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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-1098

Filed 5 November 2024

New Hanover County, Nos. 21CRS56776-77

STATE OF NORTH CAROLINA

v.

RICHARD DONALD MILLS, JR.

Appeal by defendant from judgment entered 17 February 2023 by Judge Richard Kent Harrell in New Hanover County Superior Court. Heard in the Court of Appeals 9 October 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General, Heidi M. Williams, for the State.

Kimberly P. Hoppin, for the defendant-appellant.

TYSON, Judge.

Richard Donald Mills, Jr. (“Defendant”) appeals from judgment entered upon the jury’s verdicts for second-degree forcible rape and three counts of second-degree forcible sex offense. We discern no prejudicial error.

I. Background

Nathan Rogers, a Wilmington Police Officer, responded to a “verbal domestic

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disturbance” call on 21 July 2021. Upon his arrival, Officer Rogers encountered twenty-four-year-old K.M. engaged in a verbal altercation with her mother. (pseudonym used to protect the identity of the victim). The argument concerned the recent death of K.M.’s grandmother, with whom K.M. was “very close” and who had “more or less, raised” her. K.M. told the dispatcher she had been diagnosed as on the autism spectrum.

The following morning, K.M. was still upset, feeling suicidal, and left her house planning to kill herself. She had brought her electronic tablet on the walk to record a video to serve as a suicide note, which she later deleted. After walking around for some time, K.M. decided to lay down under a tree in the corner of a parking lot to cool off because she was feeling sick from the July heat.

After about twenty minutes, a man approached her and introduced himself as “Ric.” K.M. testified “Ric,” whom she later identified as Defendant, said he was a “nice guy,” and “said [she] could go back to his place to rest on his bed.” K.M. testified she is too trusting of people because of her autism. She agreed to accompany Defendant because she did not want to return home.

As they walked to Defendant’s place, Defendant placed his arm around K.M. She told him about her dispute with her mother. Defendant told K.M. he was not supposed to have female visitors at his apartment. When they arrived at Defendant’s apartment, K.M. lay down on the bed. Defendant brought her a sandwich and a Coke.

Defendant gave K.M. seven pills, saying they were muscle relaxers and would

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make her feel better. K.M., still feeling sick and suicidal, swallowed all the pills and began to feel drowsy. Defendant handed K.M. a pipe, which she believed contained marijuana, and he continued to pressure her to smoke it until she did so.

Defendant was sitting on the bed with her and started asking her about her sexual experiences. K.M. told Defendant she had never been aroused sexually, to which Defendant responded K.M. must not have been with the right man.

Defendant kissed her, inserted his fingers inside her, and undressed her. K.M. tried to tell Defendant she had been sexually assaulted in the past, but he talked over her. Defendant rubbed his penis into her vagina and attempted to penetrate her vagina. As Defendant started rubbing and pushing his penis into her vagina, she testified she told Defendant multiple times, “I don’t think I want to do this. I don’t feel comfortable with this and stuff.” K.M. testified she had stated “multiple times” she did not feel comfortable, but “he just kept talking over” her. “He told me to relax my legs, that he wasn’t going to do anything. I still didn’t want to do that. I kept on telling him: I don’t feel comfortable[.]”

Defendant finally responded to K.M.’s multiple attempts to convey she felt uncomfortable, by saying, “Oh, you don’t?” He then turned K.M. around and penetrated her anally with his penis. K.M. testified she screamed from the pain. K.M. wanted to leave, but Defendant wanted to ejaculate first. K.M. thought about using pepper spray on Defendant, but was afraid he would use it on her. While Defendant went to the bathroom, K.M. tried to get dressed to leave. Defendant

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returned and inserted his penis into her mouth, which caused her to throw up three times. Defendant returned to the bathroom to clean the vomit off his penis, and K.M. started recording on her tablet with the screen facing down. K.M. testified the oral sex continued for at least an hour. K.M. believed Defendant was videoing or photographing her.

