NO. COA10-1199
NORTH CAROLINA COURT OF APPEALS

Filed: 6 September 2011

STATE OF NORTH CAROLINA,

v. Guilford County
No. 08CRS111914, 916-21

TONY ANTWAIN BURCH
Defendant.

Appeal by defendant from judgments entered 19 April 2010 by Judge A. Robinson Hassell in Superior Court, Guilford County. Heard in the Court of Appeals 10 March 2011.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Anita LeVeaux, for the State.

Parish & Cooke, by James R. Parish, for defendant-appellant.

STROUD, Judge.

Defendant appeals his multiple convictions for various sexually related crimes. For the following reasons, we find no error.

I. Background

The State's evidence tended to show that in early 2008, Kit,[1] a fourteen-year-old girl, lived with defendant and his wife ("the Burches"). Defendant performed oral sex on Kit and had sex with her on multiple occasions. In November of 2008, Mary, a fifteen-year-old foster child, began living with the Burches. Defendant performed oral sex on Mary, and in December of 2008, defendant went into Mary's bedroom and performed oral sex on her, had her perform oral sex on him, and had vaginal intercourse with her; afterwards, defendant used a washcloth to wipe them both. The next day Mary reported the incident to her school guidance counselor. Mary was examined by a sexual assault nurse examiner. The nurse found a tear around Mary's vagina, and the nurse determined that "the physical findings from [the] examination . . . [were] supportive of [Mary's] allegations of sexual assault" and Mary "demonstrated symptoms of rape that's consistent with other similarly situated rape or sexual assault victim[s.]" The washcloth defendant had used to wipe both Mary and himself contained DNA from both defendant's semen and Mary.

On 2 February 2009, defendant was indicted for statutory rape or sexual offense with Mary; indecent liberties with a

[1] Pseudonyms will be used to protect the identity of the minors in this case.

child, Mary; sexual offense with Mary, where defendant was in the position of a parent; two counts of statutory rape or sexual offense with Kit; indecent liberties with a child, Kit; and sexual offense with Kit, where defendant was in the position of a parent. After a trial by jury, defendant was found guilty on all charges. Judgments regarding each of the charges were entered; defendant appeals.

II. Indictments

Defendant's first two arguments on appeal are regarding five of his indictments.

A. N.C. Gen. Stat. § 14-27.7(a)

Defendant first contends that judgment should be arrested as to his two convictions for sexual offense where defendant was in the position of a parent because the indictment and the jury verdict sheet are inconsistent. Defendant argues that

> [t]he indictment alleges vaginal intercourse occurred. The problem is with the verdict form. The jury found the defendant "guilty of sex offense – parental role against named minor." . . . N.C.G.S. § 14-27.7 prohibits "intercourse and sexual offenses with certain victims[.]" The statute further reads "if a defendant who has assumed the position of a parent in the home of a minor victim engages in vaginal intercourse or a sexual act with the victim the defendant is guilty of a Class E felony. *See*, N.C.G.S. § 14-27.7(a). N.C.G.S. § 14-27.1 defines sex act as meaning

> "cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse." . . . *See*, N.C.G.S. § 14-27.1(4). Thus the defendant was indicted for one crime but was convicted of another.

(Ellipses and brackets omitted).

Defendant's argument ignores the plain language of N.C. Gen. Stat. § 14-27.7(a). Defendant was indicted for two counts of "SEX OFFENSE-PARENTAL ROLE[.]" Both indictments cite to N.C. Gen. Stat. § 14-27.7(a). N.C. Gen. Stat. § 14-27.7, entitled "[i]ntercourse and sexual offenses with certain victims; consent no defense" states in pertinent part that

> [i]f a defendant [(1)] who has assumed the position of a parent [(2)] in the home of a minor victim [(3)] engages in vaginal intercourse or a sexual act with a victim who is a minor residing in the home . . . the defendant is guilty of a Class E felony. Consent is not a defense to a charge under this section.

