NO. COA05-1264

NORTH CAROLINA COURT OF APPEALS

Filed: 16 May 2006

STATE OF NORTH CAROLINA

v. Buncombe County
Nos. 04CRS052784-85

DAVID MATTHEW JONES

Appeal by defendant from judgments entered 14 October 2004 by Judge James L. Baker in Buncombe County Superior Court. Heard in the Court of Appeals 8 May 2006.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Jane Rankin Thompson, for the State.

Don Willey for defendant-appellant.

HUNTER, Judge.

A jury found David Matthew Jones ("defendant") guilty of first degree statutory rape and taking indecent liberties with a child. The trial court consolidated the offenses for judgment and sentenced defendant to an active prison term of 288 to 355 months. Defendant gave notice of appeal in open court. For the reasons stated herein, we find no error.

Complainant S.L. testified that in late June 2003 she went roller-skating at the Skate-A-Round with her sister. While she was skating, a friend invited complainant to a party at the home of

Linda Jones ("Jones"), the grandmother of her best friend, Ashley Powell ("Powell"). Complainant telephoned her mother and obtained permission to attend the party, telling her mother that Powell would be there. When complainant arrived at the party, she saw Powell's cousins, Jonathan Sumner ("Jonathan") and Crystal Sumner ("Crystal"), and defendant's sister, Candice. Defendant, who is the son of Jones and the uncle of Powell, Jonathan, and Crystal, arrived at the party with some Smirnoff alcoholic beverages and told "everybody [to] get drunk." After complainant drank three Smirnoffs, "everything sort of started spinning[,]" and she "went and laid down" in a bedroom. When she woke up, defendant was behind her having vaginal intercourse with her. Complainant rolled over in an effort to "make him quit[,]" but defendant "just sort of pulled [her] in and kept on doing it." She then "got up and . . . walked out of the room." Defendant followed complainant, "trying to hug [her] and telling [her] that everything was okay." Complainant told Candice what had happened prior to leaving to walk to Powell's house.

As a result of the assault, complainant testified that her vaginal area "hurt really bad, like [she] couldn't walk right." She felt as though she "had done something wrong[,]" because she had "lied to [her] parents and went and got drunk and then that had happened." When she arrived at Powell's house, Powell "could tell something was wrong[.]" The two girls walked to Powell's father's house, where complainant told Powell that defendant had raped her. When complainant reported the incident to her mother the next day,

her mother "looked at [her] and said, don't lie." Believing that "if [her] mom didn't believe [her], then nobody else would[,]" complainant did not tell anyone else about the rape until the Department of Social Services interviewed her at school.

Powell testified that defendant is her uncle, and Jones is her grandmother. In late June 2003, complainant walked past her house without speaking to her on the morning after the party at Jones's house. After they walked to Powell's father house, complainant "took [her] in the back bedroom and told [her] that [defendant] raped her" at Jones's house. As complainant was talking about the rape, "her voice kind of changed and her eyes started watering." Complainant told Powell not to tell anyone what had happened to her.

Jonathan testified he attended a party in June 2003 at the home of his grandmother Jones, who is defendant's mother. Jonathan's sister, defendant, and complainant were at the party. Complainant went to sleep on a mattress in the back bedroom. Jonathan got onto the mattress and was preparing to go to sleep when defendant entered the room and laid down on the mattress behind complainant. Concerned because of "the age difference" between defendant and complainant, he "looked up, and . . . saw [defendant's] penis go in [complainant's] vagina." Complainant, who had been sleeping, appeared to be "confused." After telling defendant that what he was doing was "sick[,]" Jonathan walked out of the bedroom into the living room and told Crystal what was happening. Approximately one week later, complainant confronted

Jonathan and "was wondering why [he] told her sister about it, and she was pretty upset with [him]." Jonathan did not report the incident until he was approached by police "six months to a year" later. He gave a written statement to police on 27 June 2004.

