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NO. COA02-255

NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2002

STATE OF NORTH CAROLINA

v.

Wake County  
No. 94 CRS 85399

PATRICK KENNETH LEE

Appeal by defendant from judgment entered 26 April 1996 by Judge E. Lynn Johnson in Wake County Superior Court. Heard in the Court of Appeals 7 October 2002.

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

*Ligon and Hinton, by Lemuel W. Hinton, for defendant appellant.*

McCULLOUGH, Judge.

Defendant Patrick Kenneth Lee was tried before a jury at the 22 April 1996 Criminal Session of Wake County Superior Court after being indicted on one count of statutory rape and one count of taking indecent liberties with a minor. The State's evidence showed that SB, aged nine at trial, had an older brother, Alvin, and a younger half-sister, Arille. The three children and their mother lived with many of their mother's boyfriends after SB's mother divorced SB's father. The family first lived with Arille's father and then with defendant from June of 1993 until March of 1994.

While SB's mother worked her evening job, defendant watched the children. In February of 1994, SB's school phoned SB's mother and told her that SB was complaining about pain between her legs. SB's mother immediately took her to Kaiser Permanente where she was examined by pediatrician Dr. Allen Bell.

Dr. Bell's examination revealed SB had a small tear in her vaginal area and a brown frothy discharge. Tests indicated that SB was infected with herpes simplex type two. Dr. Bell reported the suspected sexual abuse to the Department of Social Services (DSS). Dr. Bell testified at trial that a person can contract herpes only by sexual contact. He further testified that in his medical opinion, SB "had penetrating trauma to her vaginal area resulting in a sexually transmitted disease." On cross-examination, Dr. Bell testified that SB had been seen at Kaiser in November of 1992 for complaints of pain in her private area and blood in her underpants. Unlike the 1994 exam, SB did not have vaginal discharge nor an abnormal genital exam in 1992.

DSS referred SB to the Child Sexual Abuse Team at Wake Medical Center. Dr. Denise Everett, the Director of the Team, examined SB on 15 March 1994. Dr. Everett noted that SB's vaginal area displayed abnormalities and that she tested positive for herpes. At trial, Dr. Everett testified that, in her medical opinion, SB had been sexually abused.

SB testified that she liked it when defendant played basketball with her and her brother, but did not like it when

defendant put his penis in her "private part." On one occasion, defendant came into her room while she was making her bed and told her to take off her underwear. Defendant sat down on the bed, took his penis out of his pants, pulled SB on top of him and "stuck his penis in [her]." Defendant wiped "something gooey and stuff" off the bed. Defendant then told SB that if she told anybody, he was going to beat her mother. In the past, defendant had slapped SB's mother and had thrown her down on the couch. On another occasion, defendant entered SB's room while she was sleeping and pulled the covers off her. SB stated that defendant took off his blue robe and stuck his penis in her. After defendant moved out of the house, she wrote notes to her mother and Michael (her mother's boyfriend at the time) stating that defendant had molested her and that she was afraid of dying. SB's mother positively identified SB's handwriting in the notes. SB further testified that Michael did not put his penis inside of her.

Detective Holly Rinaldo of the Raleigh Police Department interviewed SB. SB described three separate events of sexual abuse, which occurred in her bedroom. Detective Rinaldo secured a search warrant for a test of defendant's blood. Dr. Peter Leone, an expert in infectious disease, testified that tests of defendant's blood indicated he was infected with herpes simplex one and two.

Defendant presented evidence as follows: Defendant testified that he began living with SB and her family in October 1993, not in the summer of 1993. He denied sexually abusing SB. Defendant

admitted that he was on federal probation for driving while impaired at Fort Bragg. Durwood Matheny, a forensic document examiner testified that he was unable to identify or eliminate SB or her brother as the author of the notes which indicated defendant sexually abused SB. Beatrice McKenney, SB's paternal great aunt, testified that Michael's conduct with SB was overly friendly and inappropriate. Dr. Moses Elam, a dermatologist, testified that SB's complaints in 1992 were compatible with a herpes episode.

After deliberating, the jury found defendant guilty of first-degree rape and taking indecent liberties with a minor. The trial court sentenced defendant to life imprisonment. Defendant appealed to this Court, arguing that the trial court committed plain error in permitting the State to elicit evidence of his character. Upon careful review of the proceedings below, we disagree with defendant's arguments and conclude he received a fair trial free from error.

Defendant contends the trial court erroneously admitted testimony of his character from Detective Rinaldo and SB's mother. Detective Rinaldo testified, without objection, that she "had information that [defendant] was on parole, so [she] contacted the parole officer" in an attempt to locate defendant. Also without objection, SB's mother testified that, approximately three months into her relationship with defendant, she tested positive for syphilis and defendant tested "weakly positive" for syphilis. SB's mother further testified, without objection, that she suspected defendant was seeing other women, that women used to call the

house, and that defendant had brought a woman to the house.

Defendant argues the admission of evidence that (1) he was on parole, (2) he had relationships with other women while he was dating SB's mother, and (3) he had tested positive for syphilis, violated N.C. Gen. Stat. § 8C-1, Rule 404(b) (2001). Rule 404(b) provides that:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

Defendant argues the aforementioned evidence convinced the jury he was a person of bad character who must have committed the charged offenses.

Defendant did not object to the trial court's instructions, and therefore, asks this Court to review for plain error. Plain error arises when the error is "'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) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), cert. denied, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). "'Before deciding that an error by the trial court amounts to 'plain error,' the appellate court must be convinced that absent the error the jury probably would have reached a different verdict.'" *State v. Gardner*, 315 N.C. 444, 450, 340 S.E.2d 701, 706 (1986) (quoting *Odom*, 307 N.C. at 661, 300 S.E.2d at 378-79).

Assuming *arguendo* that the evidence of defendant's parole, unfaithfulness and weakly positive syphilis test were improperly admitted, we cannot say the trial court committed "plain error," or even prejudicial error under N.C. Gen. Stat. § 15A-1443 (2001). We do not believe there is a reasonable possibility the trial would have had a different outcome if the jury had not known that defendant was on parole, that he was unfaithful to SB's mother, and that he had contracted syphilis. SB testified that defendant came into her room on more than one occasion and stuck his penis in her "private part." SB told her mother, her mother's previous boyfriend, and Detective Rinaldo that defendant had sexually molested her. Both defendant and SB tested positive for herpes simplex type two. We hold that there was substantial evidence that defendant committed the crimes of which he was convicted, irrespective of the testimony elicited from SB's mother and Detective Rinaldo. Accordingly, the trial court did not commit plain error by allowing the testimony into evidence.

No error.

Chief Judge EAGLES and Judge HUDSON concur.

Report per Rule 30(e).