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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-537

Filed 17 September 2024

Mecklenburg County, Nos. 12CRS223248-51

STATE OF NORTH CAROLINA

v.

BERNARDO ROBERTO PENA, Defendant.

Appeal by defendant from judgment entered on or about 2 November 2022 by Judge Lisa C. Bell in Superior Court, Mecklenburg County. Heard in the Court of Appeals 9 January 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Elizabeth Curran O'Brien, for the State.

Steven T. Meier, PLLC, by Stephen W. Kearney, for defendant-appellant.

STROUD, Judge.

Defendant appeals judgments convicting him of sexual battery, attempted second degree sex offense, attempted second degree rape, second degree kidnapping, and second degree sexual offense.

I. Background

The State's evidence tended to show that on 28 May 2012, Defendant "dragged"

Ann¹ into a room and began forcefully sexually groping and exposing himself to her. Ann managed to call 911. Defendant's assault continued and law enforcement officers arrived. Defendant was indicted for sexual battery, attempted second degree sexual offense, attempted second degree rape, second degree kidnapping, and second degree sexual offense. Defendant was found guilty by a jury of all charges and judgments were entered by the trial court. Defendant appeals.

II. Audio Recording

Defendant first contends that "the trial court committed reversible error in admitting an unauthenticated audio recording." (Capitalization altered.) During Defendant's trial, the State presented a recording of the 911 call as Exhibit 13 and it was played for the jury. Ann testified Exhibit 13 was a recording of the 911 call she made and had thereafter listened to and signed to confirm she had heard it and that it was accurate. Defendant objected to admission of Exhibit 13 and argued that the recording had been altered. The State noted that the static had been removed from the recording. The State specifically stated, "[i]t's just taking away background noise, taking off a wave length." Defendant now contends on appeal "[i]t is absolutely unclear what is meant by taking off a wave length." But the trial court understood what this means, and we do also. As the State noted, "taking off a wave length" will "remove some of the static[.]" Importantly, as noted by the State, not even Defendant

¹ A pseudonym is used.

contends the words on the recording were changed in any way; in other words, Defendant does not contend the recording was inaccurate or modified in any substantive way, so his only argument is regarding authentication.

We review authentication under a *de novo* standard. *State v. Clemons*, 274 N.C. App. 401, 409, 852 S.E.2d 671, 676 (2020) (“We hold the appropriate standard of review for authentication of evidence is *de novo*.”).

In *State v. Rourke*, this Court concluded that where two of the parties to a 911 call identified their own voices and the voices of two additional parties to the call on an audiotape, there was sufficient evidence to authenticate the tape as a recording of the 911 call made during the incident in question.

State v. Gaither, 161 N.C. App. 96, 102, 587 S.E.2d 505, 509 (2003); *see* N.C. Gen. Stat. § 8C-1, Rule 901 (2011) (“The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”). Defendant cites no case law indicating that a person cannot authenticate her own voice on a recording. This argument is overruled.

III. Voluntary Intoxication

Defendant next contends “the trial court committed reversible error by denying . . . [his] request that the jury be instructed on voluntary intoxication.” (Capitalization altered.) “Whether the evidence is sufficient to warrant defendant’s requested jury instruction is a question of law. Our standard of review is *de novo*.”

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State v. Broussard, 239 N.C. App. 382, 385, 768 S.E.2d 367, 369 (2015). “The trial court must give a requested jury instruction when the request is a correct statement of law and is supported by the evidence in the case.” *State v. Jackson*, 161 N.C. App. 118, 124, 588 S.E.2d 11, 15 (2003).

[V]oluntary intoxication can only negate the evidence of specific intent if it is shown that the defendant was so intoxicated at the time he committed the crime that he was utterly unable to form the necessary specific intent. Evidence of mere intoxication, however, is not enough. Furthermore, voluntary intoxication is an affirmative defense, so evidence of intoxication to a degree sufficient to negate *mens rea* is the burden of defendant.

State v. Smith, 289 N.C. App. 233, 243, 888 S.E.2d 706, 715-16 (citations, quotation marks, ellipses and brackets omitted), *disc. review denied*, ___ N.C. ___, 891 S.E.2d 289 (2023).

To obtain a voluntary intoxication instruction, a defendant

must produce substantial evidence which would support a conclusion by the judge that she was so intoxicated that she could not form the specific intent[.] The evidence must show that at the time of the crime the defendant’s mind and reason were so completely intoxicated and overthrown as to render her utterly incapable of forming specific intent. In absence of some evidence of intoxication to such degree, the court is not required to charge the jury thereon.

State v. Meader, 377 N.C. 157, 162, 856 S.E.2d 533, 537 (2021) (citation, ellipses, and brackets omitted).

Neither the State nor Defendant put on evidence indicating he was “so

completely intoxicated and overthrown as to render h[im] utterly incapable of forming specific intent.” *Id.* In fact, even in Defendant’s brief he merely argues the evidence established, “he appeared intoxicated” and provides no examples of evidence of intoxication such as slurred speech, blacking out, vomiting, or a toxicology report. Although even these examples of evidence of intoxication may not always support an instruction on the defense of involuntary intoxication, here, Defendant does not direct us to any evidence of this type to consider. *See Smith*, 289 N.C. App. at 243, 888 S.E.2d at 716. Defendant contends the evidence that he “appeared intoxicated” makes it “a valid question for the jury to consider whether . . . [Defendant’s] intoxication had so affected him that he could not formulate the specific intent required[;]” this is not the legal standard. The standard is evidence showing he was “so completely intoxicated and overthrown as to render h[im] utterly incapable of forming specific intent[;]” evidence of appearing intoxicated does not rise to this level. *Meador*, 377 N.C. at 162, 856 S.E.2d at 537. The trial court did not err in refusing to give Defendant’s requested jury instruction as the evidence presented did not warrant it. *See id.* This argument is overruled.

IV. Motion to Dismiss

Finally, in an approximately one-page argument, Defendant attempts to challenge the sufficiency of the evidence as to all five of his crimes. Defendant does not identify a particular crime by name nor does he address any particular element of any crime but instead contends, “[t]he State’s evidence was not credible to establish

each of the elements against” him while noting no specific evidence which “was not credible[.]”

We first note that our standard of review here is whether there was substantial evidence of the elements of the crimes presented, not credibility, which is within the purview of the jury. *See State v. Espinoza-Valenzuela*, 203 N.C. App. 485, 494, 692 S.E.2d 145, 153 (2010) (noting that the standard of review for a motion to dismiss is substantial evidence). On a motion to dismiss,

[t]he test for sufficiency of the evidence in a criminal trial is whether there is substantial evidence to support a finding (1) of each essential element of the offense charged, and (2) that the defendant committed the offense . . . Determination of the witness’s credibility is for the jury.

Id.

Defendant’s argument addresses only credibility. He seems to suggest the State must prove that Ann had “fought him” or that she “did not even try to leave . . . after . . . [Defendant’s] first inappropriate physical contact with her.” Ann was not on trial, nor do either of these statements address the elements of any crime of which Defendant was convicted. To the extent Defendant is arguing Ann’s testimony is “not credible” because she did not take the specific actions he contends she should have, there is no legal requirement that a person who is being sexually assaulted fight her attacker or run away from him. And if Defendant is attempting to argue that Ann consented to his actions, he should make that legal argument, rather than claiming Ann should have fought him off. This argument is without merit.

V. Conclusion

For the foregoing reasons, we conclude there was no error.

NO ERROR.

Judges TYSON and ZACHARY concur.

Report per Rule 30(e).