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NO. COA03-1520

NORTH CAROLINA COURT OF APPEALS

Filed: 05 October 2004

STATE OF NORTH CAROLINA

v. Jackson County
No. 03 CRS 390, 396

CARL DEWAYNE MCCLURE

Appeal by defendant from judgment entered 24 July 2003 by Judge James U. Downs in Jackson County Superior Court. Heard in the Court of Appeals 2 September 2004.

Attorney General Roy Cooper, by Assistant Attorney General Sonya M. Calloway, for the State.

Jarvis John Edgerton, IV for defendant-appellant.

STEELMAN, Judge.

Defendant was convicted of taking indecent liberties with a child and of being an habitual felon, and was sentenced to 133 to 169 months imprisonment. From this judgment defendant appeals.

Defendant moved into a trailer in Cullowee in September of 2000 that was inhabited by H.R. (a thirteen year old girl) and H.R.'s mother (mother). Initially each person had their own bedroom, but after a few weeks H.R. asked her mother if she could move into defendant's room, which had one twin bed. Her mother agreed to this arrangement. H.R.'s aunt (Aunt Kim) moved into the room H.R. vacated, and offered to allow H.R. to sleep with her

instead of defendant. H.R. slept with Aunt Kim a few times, then returned to share a bed with defendant. H.R. wore undergarments with shorts and a t-shirt when she slept with defendant. H.R. testified that after she began sleeping with him, defendant started touching her in a way that made her uncomfortable. She testified that defendant would sometimes give her backrubs, then "as time went on he started touching me in other areas." H.R. testified that defendant touched her on her "crotch," sometimes over her shorts and other times under her shorts but over her underwear. She testified that this happened "almost every night" for as long as she continued to sleep with him. She further testified that she would push him away when he did this, and that she wanted to stop sleeping with him but did not because she did not wish to upset him. Defendant would ask her if she was mad at him when she pushed him away, and she would tell him "no" because she "was scared."

In late October or early November 2000, concerned about the sleeping arrangements, another of H.R.'s aunts (Aunt Bobbie) asked H.R. if defendant had been touching her, and H.R. "broke down and cried" and admitted to Aunt Bobbie that defendant had in fact been touching her. Aunt Bobbie informed her cousin (Brenda), and Brenda contacted Child Protective Services. H.R. was removed from her mother's custody by Child Protective Services on 7 November 2000. The testimony at trial revealed that H.R. told the following people largely consistent stories about the abuse: her two aunts, Aunt Bobbie and Aunt Betty; their cousin, Brenda; social worker Laura Brown; her mother; psychologist Betty Tulou; detective Linda

Sutton; and Dr. Judy Seago. Betty Tulou testified that she saw H.R. on three separate occasions and that H.R.'s story was always consistent. Tulou further stated that H.R. told her she had told defendant "she was too young for this" and that she "never wanted [defendant] to touch [her]." H.R. also told Tulou that she was relieved that defendant could not touch her anymore. Detective Sutton testified concerning a statement she took from H.R. on 19 February 2001. This statement corroborated H.R.'s testimony as to the sleeping arrangements, that H.R. told her aunt Betty that defendant had been touching her, that defendant touched her on "the front, bottom part of her privates and that it was on top of her underwear. [H.R.] stated that at least one time [defendant] touched her on the inside of her underwear." This statement was introduced into evidence without objection. Dr. Seago testified that H.R. told her defendant touched her on her vaginal area over her underwear on multiple occasions. Dr. Seago testified that H.R. indicated that she would push defendant away from her and that she told him she was too young. Dr. Seago testified that there was no physical evidence of abuse, but based on the facts as given to her by H.R., she would not expect to find any physical evidence.

At trial, the State called eight witnesses, six of whom testified to statements H.R. made concerning the acts of defendant. Defendant did not object to any of this testimony at trial. At the close of State's evidence defendant rested without presenting any evidence. After deliberation, the jury returned a verdict of guilty of taking indecent liberties with a child and guilty of

being an habitual felon. We will discuss further relevant facts within the context of defendant's assignments of error.

In his first assignment of error defendant argues that the trial court committed plain error by allowing noncorroborative hearsay testimony into evidence as corroboration. We disagree.

According to The North Carolina Rules of Appellate Procedure:

> In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may 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. Rule 10(c)(4)(2003). "The plain error rule applies only in truly exceptional cases." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986). "[T]he term 'plain error' does not simply mean obvious or apparent error . . . ." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). "[T]o reach the level of 'plain error' contemplated in *Odom*, the error . . . must be '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. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993)(citations omitted).

