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NO. COA11-465
NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2011

STATE OF NORTH CAROLINA

v.

Pitt County

No. 06 CRS 57348-57350

FREDERICK KENNARD GIBSON

06 CRS 15170-15175

Appeal by Defendant from judgment entered 14 August 2007 by Judge W. Russell Duke, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 13 October 2011.

Attorney General Roy Cooper, by Assistant Attorney General Jill A. Bryan, for the State.

William D. Sperce, for Defendant.

BEASLEY, Judge.

Frederick Kennard Gibson (Defendant) appeals pursuant to N.C. Gen. Stat. § 7A-27(b), § 15A-1444(a), and § 15A-1442 from his convictions of statutory sex offense and indecent liberties with a child. Defendant asserts that the trial court erred by (1) failing to dismiss *ex mero motu* the counts of statutory sex offense and indecent liberties; and (2) allowing Officer Ferrar to read the victim's written statement to the jury.

Additionally, Defendant asserts he was denied effective assistance of counsel by his trial attorney's failure to make a motion to dismiss at the close of the State's evidence. For the following reasons, we find no error.

T.V.¹, the minor victim, was born on 28 July 1990. T.V. met Defendant in 2006 when he was 15 years old. At trial, T.V. testified that he met Defendant while he was walking down the street. Defendant walked up behind him, approached him with a knife and directed him to a nearby shed. Once inside the shed, Defendant told T.V. to remove his clothes and perform oral sex on him. After T.V. complied, Defendant then inserted his penis into T.V. Afterwards, Defendant told T.V. that he had to spend the night with him in the shed. The following morning, T.V. returned home and did not tell his mother about the incident.

At some time after the first sexual incident with Defendant, T.V. was approached by Defendant again on the same street. This time Defendant did not have a weapon. Again, Defendant told him to go to the same shed and once inside, T.V. performed oral sex and Defendant penetrated T.V. Afterwards, Defendant took T.V. home with him. Defendant lived with Tasha Staton, his cousin. Defendant introduced T.V. to Ms. Staton as

¹ To protect the privacy of the victim, his initials are used in this opinion.

his cousin. That same night Defendant told T.V. that he loved him and that he wanted T.V. to be his girlfriend. Subsequently, T.V. and Defendant started "hanging out."

Defendant next had sex with T.V. at Defendant's friend's house. T.V. performed oral sex and Defendant penetrated him in the bathroom of the house. Subsequently, T.V. estimated that Defendant had sex with him seven times from late April to early June 2006.

On 16 October 2006, Defendant was indicted on six counts of statutory sex offense and six counts of indecent liberties with a child. On 14 August 2007 after a jury trial, Defendant was found guilty on all counts. On 8 September 2010, we granted Defendant's petition for writ of certiorari.

Defendant argues that the trial court committed plain error by failing to dismiss *ex mero motu* the statutory sex offense and indecent liberties charges at the close of all the evidence, on the grounds that the credible evidence was insufficient to establish every element of this crime. Defendant concedes that he did not make a motion to dismiss at the close of the State's evidence. We find that Defendant has waived appellate review of these arguments.

It is well established that in the context of criminal cases, "a question which was not preserved by objection noted at trial and which is not deemed preserved by rule of law without

any such action may still be the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error." *State v. Cummings*, 361 N.C. 438, 469, 648 S.E.2d 788, 807 (2007) (citing N.C.R. App. P. 10(c)(4)). Our Supreme Court has concluded that plain error review is limited to issues "involv[ing] either errors in the trial judge's instructions to the jury or rulings on the admissibility of evidence." *State v. Cummings*, 346 N.C. 291, 314, 488 S.E.2d 550, 563 (1997) (citations omitted). Here, Defendant's argument does not fall into either category. Plain error review is inapplicable to review the trial court's failure to intervene where the court had no duty to intervene. Defendant attempts to relieve himself of the duty to make a motion at the trial level and improperly places the burden on the trial court. This argument is unpersuasive. Because Defendant failed to preserve these issues for appellate review and plain error review does not apply, Defendant's first two arguments are waived.

Next, Defendant argues that he was denied effective assistance of counsel by his trial attorney's failure to make a motion to dismiss the charges at the close of the State's evidence. We disagree.

"When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct

fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985) (citing *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984)). Defendant must also prove that he was "prejudiced by his attorney's performance to the extent there exists a reasonable probability that the result of the trial would have been different absent the error." *State v. Skipper*, 146 N.C. App. 532, 537-38, 553 S.E.2d 690, 694 (2001). "[I]f a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 249.

Defendant contends that his trial attorney's performance fell below an objective standard of reasonableness because trial counsel failed to move to dismiss at the close of the State's evidence. Defendant asserts that every criminal trial attorney should move to dismiss for insufficiency of the evidence at the close of the State's evidence, and again at the close of all evidence. Assuming arguendo that Defendant's contention is correct, we conclude that there was sufficient evidence to survive a motion to dismiss on the statutory sex offense charges as well as the charges of indecent liberties. The State

presented sufficient evidence to support the sex offense and indecent liberties charges where T.V. testified in detail concerning his sexual encounters with Defendant.