N.C. Gen. Stat. § 14-27.7(a) (2007). The body of both indictments stated that defendant "[(1)] assumed the position of a parent [(2)] in the home in which [Kit or Mary], a minor child under the age of 18 years of age, was residing, [and] [(3)] engage[d] in vaginal intercourse with that child."

The trial court instructed the jury that in order for defendant to be found guilty "of felonious sexual activity with a person in defendant's custody . . . specifically . . .

feloniously engaging in vaginal intercourse with a person over whom he had assumed custody" they must find:

> First. That the defendant engaged in vaginal intercourse with the victim. In one case the victim being [Kit] and the other case the victim being [Mary].
>
> Second that the defendant had custody of the victim. Custody is the care, keeping or control of one person by another.
>
> And third, that the defendant had assumed the position of a parent in the home where the victim resided.

The jury checked the blanks on the verdict sheets noting they found defendant "GUILTY OF SEX OFFENSE-PARENTAL ROLE AGAINST [Mary or Kit]." Accordingly, we find no inconsistencies regarding the indictment or verdict sheets regarding defendant's convictions pursuant to N.C. Gen. Stat. § 14-27.7(a). While the indictment and verdict sheets may have failed to list the entire title of N.C. Gen. Stat. § 14-27.7(a), it is clear that the indictment, jury instructions, and the verdict sheet were based upon "vaginal intercourse" and not a "sexual act[,]" either of which is appropriate for a conviction under N.C. Gen. Stat. § 14-27.7(a). *See id.* This argument is without merit.

B. N.C. Gen. Stat. § 14-27.7A(a)

Defendant next contends that judgment should be arrested as to his convictions for statutory rape because again, the indictment and the jury verdict sheets are inconsistent and

because he "may have been denied the right to a unanimous verdict[.]" (Original in all caps.) Similar to his last argument defendant contends,

> The language in the body of the indictments in question alleges the defendant "did engage in vaginal intercourse with named minor." . . .
>
> The problem is with each of the verdict sheets because they each read "guilty of statutory rape/sex offense of named minor."
>
> The body of the indictments allege the crime of statutory rape. Statutory rape requires, and the indictment alleges "vaginal intercourse". *See,* N.C.G.S. § 14-27.7A. The verdict of the jury as to each of these, convicts the defendant of two separate and distinct offenses; one for which the defendant was never indicted. . . . The jury verdict allowed the jury to convict the defendant if they found he either had vaginal intercourse with the named minor or committed a sex offense with the same minor.

(Brackets omitted.) Again, we disagree.

Defendant was indicted for three counts of "STATUTORY RAPE/SEX OFFENSE DEF> =6 YR[.]" All three indictments cite to N.C. Gen. Stat. § 14-27.7A(a). N.C. Gen. Stat. § 14-27.7A, entitled "[s]tatutory rape or sexual offense of person who is 13, 14, or 15 years old" states in pertinent part that "[a] defendant is guilty of a Class B1 felony if the defendant [(1)] engages in vaginal intercourse or a sexual act [(2)] with another person who is 13, 14, or 15 years old and [(3)] the

defendant is at least six years older than the person[.]" N.C. Gen. Stat. § 14-27.7A(a) (2007). The body of all three indictments stated that defendant "[(1)] engage[d] in vaginal intercourse with [Kit or Mary], [(2)] a person of the age of [14 or 15] years. [(3)] At the time of the offense, the defendant was at least six years older than the victim[.]"

The trial court instructed the jury that in order for defendant to be found "guilty of statutory rape of a victim who was fourteen or fifteen years old" they must find:

> First. That the defendant engaged in vaginal intercourse with the victim. . . .
>
> Second. That at the time of the act the victim, [Kit], was fourteen years old on one offense and that the victim, [Kit] was fifteen years old on another offense. And that the victim, [Mary] was fifteen years old at the time of the offense.
>
> And third, that at the time of the act the defendant was at least six years older than the victim, whether the victim was [Kit] or [Mary].