> In other words, the appellate court must determine that the error in question "tilted the scales" and caused the jury to reach its verdict convicting the defendant. Therefore, the test for "plain error" places a much heavier burden upon the defendant than that imposed by N.C.G.S. § 15A-1443 upon defendants who have preserved their rights by timely objection. This is so in part at least because the defendant could have prevented any error by making a timely objection.

Walker, 316 N.C. at 39, 340 S.E.2d at 83.

Defendant specifically assigns as plain error the admission of the following testimony: 1) The testimony of social worker Brown that according to H.R., defendant told H.R. not to tell anyone about the abuse because he might go to jail; 2) psychologist Tulou's testimony that according to H.R., defendant told H.R. "it was ok to fool around." 3) Tulou's testimony that H.R. "was aware that to disclose the molestation might send [defendant] to jail." 4) Detective Sutton's entire testimony about what H.R. told her; 5) Detective Sutton's testimony that according to H.R. defendant had touched her inside her underwear; and 6) Dr. Seago's testimony that according to H.R., defendant "generally would put his hand inside her underwear."

Defendant's argument that Detective Sutton's entire testimony about what H.R. told her constitutes plain error is without merit. The written statement given to Detective Sutton by H.R. was entered into evidence for corroborative purposes without objection, and defendant makes no claim that the trial court's decision allowing this written statement to be entered into evidence constituted plain error. Detective Sutton read the statement verbatim to the jury. Assuming *arguendo* that Detective Sutton's testimony was error, because the same information was entered into evidence by the written statement, allowing the verbal recitation of the statement by Detective Sutton cannot constitute plain error. *See e.g. State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984)("Where evidence is admitted over objection, and the same

evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost.") Defendant never objected to admission of the written statement, and he fails to argue that its admission amounts to plain error.

Defendant's argument that allowing Dr. Seago's testimony into evidence constituted plain error is also without merit. While taking H.R.'s history in preparation for her medical examination of H.R. (for the purpose of determining any physical trauma or disease from the alleged abuse), Dr. Seago asked H.R. about the touching incidents. Dr. Seago testified that H.R. "stated that generally he would put his hand inside of her underwear, but she said he did not actually put his finger inside of her. Once he had touched her on the bottom. She denied any touching of her breast.

"She said he had never used anything other that his hand or fingers, no foreign objects or other body parts of his own. She said he never took off his clothes, nor she hers." This evidence was admissible for substantive purposes as an exception to the hearsay rule for "purposes of medical diagnosis or treatment." N.C. R. Evid. Rule 803(4) (2003).

Rule 803 states "The following are not excluded by the hearsay rule, even though the declarant is available as a witness:"

> (4) Statements made for the purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

“Rule 803(4) requires a two-part inquiry: (1) whether the declarant's statements were made for purposes of medical diagnosis or treatment; and (2) whether the declarant's statements were reasonably pertinent to diagnosis or treatment.” *State v. Hinnant*, 351 N.C. 277, 284, 523 S.E.2d 663, 667 (2000). The declarant must have “had the requisite intent by demonstrating that the declarant made the statements understanding that they would lead to medical diagnosis or treatment.” *Id.* at 287, 523 S.E.2d at 669. “[T]he trial court should consider all objective circumstances of record surrounding declarant's statements in determining whether he or she possessed the requisite intent under Rule 803(4).” *Id.* at 288, 523 S.E.2d at 670.

H.R. was removed from her mother’s home on 7 November 2000, Dr. Seago’s examination of H.R. occurred on 6 December 2000, and Detective Sutton first interviewed H.R. for her criminal investigation of defendant on 19 February 2001. H.R. was examined shortly after the alleged abuse was reported to the Department of Social Services. This examination occurred two and one half months before she was interviewed by the police, suggesting the examination was not for the purpose of prosecuting defendant. *State v. Aguallo*, 318 N.C. 590, 350 S.E.2d 76 (1986). H.R. was examined by a medical doctor, and at the doctor’s office, suggesting she was aware that her statements were being used for the purpose of medical diagnosis or treatment. *State v. Stancil*, 146 N.C. App. 234, 552 S.E.2d 212 (2001); *State v. Summers*, 92 N.C. App. 453, 374 S.E.2d 631 (1988). These circumstances, when viewed together,

provide sufficient evidence of H.R.'s intent in the Rule 803(4) context. *See State v. Hinnant*, 351 N.C. 277, 284, 523 S.E.2d 663, 667 (2000). For the purposes of diagnosis and treatment, Dr. Seago reasonably inquired into the nature of the touching. It was important to know where and how H.R. was touched, especially concerning the presence or absence of penetration, for Dr. Seago to make her determinations concerning the alleged abuse and any necessary treatment. The proffered testimony passes both prongs of the test for admissibility under Rule 803(4).

