NO. COA01-1281

NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2002

STATE OF NORTH CAROLINA

v. Caldwell County
No. 00 CRS 6135
00 CRS 5189

CARL DOUGLAS ST. JOHN,
Defendant.

Appeal by defendant from judgment entered 2 August 2001 by Judge J. Gentry Caudill in Caldwell County Superior Court. Heard in the Court of Appeals 14 August 2002.

Attorney General Roy Cooper, by Assistant Attorney General Celia Grasty Lata, for the State.

Leslie C. Rawls, for defendant-appellant.

HUDSON, Judge.

A jury found defendant guilty of three counts of first-degree sex offense of a child and three counts of indecent liberties with a child, and was sentenced to life imprisonment without parole. Defendant appeals.

The State presented evidence indicating that these allegations concerning defendant came to light after the fact when the victim, JM, initiated contact with Steve Hamby, whose telephone number JM found on the bathroom wall in a local retail store. JM met Hamby, they engaged in oral sex, and both returned to their respective homes. JM's mother later overheard her son discussing a

pornographic video on the phone, and later learned he was talking with Hamby. She contacted Hamby and local law enforcement. During the course of the investigation, Hamby revealed to police that JM told him "that he had sex with his step father." The police then began an investigation into defendant's behavior.

At trial, the State presented the testimony of the victim, JM, and numerous other witnesses. JM was twelve years old at the time of the incidents in question and was living with his younger brother, sister, mother and her boyfriend, the defendant. JM testified that defendant played strip poker with him and that defendant "said I had to suck him off. That who ever lost had to suck the other one." JM testified that while his mother was in the hospital, defendant was responsible for caring for him and his two younger siblings. JM indicated that defendant "put KY jelly on my penis and masturbated me," and that defendant showed JM his penis "[a]lmost every day" and was "[k]ind of shaking it at me and my brother." JM testified that on another occasion "we were in the bathroom and he was in there masturbating me." On yet another occasion, defendant was masturbating and JM testified that defendant "ejaculated in my hand." JM indicated that defendant made him "suck him" "fifteen or twenty times." JM explained that he was scared of defendant because defendant "kicked us in the butts" and defendant spanked him every time JM's mother told him to do so.

Defendant denied any wrongdoing, but admitted that he exposed himself to JM and his brother on one occasion, and dared JM to play

strip poker on another occasion. Defendant also admitted physically disciplining JM and his brother, and admitted that he slapped JM's mother. But, he denied that slapping a woman constituted a criminal offense and blamed the district attorney for previous assault on a female charges. Defendant also testified that he was consuming a large quantity of alcohol during the time period that the alleged sexual abuse took place.

A jury convicted defendant of three counts of first-degree sex offense pursuant to N.C. Gen. Stat. § 14-27.4(a)(1) (2001) and three counts of indecent liberties with a child pursuant to N.C. Gen. Stat. § 14-202.1 (2001). The trial court found that the factors in aggravation outweighed any factors in mitigation and sentenced defendant to life imprisonment without parole, as required by N.C. Gen. Stat. § 15A-1340.16B (2001).

Defendant designated four assignments of error, but he brings forward only three in his brief on appeal. The fourth (Assignment of Error No. 2) is therefore abandoned. *See* N.C. R. App. P 28(a) (2001). In his first argument, defendant contends that the trial court committed plain error by admitting evidence concerning defendant's physical discipline of JM. Defendant testified during cross-examination that he "spanked [JM] with a belt" whenever JM's mother told defendant to do so. He testified that on one occasion he kicked JM's younger brother "in the butt," but that he never did that to JM. Defendant also testified that he grabbed JM by the arm, and that he struck JM's mother in the face on more than one occasion. Defendant did not object to this questioning at trial,

but now contends that the court committed plain error in allowing this testimony, because it was not relevant and its prejudicial effect outweighed any possible relevance.