K.M. made up a story about needing to leave to go to an appointment and used the excuse multiple times. She told Defendant she had missed her appointment and would come back so he would let her go. Before she left Defendant's apartment, the two exchanged phone numbers. Defendant later sent a text message to K.M.

K.M. left Defendant's apartment, went home, and told her mother and sister she had been raped. K.M.'s family called 911 to report the incident on 22 July 2021 at 3:09 p.m.

Officer Rogers again arrived at K.M.'s house at 3:47 p.m. Officer Rogers testified K.M. "was stumbling[,] . . . collapsed and leaned against a tree[,] . . . seemed disoriented and different from the [day] before[.]" K.M. relayed to him, consistent with her trial testimony, the events that had happened to her. Officer Rogers also testified K.M. gave him a paper with a phone number and the name "Ric" written on it. Officer Rogers was able to identify Defendant as the suspect based on the note containing the phone number and name.

Paramedics also responded and identified K.M. as showing signs of drug and alcohol use. Paramedics testified K.M. told them about the events that happened to

her, which was consistent with her trial testimony.

Paramedics transported K.M. to the hospital during the evening of 22 July 2021. K.M. consented to a sexual assault examination. The sexual assault nurse, Erin Hall, who had examined K.M., testified K.M.'s allegations were consistent with her trial testimony. Hall testified K.M. had reported vaginal, anal, and oral penetration by Defendant's penis; digital penetration of her vagina; and oral touching of her vagina.

Hall's physical examination of K.M. revealed K.M.'s external genitalia was "extremely red and irritated" with broken skin and injury on the outside, consistent with "blunt force vaginal penetration." Hall's examination of K.M. also showed stool located deep inside her vaginal canal, which could not have been caused by wiping inappropriately. K.M.'s urine sample tested positive for marijuana and for tricyclic antidepressants.

After being released from the hospital around 9:00 p.m. on 22 July 2021, K.M. directed Detective Barksdale to Defendant's apartment and pointed it out as they drove by. Detective Barksdale searched for the phone number, which K.M. had identified as Ric's on the note she had given to Officer Rogers, in databases used by the police department. The number was registered to Defendant. The number was also associated with the apartment address K.M. had pointed out. Messages from the same phone number were extracted from K.M.'s tablet. The sender of the message identified himself in the first message as "Ric."

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A recording at 1:57 p.m. on 22 July 2021, identified as the one K.M. had recorded while the tablet was face-down during the assault, was recovered from her tablet. K.M. identified Defendant's photo out of a photo lineup on 27 July 2021, indicating the person she had selected "[l]ooks kind of like him."

Detective Barksdale executed a search warrant for Defendant's DNA, which they obtained from him at his apartment on 13 August 2021. Detective Barksdale left Defendant a copy of the search warrant, which included a summary of the facts of the case and the probable cause indicating he had committed forcible rape.

Samples from K.M. were tested for the presence of male DNA. Samples of hair from K.M.'s underwear, the vaginal canal swab, the rectal swab, and the oral swab returned trace amounts of male DNA, but the forensic analyst could not determine to whom it belonged.

April Perry, who qualified as an expert in DNA analysis, later conducted a YSTR analysis, specific to male DNA only. The YSTR DNA profile obtained from the external vaginal swab taken from K.M. matched the YSTR profile obtained from Defendant, or any of his direct paternal male relatives.

Detective Barksdale executed another search warrant for Defendant's apartment on 2 September 2021 and found twenty-four different medications in Defendant's apartment, including Trazodone, Doxepin, Butalbital, and Quetiapine. A forensic blood analysis confirmed the presence of Trazodone in K.M.'s blood sample taken at the hospital on the day of the alleged assault.

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K.M.'s urine analysis confirmed the presence of five substances – Doxepin, Norquetiapine, Quetiapine, Trazodone, and Butalbital. Melanie Thornton, a forensic scientist supervisor, testified a person taking such drugs would be sleepy and possibly experience disorientation, dizziness, or a lack of coordination.