Further, Dr. Seago's report, including the notes from which she refreshed her memory concerning her interview with H.R., was entered into evidence without objection. Assuming *arguendo* that the testimony of Dr. Seago was improperly admitted, defendant does not now contest the admission of this report, thus defendant can not show prejudice amounting to plain error resulting from the testimony of Dr. Seago concerning the contents of the report. *See e.g. State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984).

Assuming *arguendo* that it was error for the trial court to admit the remaining incidents of testimony of which defendant complains, defendant cannot meet his burden under plain error analysis. The unchallenged evidence is more than sufficient to support the jury's verdict that defendant was guilty of indecent liberties with a child.

In order to prove indecent liberties, the State must prove the defendant is sixteen or older, at least five years older than the

victim, and that he willfully "takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire . . . ." N.C. Gen. Stat. § 14-202.1(a)(1)(2003). That the purpose of the act was for arousing or gratifying sexual desire may be inferred from defendant's actions. *State v. Rhodes*, 321 N.C. 102, 361 S.E.2d 578 (1987); *State v. Rogers*, 109 N.C. App. 491, 428 S.E.2d 220 (1993). In fact, it is not even necessary that defendant touch the victim to be guilty of taking indecent liberties with a minor. *State v. Hicks*, 79 N.C. App. 599, 339 S.E.2d 806 (1986).

The evidence in this case, even excluding *all* the contested evidence, is sufficient to show defendant repeatedly took advantage of the appalling lack of parental protection in H.R.'s household to arouse or satisfy his sexual gratification by fondling H.R. Defendant does not contest that H.R. was under sixteen, or that he was at least sixteen and at least five years older than her. Whether defendant fondled the child on top of or beneath her underwear is of no consequence. The act itself, and the fact that it was repeated again and again despite H.R. pushing his hand away, is plenary evidence that defendant committed an indecent liberty for the purpose of sexual gratification. There is no evidence in the record to suggest any alternate reason for defendant's acts. There is no probability that the admission of the testimony defendant complains of "resulted in the jury reaching a different

verdict than it otherwise would have reached." This assignment of error is without merit.

In defendant's second assignment of error he argues his conviction must be vacated because the trial court gave a jury instruction that included an error of law allowing jurors to improperly consider corroborative evidence as substantive evidence. We disagree.

Defendant admits that he did not object to the jury instruction at trial, but argues the issue is preserved for normal appellate review under N.C. Gen. Stat. § 15A-1446(d)(13) (2003) which states that an "[e]rror of law in the charge to the jury" "may be the subject of appellate review even though no objection, exception or motion has been made in the trial division." Our Supreme Court has held:

> Rule 10(b)(2) [of the North Carolina Rules of Appellate Procedure] and G.S. 15A-1446(d)(13) are in conflict. . . . Rule 10(b)(2) states: "No party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict . . . ." Rule 10(b)(2) is a rule of appellate practice and procedure, promulgated by the Supreme Court pursuant to its exclusive authority under the Constitution of North Carolina, Article IV, Section 13(2). To the extent that G.S. 15A-1446(d)(13) is inconsistent with Rule 10(b)(2), the statute must fail. *See State v. Elam*, 302 N.C. 157, 273 S.E.2d 661 (1981).

State v. Bennett, 308 N.C. 530, 535, 302 S.E.2d 786, 790 (1983); *See also State v. Moore*, 107 N.C. App. 388, 395, 420 S.E.2d 691, 696 (1992). Defendant did not object to the now contested

instruction as required by Rule 10(b)(2), nor does he argue plain error. This assignment of error is without merit.

In defendant's third assignment of error he argues the trial court erred by including a non-pattern jury instruction at trial without notice to the parties in violation of N.C. Gen. Stat. § 15A-1231(b)(2003), and that this instruction prejudiced him. We disagree.

The disputed portion of the trial court's instruction states:

> But there are three things and three things only that you use to come to whatever conclusions you come to in this case. One is the testimony of witnesses that came to you from the mouths of witnesses after they took some kind of oath, that is such testimony as you deem to be believable to the extent of beyond a reasonable doubt. Any reasonable inferences that rise from that same evidence you deem to be believable beyond a reasonable doubt, and any exhibits incidental to, relevant to, germane to that same evidence you deem to be believable to the extent of beyond a reasonable doubt.

