each crime once, rather than for each of the separate counts. Each verdict sheet, however, was broken out by crime and date to differentiate between the number of charged crimes and counts. Similar to *Bullock*, it was clear that “the initial instruction on the elements” of indecent liberties with a child, of sex act by a substitute parent, and of second-degree forcible sexual offense applied to all counts of each crime. *See id.* at 465, 631 S.E.2d at 872.

Therefore, because the trial court did not err by instructing the jury on the elements of the charged crimes once, the trial court did not plainly err. *See id.* at 465, 631 S.E.2d at 872; *Towe*, 366 N.C. at 62, 732 S.E.2d at 568.

B. Medlin’s Testimony

Next, Defendant argues the trial court erred by allowing Medlin to testify without first reopening voir dire. We disagree.

Whether a trial court erred in allowing a witness to testify who was not on the State’s list of trial witnesses is reviewed for an abuse of discretion. *State v. Taylor*, 178 N.C. App. 395, 412, 632 S.E.2d 218, 230 (2006). “Abuse of discretion results where the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

Subsection 15A-903(a)(3) requires prosecutors to provide defendants with a list of the names of “witnesses whom the State reasonably expects to call during the trial.” N.C. Gen. Stat. § 15A-903(a)(3) (2021). But if a witness which the State did not reasonably expect to call is not listed, the trial court may allow the witness to testify upon a “good faith showing.” *Id.* Moreover, “the court may in its discretion permit any undisclosed witness to testify.” *Id.* And a trial court is not required to reopen voir dire to make the determination. *See id.*

Here, the State failed to include Medlin on its pretrial witness list, even though it appears the State reasonably expected to call Medlin. But the State needed Medlin’s testimony to establish chain of custody concerning a piece of evidence. The trial court considered arguments from Defendant and the State and concluded that “there was not a bad faith attempt to sandbag the defense in its preparation and inquiry of the jurors, potential jurors, or other witnesses or to prejudice the defendant in preparing for trial.” The trial court heard arguments from both parties, and it was within the trial court’s “discretion [to] permit an[] undisclosed witness to testify.” *See id.*

Thus, the trial court’s decision was not “so arbitrary that it could not have been the result of a reasoned decision.” *See Hennis*, 323 N.C. at 285, 372 S.E.2d at 527. Accordingly, the trial court did not abuse its discretion when it allowed Medlin to testify without reopening voir dire. *See Taylor*, 178 N.C. App. at 412, 632 S.E.2d at 230.

V. Conclusion

We conclude the trial court did not err by instructing the jury once for each crime charged, rather than separately instructing the jury for every count of each crime. The trial court also did not abuse its discretion by allowing a witness who was not on the State's pretrial-witness list to testify.

NO ERROR.

Judges HAMPSON and THOMPSON concur.

Report per Rule 30(e).