Detective Barksdale also seized Defendant's cell phone on 2 September 2021. Forensic analysis of Defendant's phone showed Defendant had downloaded the apps Shreddit-Data Eraser and DigDeep Recovery & Recycle on 17 August 2021, four days after law enforcement officers had obtained Defendant's DNA samples, which first alerted him to the investigation.

No internet web history was present on Defendant's phone between 17 July 2021 and 14 August 2021. Further forensic analysis showed multiple searches Defendant had made from his phone, including how to permanently delete videos from Android devices, the statute of limitations on sexual assaults, sodomy laws, and information regarding the backlog in North Carolina for sexual assault kits.

The State originally obtained indictments on 27 September 2021, charging Defendant with second-degree forcible rape under N.C. Gen. Stat. § 14-27.22(a)(2) (2023), first-degree kidnapping, and three counts of second-degree forcible sexual offense under N.C. Gen. Stat. § 14-27.27(a)(2) (2023). Under N.C. Gen. Stat. § 14-27.22(a)(2) and N.C. Gen. Stat. § 14-27.27(a)(2), the original indictments had charged Defendant with committing the alleged crime while K.M. had a mental disability and was mentally incapacitated.

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The State obtained superseding indictments on 18 July 2022, charging Defendant with second-degree forcible rape under N.C. Gen. Stat. § 14-27.22(a)(1), first-degree kidnapping, three counts of second-degree forcible sexual offense under N.C. Gen. Stat. § 14-27.27(a)(1), and a non-statutory aggravating factor. Under N.C. Gen. Stat. § 14-27.22(a)(1) and N.C. Gen. Stat. § 14-27.27(a)(1), the superseding indictments charged Defendant with committing the alleged crimes by force and against K.M.’s will. N.C. Gen. Stat. §§ 14-27.22(a)(1), 27(a)(1).

During Defendant’s jury trial, in addition to the testimony above, the recording recovered from K.M.’s tablet during the alleged sexual assault was admitted and played for the jury. During the charge conference, the trial court stated it “attempted on the rape and sex offense charges to incorporate the methods of establishing of second degree” to incorporate the (a)(1) force subdivisions and the (a)(2) mental disability and mental incapacity subdivisions for the jury instructions.

The State decided to obtain superseding indictments under (a)(1) because the evidence tended to show K.M. had “repeatedly communicated her unwillingness to participate in the event[,]” and Defendant had allegedly refused to listen.

Defense counsel objected to the court’s attempt to “marry” the instructions for (a)(1) and (a)(2) and asked the court instead to provide only the instruction on (a)(2), i.e., the mental disability and mental incapacity subdivision of the statute.

The trial court sought the State’s position on defense counsel’s request to remove the (a)(1) instructions applicable to force and to provide only the (a)(2) mental

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incapacity and mental disability instructions. The State asserted defense counsel was requesting the removal of the (a)(1) instructions applicable to force because the (a)(2) mental incapacity and mental disability would be harder for the State to prove, as K.M. was an adult and did not tell Defendant she was autistic. The prosecutor said, “I did not think of combining [the (a)(1) and (a)(2) instructions]. I agree with what Your Honor is doing.” The trial court overruled defense counsel’s objections and request for an instruction only on (a)(2), and stated it would continue to provide an instruction on both (a)(1) (force) and (a)(2) (mental incapacity/disability).

The trial court instructed the jury once on the three charges of second-degree forcible sexual offense. The trial court explained to the jury that each charge required evidence tending to show a separate sexual act. The trial court named five different acts that could constitute the sexual act required to be proven beyond a reasonable doubt by the State: cunnilingus, fellatio, anilingus, anal intercourse, and any penetration by an object into the genital opening of a person’s body. The trial court stated: “All 12 of you must agree to your verdict. You cannot reach a verdict by majority vote.” The verdict sheet did not direct which sexual act the jury should consider, nor identify which sexual act the jury had found for each count on which they returned a verdict of guilty, and the counts were not otherwise distinguished from each other.