Crystal testified that she was "pretty close" to defendant and loved him. She was not good friends with complainant and had only met her "once or twice." During the party at Jones's house, defendant was drinking Smirnoff Ice and gave alcohol to complainant. When complainant began to remove her shirt, Crystal "told her that she couldn't do that and . . . helped her put her shirt back on." Complainant eventually went to sleep. At some point during the night, Crystal's brother, Jonathan, came out of the bedroom where complainant had gone to sleep and entered the living room. Jonathan was "[u]pset" and "said that [complainant] was riding [defendant]." Hearing complainant scream, Crystal went into the bedroom and saw defendant "on top of [complainant]" having sex with her. Crystal pulled her uncle off of complainant and brought her into the living room. Crystal did not report the incident but subsequently gave a written statement to police on 27 February 2004.

Laurie R. Dotson ("Dotson"), an investigative social worker for the Buncombe County Department of Social Services, testified that complainant disclosed the rape to her during an interview at North Buncombe Middle School on 24 October 2003. After initially stating that defendant "tried to put his hands down her pants" at Jones's house, complainant began "crying uncontrollably" and said

"that she woke up from sleep and that [defendant] was having sex with her." When Dotson asked her what "having sex" meant, complainant "pointed to her vaginal area and said, 'He was inside of me with his dick.'" Complainant also told Dotson that Powell was with her at Jones's house and did not reveal that she had been drinking. Dotson reported the conversation to the Woodfin Police Department.

Woodfin Police Officer James Marsh ("Officer Marsh") testified that he interviewed complainant on 5 January 2004, and "she said that, 'I went to bed. When I woke up [defendant] was behind me having intercourse with me.'" On 3 February 2004, Officer Marsh interviewed defendant about the party at Jones's house. Defendant "denied any involvement in it," and claimed he had spent the evening at a church singing group in Bardnardsville with a friend named Will. Defendant did not know Will's last name or where he lived. Officer Marsh repeatedly called the telephone number provided by defendant for Will, but was unable to make contact with him. On 27 February 2004, Officer Marsh spoke to Jonathan and Crystal. Jonathan told Officer Marsh that he "saw [defendant] penetrate [complainant] from behind." Crystal "stated . . . that she was in the other room when she heard [complainant] screaming. She went in and [defendant] had her down raping her, and she said that he was on top of [complainant] from the front." Officer Marsh interviewed defendant a second time on 2 March 2004. Asked by Officer Marsh about his whereabouts on the night of the alleged rape, defendant said that "he and Will left Will's work and went to

the Jones house for a few minutes, and that they then went to Pizza Hut and ate pizza and drank beer for about an hour-and-a-half" before visiting two friends. When Marsh reminded defendant of his previous claim that he spent the evening in question singing at church, defendant replied "that he didn't think that he should have to tell [Officer Marsh] his life story."

The State adduced evidence that complainant was born on 5 March 1990, and was thirteen years old at the time of Jones's party. Defendant was born on 9 February 1983, and was thus twenty years old in June 2003.

On appeal, defendant claims the trial court committed plain error by allowing the State's expert witness to opine that complainant had been sexually assaulted despite the lack of any physical evidence of assault. Defendant avers that the expert's testimony was inadmissible under N.C.R. Evid. 702, amounting to an improper endorsement of complainant's credibility. Acknowledging that he failed to object to the challenged testimony at trial, *see* N.C.R. App. P. 10(b)(1), defendant assigns plain error to its admission pursuant to N.C.R. App. P. 10(c)(4).

> Where, as in this case, a defendant has failed to object, the defendant has the burden of showing that the error constituted plain error, that is, (i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial.

State v. Bishop, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997) (citing *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987)).

Elizabeth Osbahr ("Osbahr"), who examined complainant at Mission Children's Clinic on 28 October 2003, was received by the court as an expert in medicine and pediatric nursing. Osbahr testified that, because complainant had entered puberty, her hymen was fully "estrogenized and distensible." Therefore, although Osbahr found no tearing or other injury to complainant's vagina, she explained that "it would have been very unlikely to have found evidence of sexual assault." When asked what conclusions she drew from her examination of complainant, Osbahr testified without objection as follows:

> *I concluded by way of the history that I got that she had been sexually assaulted.* Her exam, genital exam, was normal which in my opinion did not preclude the possibility that she was assaulted. I also had gotten history from her mother that she had been angry, she had been depressed, she was feeling a lot of blame and feeling that everyone at school knew about it.
>
> These are very common things that adolescents feel when a situation like that has happened to them. That there was some problem with her grades, that they had gone down. So all of this seemed to corroborate the fact that she had gone through a traumatic event and was suffering the consequences of that.