The jury checked the blanks on the verdict sheets noting they found defendant "GUILTY OF STATUTORY RAPE/SEX OFFENSE OF [Mary,]" "GUILTY STATUTORY RAPE/SEX OFFENSE OF [Kit,] and guilty of "STATUTORY RAPE/SEX OFFENSE OF [Kit.]"[2] Accordingly, we find no inconsistencies regarding the indictment, jury instructions,

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[2] The verdict sheet for 08CRS111919 did not have the word "guilty" in front of "STATUTORY RAPE/SEX OFFENSE[,]" but the only other option on the verdict sheet was "NOT GUILTY[.]"

or verdict sheets regarding defendant's convictions pursuant to N.C. Gen. Stat. § 14-27.7A(a), and we fail to see how defendant "may have been denied the right to a unanimous verdict." Again, while the indictment and verdict sheets may have failed to list the entire title of N.C. Gen. Stat. § 14-27.7A(a), it is clear that the indictment, jury instructions, and the verdict sheets were based upon "statutory rape" and not a "sexual act[,]" either of which is appropriate for a conviction under N.C. Gen. Stat. § 14-27.7A(a). (Original in all caps.) Again, these arguments are without merit.

III. Plain Error

Defendant's next ten issues on appeal are regarding various alleged errors which defendant claims establish plain error. These errors, by defendant's account, include: (1-3) hearsay, denying defendant's rights to confront a witness against him and to a fair trial, and erroneous admission of a prior inconsistent statement regarding defendant's son's statements to a social worker and police officer about hearing his father having sex with one of the girls; (4-6) inadmissible opinion testimony, made by the nurse, bolstering the credibility of one of the girl's statements and denying defendant's right to a fair trial; (7) unnecessarily argumentative questions which "invaded the

province [of] the jury and thus denied the defendant a fair trial[,]" (original in all caps), by the prosecution to defendant's wife; (8-9) hearsay and denying defendant's rights to confront, cross-examine, and receive a fair trial by allowing testimony regarding what other individuals had said about defendant's sexual history; and (10) inadmissible opinion testimony which bolstered the credibility of one of the girls, diminished defendant's credibility, "invad[ed] the province of the jury[,] and den[ied] the defendant a fair trial[,]" (original in all caps), regarding the believability of defendant and one of the girls. While some of these issues may have been error, we note the high hurdle presented by plain error review:

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error 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, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)

(citation, quotation marks, and brackets omitted). "Plain error is error so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Leyva*, 181 N.C. App. 491, 499, 640 S.E.2d 394, 399 (citation and quotation marks omitted), *disc. review denied and appeal dismissed*, 361 N.C. 573, 651 S.E.2d 370 (2007). "Plain error is error so fundamental that it tilted the scales and caused the jury to reach its verdict convicting the defendant." *State v. McNeil*, 196 N.C. App. 394, 400, 674 S.E.2d 813, 817 (2009) (citation and quotation marks omitted). Furthermore, "the plain error rule may not be applied on a cumulative basis, but rather a defendant must show that each individual error rises to the level of plain error." *State v. Dean*, 196 N.C. App. 180, 194, 674 S.E.2d 453, 463, *disc. review denied and appeal dismissed*, 363 N.C. 376, 679 S.E.2d 139 (2009).

Here, both Kit and Mary testified to the crimes defendant committed against them. Furthermore, there was corroborating evidence of Mary's crime from Mary's physical examination by the sexual assault nurse examiner and the washcloth with defendant's semen and Mary's DNA. Even if we were to assume *arguendo* that the trial court erred as to each of the individual issues argued

by defendant and that the jury might have reached a different verdict, we cannot say it "probably" would have, *Leyva*, 181 N.C. App. at 499, 640 S.E.2d at 399, or that any one error "tilted the scales and caused the jury to reach its verdict convicting the defendant." *McNeil*, 196 N.C. App. at 400, 674 S.E.2d at 817. Accordingly, this argument is overruled.

IV. Conclusion

For the foregoing reasons, we find no error as to defendant's appealed indictments in regards to their consistency with the jury's verdict and no plain error as to defendants other issues on appeal.

NO ERROR.

Judges HUNTER, JR., Robert N. and THIGPEN concur.

Report per Rule 30(e).