The jury returned a verdict of not guilty on the first-degree kidnapping offense, but guilty on the remaining offenses. The trial court entered judgment on the jury’s

verdict and imposed four consecutive terms of 83 to 160 months of active imprisonment. The trial court ordered Defendant to register as a sex offender for the remainder of his natural life and ordered he would not be required to enroll in satellite-based monitoring. The trial court also entered a permanent no contact order regarding K.M. Defendant gave oral notice of appeal in open court following sentencing.

II. Jurisdiction

This Court possesses jurisdiction to review a final judgment entered in a criminal case pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2023).

III. Issues

Defendant argues the trial court committed reversible and plain error by instructing the jury on a theory of the offenses not alleged in the indictments. Defendant additionally argues the trial court committed reversible and plain error by instructing the jury on only one count of second-degree forcible sexual offense, and not distinguishing the elements of the offenses on the sheets, jeopardizing his right to a unanimous verdict.

IV. Jury Instructions Different from Indictment

A. Standard of Review

Defendant concedes in his brief he did not object to the trial court's decision at trial to instruct the jury on the (a)(2) mental disability and mental incapacity subdivisions of the statute. Because Defendant failed to object to the (a)(2) mental

disability and mental incapacity jury instructions, this Court reviews unpreserved instructional errors using the plain error standard of review. *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012).

Establishing plain error requires proof the error was fundamental and “had a probable impact” on the jury’s guilty verdict. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). For plain error to be found, it must be probable, not just possible, that absent the instructional error, the jury would have returned a different verdict. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

B. Analysis

1. Plain Error

Defendant argues the trial court committed plain error in instructing the jury on (a)(2) mental disability and mental incapacity subdivisions, while the superseding indictments had charged Defendant only under the (a)(1) use of force subdivisions. Defendant correctly argues: “[A] defendant must be convicted, if convicted at all, of the particular offense charged in the warrant or bill of indictment.” *State v. Williams*, 318 N.C. 624, 628, 350 S.E.2d 353, 356 (1986) (citations omitted). “[T]he failure of the allegations [in a warrant or indictment] to conform to the equivalent material aspects of the jury charge represents a fatal variance, and renders the indictment insufficient to support that resulting conviction.” *Id.* at 631, 350 S.E.2d at 357.

However, “[a] criminal defendant will not be heard to complain of a jury instruction given in response to his own request.” *State v. McPhail*, 329 N.C. 636,

643, 406 S.E.2d 591, 596 (1991). “A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct.” N.C. Gen. Stat. § 15A-1443(c) (2023). “[A] defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review.” *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001), *disc. review denied*, 355 N.C. 216, 560 S.E.2d 141 (2002).

2. Jury Instructions

During the charge conference, the trial court stated it “attempted on the rape and sex offense charges to incorporate the methods of establishing of second degree” to incorporate the (a)(1) force subdivisions and the (a)(2) mental disability and mental incapacity subdivisions for the jury instructions. Defense counsel objected to the court’s attempt to “marry” the instructions for (a)(1) and (a)(2) and asked the court instead to provide solely the instruction on (a)(2), i.e., the mental disability and mental incapacity subdivision of the statutes. The trial court ruled, despite defense counsel’s objection and request for an instruction only on (a)(2), it would continue to provide an instruction that included both (a)(1) (force) and (a)(2) (mental disability/incapacity).

Defendant concedes in his brief he failed to object to the trial court’s decision at trial to instruct the jury on the (a)(2) mental disability and mental incapacity subdivisions. Rather, Defendant requested the trial court instruct the jury only on (a)(2).

The jury instruction, which Defendant now alleges is plain error, resulted in part from his own request. Defendant has not demonstrated prejudice. *See* N.C. Gen. Stat. § 15A-1443(c) (2023). Defendant’s asserted plain error, if any, was also invited, and he “will not be heard to complain” on appeal. *See McPhail*, 329 N.C. at 643, 406 S.E.2d at 596. Defendant’s argument is overruled.