(Emphasis added.) On cross-examination, defendant elicited an admission from Osbahr that she did not personally discern a downward trend in complainant's grades after the alleged rape, but had relied on information provided by complainant's mother.

It is well-established that, "'[i]n a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred

because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility.'" *State v. Bush*, 164 N.C. App. 254, 258, 595 S.E.2d 715, 718 (2004) (quoting *State v. Stancil*, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002)). Here, notwithstanding a "normal" genital exam, Osbahr offered her conclusion that complainant had been sexually assaulted based on the history reported to her by complainant's mother. This testimony was improper, and it was error to allow it into evidence.

Having found error, we must now determine whether the admission of Oshahr's opinion testimony amounted to "plain error" under Rule 10(c)(4). In conducting plain error review, "[w]e examine the entire record to decide whether the error 'had a probable impact on the jury's finding of guilt[]' . . . [and] whether, without this error, the jury would have 'reached a different verdict.'" *State v. Blizzard*, 169 N.C. App. 285, 293, 610 S.E.2d 245, 251 (2005) (quoting *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983); *State v. Riddle*, 316 N.C. 152, 161, 340 S.E.2d 75, 80 (1986)).

The admission of improper expert opinion of sexual abuse has been held to be plain error where the State's case against a defendant was essentially limited to "the mere testimony of the victim and the other witnesses's corroboration" thereof. *State v. Delsanto*, ___ N.C. App. ___, ___, 615 S.E.2d 870, 875 (2005) (citing *State v. Couser*, 163 N.C. App. 727, 731, 594 S.E.2d 420, 423 (2004)); *accord State v. Ewell*, 168 N.C. App. 98, 102-03, 606

S.E.2d 914, 918, *disc. review denied*, 359 N.C. 412, ___ S.E.2d ___ (2005); *Bush*, 164 N.C. App. at 260, 595 S.E.2d at 719 (finding plain error where "any and all corroborating evidence is rooted solely in [the victim]'s telling of what happened, and that her story remained consistent"). In such cases, we have reasoned, the victim's "credibility was the strength of the State's case and . . . any comment on [the victim]'s credibility weighed heavily" against the defendant. *Ewell*, 168 N.C. App. at 106, 606 S.E.2d at 920. By contrast, this kind of improper expert testimony has been deemed not to constitute plain error where the State introduces substantial additional evidence of the sexual assault beyond the testimony and corroborative statements of the victim. *See Stancil*, 355 N.C. at 267, 559 S.E.2d at 789 ("[t]he overwhelming evidence against defendant leads us to conclude that the error committed did not cause the jury to reach a different verdict than it otherwise would have reached"); *Blizzard*, 169 N.C. App. at 294-95, 610 S.E.2d at 252 (finding no plain error where witnesses observed the defendant running naked from the victim's house, heard the victim scream, and found the victim crying and claiming that the defendant had raped her); *cf. also State v. Figured*, 116 N.C. App. 1, 11, 446 S.E.2d 838, 844 (1994) (finding no plain error where expert improperly opined that defendant was the perpetrator of sexual abuse).

The State adduced compelling direct evidence of defendant's rape of complainant independent from her testimony and her prior consistent statements to other witnesses. Specifically,

defendant's niece and nephew both testified that they saw him having vaginal intercourse with complainant at Jones's party in June 2003. Their testimonies were corroborated by their statements to Officer Marsh during the course of his investigation. Moreover, the record contains no evidence that Jonathan and Crystal were estranged from their uncle or otherwise possessed a motive to testify falsely against him in a criminal prosecution for rape. In light of these two additional eyewitnesses, the State's case against defendant was not dependent upon the complainant's credibility. Therefore, we hold Osbahr's opinion testimony did not have a probable impact on the jury's verdict or otherwise undermine the fundamental fairness of defendant's trial. *See Blizzard*, 169 N.C. App. at 294-95, 610 S.E.2d at 252. Accordingly, defendant's assignment of plain error is overruled.

The record on appeal includes additional assignments of error not addressed by defendant in his brief to this Court. Pursuant to N.C.R. App. P. 28(b)(6), we deem them abandoned.

No error.

Judges WYNN and McGEE concur.

Report per Rule 30(e).