Rule 10(b) of the North Carolina Rules of Appellate Procedure requires that "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(b) (2001). Part (c)(4) of the same rule allows questions not properly preserved to "be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(c)(4) (2001). Although Rule 10 does not limit plain error review to specific kinds of errors, that review has been limited by our Courts to jury instructions and evidentiary rulings. *See State v. Wilson,* 354 N.C. 493, 504, 556 S.E.2d 272, 280 (2001). A plain error is one that "'is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused.'" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *Unites States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 74 L.Ed.2d 513 (1982)). "To prevail on plain error review, defendant must show that (i) a different result probably would have been reached but for the error or (ii) the error was so

fundamental as to result in a miscarriage of justice or denial of a fair trial." *State v. Braxton*, 352 N.C. 158, 197, 531 S.E.2d 428, 451 (2000), *cert. denied* 531 U.S. 1130, 148 L.Ed.2d 797 (2001).

Here, defendant contends that the testimony at issue was irrelevant and any relevance was outweighed by its prejudicial effect. Pursuant to Rule 402 of the North Carolina Rules of Evidence, "[a]ll relevant evidence is admissible." N.C. R. Evid. 402 (2001). Relevant evidence includes "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable then it would be without the evidence." N.C. R. Evid. 401 (2001). Defendant contends that evidence of defendant physically disciplining JM was irrelevant to the crimes charged and tended only to prejudice the jury. Defendant also contends that the evidence should have been found inadmissible in accordance with Rule 404(b), which prohibits admitting "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show that he acted in conformity therewith." N.C. R. Evid. 404(b) (2001). The State responds that the testimony concerning physical discipline of JM and his brother was elicited to corroborate the boys' testimony that defendant physically disciplined them.

In cases with similar fact patterns, testimony of physical abuse by the defendant upon either the prosecuting witness or his or her siblings has been held admissible pursuant to Rule 404(b) to

illustrate the victim's state of mind or to explain why the victim failed to come forward earlier. *See State v. Thompson*, 139 N.C. App. 299, 533 S.E.2d 834 (2000) (holding that evidence of defendant's physical abuse of sexual abuse victim's siblings and family cat in victim's presence was admissible under Rule 404(b)); *State v. Bynum*, 111 N.C. App. 845, 433 S.E.2d 778 (1993), *disc. review denied*, 335 N.C. 239, 439 S.E.2d 778 (1993) (holding that evidence of defendant threatening to kill victim was admissible to explain why victim failed to come forward earlier with allegations of sexual abuse). Here, in response to a question concerning what defendant would do if JM did not comply with his instructions, JM testified that he was scared of the defendant and "[s]cared he would hurt me." He also testified that defendant spanked him "[e]very time mom told him to." Defendant's testimony corroborates JM's testimony about the physical discipline that JM experienced and supports JM's contention that he was afraid of defendant. We do not believe that any possible prejudicial effects outweigh the relevance of this evidence. As it was not error to admit this testimony, it could not amount to plain error.

In his second argument, defendant contends that the trial court erred by sustaining the State's objection to introducing Herb Pearce, a practicing attorney, to testify as to the effect of the habitual felon law on Glenn Abernathy, one of the State's witnesses. Abernathy testified that defendant confessed to the crime while they were both being held in the same cell at the Caldwell County Detention Center. Abernathy also testified to the

crimes he had been convicted of in the past, and the current charges he was released on bond for at the time of defendant's trial. Abernathy testified that he was neither receiving any special consideration in exchange for his testimony, nor was he expecting any benefit from his testimony. He explained that his motivation in coming forward was "I don't like such things being done to kids. That is why I am here and I told what he told me. I think it is very sick for a man to take advantage of a child like that. I have a kid of my own." The defendant sought to introduce Mr. Pearce's testimony, "for the purpose of assist[ing] the jury in understanding the requirements for a charge of habitual felony with regard to Mr[.] Abernathy. I would like to ask Mr[.] Pearce to review Mr[.] Abernathy's record or certain aspect[s] of his record, and review the statute and I would like to ask him as an expert whether or [] not Mr[.] Abernathy could be charged with the [charge] of [habitual] felony." The State objected to Mr. Pearce's testimony as being irrelevant and the court sustained the State's objection, but instructed defendant that he may read to the jury the pertinent habitual felon law. *See* N.C. Gen. State. § 14-7.1 to 14-7.6 (2001). Defendant never read the statute into the record, and withdrew his motion to do so.