Defendant argues that the State failed to present sufficient evidence to support the statutory sex offense and indecent liberties because T.V.'s testimony was unreliable and "inherently incredible." Defendant acknowledges the general rule "that the testimony of a single witness will legally suffice as evidence upon which the jury may found a verdict." *State v. Vehaun*, 34 N.C. App. 700, 704, 239 S.E.2d 705, 709 (1977). However, Defendant argues that T.V.'s testimony falls into the exception to this rule. "The credibility of witnesses is a matter for the jury except where the testimony is inherently incredible and in conflict with the physical conditions established by the State's own evidence." *State v. Begley*, 72 N.C. App. 37, 43, 323 S.E.2d 56, 60 (1984).

Defendant argues that T.V. had so many inconsistencies in his version of events that T.V.'s testimony should not have been treated as credible evidence. The inconsistencies are as follows: (1) T.V. initially told officers, and later testified, that Defendant had a knife during their first encounter, but during subsequent interviews he later stated that he was never forced by Defendant to engage in sexual acts; (2) T.V. initially stated that he felt threatened by Defendant and later told

officers that he loved Defendant and engaged in a consensual relationship with Defendant; and (3) T.V. also told officers in subsequent interviews that he was a prostitute and was a prostitute before meeting Defendant.

As the State correctly highlights, none of the inconsistencies between T.V.'s testimony and his statements made to law enforcement contradicted the existence of or negated any of the essential elements of the charged offenses. Moreover, the inconsistencies that Defendant refers to do not rise to the level of "inherently incredible". Our courts have stated that inherently incredible evidence is evidence that is "physically impossible and contrary to the laws of nature." See *State v. Lester*, 294 N.C. 220, 225, 240 S.E.2d 391, 396 (1978); see also *State v. Whitman*, 179 N.C. App. 657, 670, 635 S.E.2d 906, 914 (2006). "It would not have been proper for the trial court—and is not proper for this Court—to accept defendant's invitation to weigh the backgrounds of the alleged victim . . . and conclude as a matter of law that the alleged victim cannot be believed. The argument is one for the jury; it is inappropriate on appeal." *Whitman*, 179 N.C. App. at 670, 635 S.E.2d at 914. Because we can find no prejudice in counsel's failure to make a motion to dismiss at the close of all the evidence where the State had sufficient evidence to support the charges of statutory sex offense and indecent liberties, Defendant's

argument is overruled.

Finally, Defendant asserts that the trial court committed plain error when it permitted Officer Charles Ferrar to read T.V.'s written statement to the jury.

Plain error review should 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[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (internal quotation marks and citations omitted). Under this standard of review, the court will only find reversible error when "absent the error, the jury would have reached a different verdict." *State v. Reid*, 322 N.C. 309, 313, 367 S.E.2d 672, 674 (1988). Because Defendant failed to object to the admission of statements at trial, we review for plain error.

"A witness's prior consistent statements may be admitted to corroborate the witness's courtroom testimony. Corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness." *State v. Harrison*, 328 N.C. 678, 681, 403 S.E.2d 301, 303 (1991) (internal quotation marks and citations omitted). "If previous statements offered in corroboration are generally consistent with the witness's testimony, slight variations between them

will not render the statements inadmissible. Such variations only affect the credibility of the evidence which is always for the jury." *State v. Locklear*, 320 N.C. 754, 762, 360 S.E.2d 682, 686 (1987).

Defendant argues that T.V.'s statements read by Officer Ferrar did not corroborate T.V.'s testimony where T.V. was inconsistent about (1) the placement of the knife during the first encounter; (2) the number of times Defendant performed oral and anal sex on him in one night; (3) whether or not Defendant ejaculated; and (4) the exact place in the house where one of the incidents occurred.

"It is not necessary in every case that evidence tend to prove the precise facts brought out in a witness's testimony before that evidence may be deemed corroborative of such testimony and properly admissible." *State v. Burns*, 307 N.C. 224, 231, 297 S.E.2d 384, 388 (1982). Although T.V.'s statements to Officer Ferrar did not mirror his in court testimony, we find that his statements are sufficiently similar to and do corroborate his testimony. The portions of T.V.'s statement that were not consistent with his testimony affect the credibility of his testimony, but do not contradict his testimony. See *State v. Treadway*, ___ N.C. App. ___, ___, 702 S.E.2d 335, 341 (2010). In addition, we are not convinced that, absent the reading of T.V.'s statements, the jury would have

reached a different verdict when the inconsistent statements do not affect the essential elements of the crimes.

For the foregoing reasons, we find no error.

No Error.

Judges HUNTER, JR. and THIGPEN concur.

Report per Rule 30(e).