V. Unanimous Jury Verdict

A. Standard of Review

Defendant concedes he failed to object to the trial court’s decision to instruct the jury once on second-degree forcible sexual offense, despite being charged with three counts of the same offense. Because Defendant failed to object to the trial court’s decision to instruct the jury once on second-degree forcible sexual offense, this Court reviews unpreserved instructional errors using the plain error standard of review. *State v. Lawrence*, 365 N.C. 506, 723 S.E.2d 326 (2012). Establishing plain error requires proof that the error was fundamental and “had a probable impact” on the jury’s guilty verdict. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). For plain error to be found, it must be probable, not just possible, that absent the instructional error, the jury would have returned a different verdict. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

B. Analysis

Under N.C. Gen. Stat. § 14-27.27(a), second-degree forcible sexual offense requires proof of a “sexual act.” Our General Statutes define a “sexual act” as

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“[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(4) (2023).

In *State v. Bates*, this Court adopted a four-factor test to determine whether a defendant was denied a unanimous verdict by examining: “(1) the evidence; (2) the indictments; (3) the jury charge; and (4) the verdict sheets.” 179 N.C. App. 628, 633, 634 S.E.2d 919, 922 (2006). Weighing these four factors, this Court in *Bates* held “it [was] possible to match the jury’s verdict of guilty with specific incidents presented in evidence and in the trial court’s instructions. . . . [D]efendant’s right to unanimous verdicts . . . was not violated.” *Id.* at 634, 634 S.E.2d at 923.

Regarding the first two factors, the evidence and the indictments, this Court in *Bates* asserted: “Where the number of incidents equal the number of indictments, the risk of a non-unanimous verdict is substantially lower.” *Id.* at 633, 634 S.E.2d at 922. In *Bates*, the defendant “was indicted on eleven counts of first-degree sexual offense; evidence was presented of six to ten incidents of first-degree sexual offense.” *Id.* at 632, 634 S.E.2d at 921. This Court concluded the indictment of more counts than presented evidence of incidents “certainly creates more opportunity for confusion, [but] it does not necessarily make it impossible to match the jury verdict to the evidence.” *Id.* at 633, 634 S.E.2d at 922.

Here, Defendant was charged with three counts second-degree forcible sexual

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offense. K.M. testified Defendant had digitally penetrated her vagina, penetrated her anally with his penis, and orally penetrated her with his penis. The nurse examiner testified K.M. reported Defendant had touched her vagina with his tongue. Evidence was presented of four qualifying sexual acts under the statute, although Defendant was only charged with three counts of second-degree forcible sexual offenses. Because hearsay evidence of cunnilingus was presented only once by the nurse in the record, the evidence and indictment factors do not weigh heavily in favor of a non-unanimous jury verdict.

Regarding the third factor, jury instructions, the trial court in *Bates* “instructed the jury: ‘[y]ou may not return a verdict until all 12 jurors agree unanimously as to each charge. You may not render a verdict by majority vote.’” *Id.* at 633, 634 S.E.2d at 922. This Court found “[t]hese instructions were adequate to ensure that the jury understood that it must agree unanimously as to each verdict on each charge.” *Id.* The trial court’s explicit instructions requiring a unanimous verdict favored the finding of a unanimous jury verdict. *Id.* at 634, 634 S.E.2d at 922.

Here, the trial court instructed the jury once on the three charges of second-degree forcible sexual offense. The trial court explained to the jury each charge required evidence of a separate sexual act. The trial court named five statutory different acts, which could constitute the sexual act required to be proven beyond a reasonable doubt by the State: cunnilingus, fellatio, anilingus, anal intercourse, and any penetration by an object into the genital opening of a person’s body.