We review the trial court's decision to sustain the State's objection to the introduction of Mr. Pearce's testimony for abuse of discretion. *See State v. Parks*, 96 N.C. App. 589, 592, 386 S.E.2d 748, 750 (1989). Here, there was no evidence of any relationship between Mr. Abernathy's criminal charges or subsequent

sentencing and his testimony at defendant's trial. Thus, any relevance was speculative. We find no abuse of discretion on the part of the trial court in excluding this testimony.

In his final argument, defendant contends that the trial court erred in (1) refusing to find defendant's alcohol dependency a mitigating factor, (2) finding that an aggravated sentence was appropriate, and (3) sentencing defendant to life imprisonment without parole. Pursuant to N.C. Gen. Stat. § 15A-1340.16, "the offender bears the burden of proving by a preponderance of the evidence that a mitigating factor exists." N.C. Gen. Stat. § 15A-1340.16(a) (2001). A trial court must consider a mitigating factor where the evidence is "uncontradicted, substantial, and there is no reason to doubt its credibility." *State v. Sanford Video & News, Inc.*, 146 N.C. App. 554, 560, 553 S.E.2d 217, 221 (2001), *disc. review denied,* 355 N.C. 221, 560 S.E.2d 359 (2002) (quoting *State v. Lane*, 77 N.C. App. 741, 745, 336 S.E.2d 410, 412 (1985)). Here, defendant requested, almost as an afterthought, that the trial court find one factor in mitigation.

> COURT: What do you tender as a mitigating factor or circumstances?
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> MR WHISNANT: The defense does not present any mitigating circumstances your Honor or argue any to the court.
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> COURT: All right.
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> MR WHISNANT: Other than the defendant had some alcohol problem with regard to that which impaired his judgment but no mitigating factor. It is the one where is no excuse but might tend to reduce his culpability [sic].
>
> COURT: Very well.

From the defendant's description of the factor, we presume that he is referring to factor 3(a), "[t]he defendant was suffering from a mental condition that was insufficient to constitute a defense but significantly reduced the defendant's culpability for the offense." AOC-CR-605, Felony Judgment Findings of Aggravating and Mitigating Factors (Structured Sentencing), p2. On appeal, defendant argues that the trial court should have found a "non-statutory mitigating factor of chemical dependency, which may be a mitigating factor if a link is shown between the condition and the offense." Defendant presented no evidence on this factor, however, and failed to prove "by a preponderance of the evidence that a mitigating factor exists." N.C. Gen. Stat. § 15A-1340.16 (2001).

Defendant also contends that the trial court abused its discretion by sentencing defendant in the aggravated range. "The sentencing judge, even when required to find factors proved by uncontradicted, credible evidence, may still attribute whatever weight he deems appropriate to the individual factors found when balancing them and arriving at a prison term." *State v. Jones*, 309 N.C. 214, 219, 306 S.E.2d 451, 455 (1983). The trial court found as an aggravating factor that the defendant "took advantage of a position of trust or confidence to commit the offense." AOC-CR-605, factor 15. This factor was proved by "uncontradicted, credible evidence." The trial court found no factors in mitigation and determined that the "factors in aggravation outweigh the factors in mitigation and that an aggravated sentence is justified." We find no abuse of discretion in the court's

sentencing defendant in the aggravated range.

Defendant was convicted of three Class F felonies (taking indecent liberties with children) and three Class B1 felonies (first-degree sexual offense). Pursuant to N.C.G.S. § 15A-1340.16B, the court properly sentenced defendant to life imprisonment without parole.

No error.

Judges WYNN and CAMPBELL concur.

Report per Rule 30(e).