We first note that pattern jury instructions "are drafted by a committee of the North Carolina Conference of Superior Court Judges and . . . do not in themselves have the force of the law." *State v. Warren*, 348 N.C. 80, 120, 499 S.E.2d 431, 453 (1998). The fact that a non-pattern jury instruction is given by the court is not error *per se* as suggested by defendant. "When instructing the jury, the trial court is not required to use 'an exact formula,' however, 'its instruction must be a correct statement of the law.'" *State v. McAdoo*, __ N.C. App. __, __, 598 S.E.2d 227, 230 (2004)(citation omitted).

Defendant argues that he was prejudiced by this instruction because it encouraged jurors to consider evidence as substantive that was only admitted for purposes of corroboration, and that no instruction limiting consideration of the evidence for corroborative purposes was given. However, the complained of instruction given by the trial court does not, as defendant argues, encourage the jury to consider corroborative evidence as substantive evidence. The instruction merely admonishes the jurors to limit their consideration to evidence properly before them, namely sworn testimony, permissible inferences therefrom, and exhibits entered into evidence. Defendant acknowledges that he did not object to the instruction at trial as required by Rule 10(b)(2), but argues the trial court's purported violation of N.C. Gen. Stat. § 15A-1231(b) amounts to plain error, or in the alternative that this Court should exercise its power under N.C. R. App. P. Rule 2 to evaluate his argument.

N.C. Gen. Stat. § 15A-1231(b) states:

> Before the arguments to the jury, the judge must hold a recorded conference on instructions out of the presence of the jury. At the conference the judge must inform the parties of the offenses, lesser included offenses, and affirmative defenses on which he will charge the jury and must inform them of what, if any, parts of tendered instructions will be given. A party is also entitled to be informed, upon request, whether the judge intends to include other particular instructions in his charge to the jury. The failure of the judge to comply fully with the provisions of this subsection does not constitute grounds for appeal unless his failure, not corrected prior to the end of the trial, materially prejudiced the case of the defendant.

At the jury charge conference the following exchange occurred:

> THE COURT: Any special requests for instructions by the defense?
>
> MR. HILTY [defendant's attorney]: No.
>
> THE COURT: What about your client's election not to testify, do you want that one?
>
> MR. HILTY: Certainly would want that.
>
> THE COURT: All right.
>
> MR. HILTY: The court will also be giving I take it burden of proof, standard of proof, all those basics?
>
> THE COURT: Yes. I was mainly concerned about the one I just asked you about any other special requests. Anything else by way of precharge conference?
>
> MS. LESLIE [prosecutor]: No, sir.
>
> MR. HILTY: No, sir.

Defendant never requested that the trial court give notice of any other instructions it intended to present to the jury. After the trial court instructed the jury, it inquired of the parties: "Anything else by way of instructions from either the State or the defense?" To which the defendant answered: "None from the defense." The trial court then asked the State and the defense again separately if there were any other requests for instructions, then for a third time asked "Any requests for any further instructions?" Defendant replied in the negative.

Defendant argues that by his statement: "The court will also be giving I take it burden of proof, standard of proof, all those basics?" he was asking the trial court specifically to be informed of any other particular instructions as authorized under N.C. Gen.

Stat. § 15A-1231(b). First, this was not a specific request of the trial court to be informed of additional instructions as required by N.C. Gen. Stat. § 15A-1231(b). Second, the instruction given is one of the "basics" (instructing the jury on what evidence they may consider) and thus defendant was put on notice that this instruction could be given. Finally, defendant was given multiple opportunities to object to the instruction, or request additional instructions, but did not do so. The trial court did not violate N.C. Gen. Stat. § 15A-1231(b).

Assuming *arguendo* that the trial court did violate N.C. Gen. Stat. § 15A-1231(b), we determine that: "Having reviewed this instruction and the whole record, we find that the trial court did not commit 'plain error' such as to require a new trial in spite of the defendant's failure to comply with the requirements of Rule 10(b)(2)." *Bennett*, 308 N.C. at 536, 302 S.E.2d at 790. We decline to review this assignment of error under Rule 2 of the Rules of Appellate Procedure. This assignment of error is without merit.

Because defendant has not argued his other assignments of error in his brief, they are deemed abandoned. N.C. R. App. P. Rule 28(b)(6) (2003).

NO ERROR.

Judges CALABRIA and ELMORE concur.

Report per Rule 30(e).