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The trial court instructed the jury: “All 12 of you must agree to your verdict. You cannot reach a verdict by majority vote.” Given the similarities between the jury instructions in *Bates* and the jury instructions in Defendant’s case, “[t]hese instructions were adequate to ensure . . . the jury understood . . . it must agree unanimously as to each verdict on each charge.” *Id.* at 633, 634 S.E.2d at 922. This factor weighs in favor of finding a unanimous jury verdict.

Regarding the fourth factor, verdict sheets, this Court in *Bates* stated, “the question this Court must address is whether it is possible to match a jury’s verdict of guilty with a specific incident.” *Id.* at 634, 634 S.E.2d at 923 (citation and internal quotation marks omitted). This Court restated “where ‘the verdict sheets . . . identified the . . . offenses only by the felony charged . . . and their respective case numbers . . . the verdict sheets did not lack the required degree of specificity needed for a unanimous verdict if they could be properly understood by the jury based on the evidence presented at trial.” *Id.* at 634, 634 S.E.2d at 922 (quoting *State v. Wiggins*, 161 N.C. App. 583, 592-93, 589 S.E.2d 402, 409 (2003)).

The verdict sheet in *Bates* did not contain the case number, but the “verdict sheets listed each charge separately with a notation of the felony charged next to each one.” *Id.* Also, in *Bates*, “[t]he trial court gave date ranges for the different counts to differentiate the charges for the jury. The date ranges did not correspond with any specific evidence at trial; thus, they failed to fully clarify which incidents corresponded to which charges.” *Id.* at 634, 634 S.E.2d at 923.

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This Court in *Bates* found “the use of dates reduced the possibility that different jurors had different acts in mind, and therefore reduced the risk of nonunanimity.” *Id.* The trial court in *Bates* also listed beside some of the charges specific sexual acts. *Id.* This Court found these listings “reduc[ed] the risk that the jurors considered different incidents in reaching their verdict and increase[ed] the likelihood of unanimity.” *Id.*

Here, the jury verdict sheets contained the case number “21-CRS-56776” and the three second-degree forcible sexual offenses were separately identified using a numerical list. Listing dates beside each charge would not have been helpful to the jury in this case, because the evidence tended to show all four of the sexual acts had allegedly occurred in a continuum on 22 July 2021. While the trial court in *Bates* listed beside some of the charges specific sexual acts, this was not required in the absence of a request for a special verdict form, which is not in the record. The listing of dates and specific sexual acts was important in *Bates*, because the verdict sheets in *Bates* did not contain the case number. *See id.* at 634, 634 S.E.2d at 922-23.

Dates and specific sexual acts were not necessary, because the case number was listed on the verdict sheets, the felony charges were separately identified in Defendant’s case, and all acts were alleged to have occurred on the same day. Weighing the four factors from *Bates* and applying them to the present case, it is possible to match the jury’s verdict of guilty with specific sexual acts presented in evidence and consistent with the trial court’s instructions. Defendant’s argument is

overruled. *Id.* at 634, 634 S.E.2d at 923.

VI. Conclusion

Defendant's counsel failed to object to the (a)(2) mental disability and mental incapacity jury instruction as a fatal variance, which he now alleges was plain error to warrant a new trial. If any error resulted from this unpreserved objection, the error was also invited error, as Defendant's counsel had specifically requested and contributed to the variance. N.C. Gen. Stat. § 15A-1443(c); *McPhail*, 329 N.C. at 643, 406 S.E.2d at 596.

Defendant's counsel did not object to the trial court's decision at trial to instruct the jury once on second-degree forcible sexual offenses. Based on the four-factor test established in *Bates*, Defendant has failed to show plain error and prejudice in the jury instruction to warrant a new trial. *Bates*, 179 N.C. App. at 634, 634 S.E.2d at 923.

Defendant received a fair trial, free from plain and prejudicial errors he preserved and argued. We fail to discern reversible error in the jury's verdicts or in the judgments entered thereon. *It is so ordered.*

NO ERROR.

Judges GORE and FLOOD concur.

Report per Rule 30(e).