NO. COA05-305

NORTH CAROLINA COURT OF APPEALS

Filed: 06 June 2006

STATE OF NORTH CAROLINA

v. Rowan County
No. 00 CRS 50898, 50899, 50900

JERRY MARK BROWN

Appeal by defendant from judgments entered 6 May 2004 by Judge Christopher M. Collier in Rowan County Superior Court. Heard in the Court of Appeals 3 November 2005.

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

Criminal Defense Associates, by Lorilee M. Gates, pro hac vice, for defendant-appellant.

ELMORE, Judge.

Jerry Mark Brown (defendant) was indicted for one count of statutory rape and statutory sex offense with M.P. and one count of taking indecent liberties with a child with E.P. At trial, M.P. testified that defendant was her mother's boyfriend at the time that she attended West Rowan Middle School and lived with them and her older sister, E.P., in Cleveland, North Carolina. Patricia Smith, the mother of E.P. and M.P., worked at a convenience store where her shifts began at around 4:00 a.m.

On 4 April 2000 M.P. told her school counselor and Deputy Jonathan Brindle of the Rowan County Sheriff's Department that

defendant had molested her. M.P. testified that the night before she spoke to these officials, defendant had oral sex and sexual intercourse with her. Deputy Brindle contacted the Department of Social Services, and Kathy Tart came to talk to M.P. and E.P. Both M.P. and E.P. were examined at the hospital and then placed in a group home. A rape kit was prepared during the examination of M.P. Agent Brenda Bissette of the State Bureau of Investigation testified that she analyzed sperm samples taken from M.P.'s rape kit and that the sperm was from defendant.

E.P. testified that her mother started dating defendant when they lived in Iredell County. After moving to Cleveland, North Carolina, her mother worked at a convenience store and defendant worked as a mechanic. E.P. stated that she liked defendant until they all moved into the house in Cleveland. Defendant would get into bed with E.P. at night and touch her vagina with his fingers. Defendant first began touching her when they still lived in Iredell County. E.P. reported defendant's behavior to a guidance counselor, who told E.P. and her mother to speak to the police. E.P.'s mother told E.P. to tell the police that she made up the accusation for attention.

After they moved to the Cleveland house, defendant had sexual intercourse with E.P. at nighttime after her mother had gone to sleep. E.P. stated that in April 2000 she and M.P. were taking a break from some yard work and smoking cigarettes that defendant had given them. M.P. and E.P. talked about defendant's abuse, and M.P. said that she was going to tell someone at school the next day.

E.P. was called to the office at school the following day and interviewed by Deputy Brindle. She reported to him that defendant had been touching her in the wrong spots.

Deputy Brindle testified that he worked at West Rowan Middle School as a resource officer. He spoke to both M.P. and E.P. on 4 April 2000. M.P. was too distraught to speak, but she wrote "molestation" on a piece of paper. Approximately two days later, Chief David Allen of the Cleveland Police Department came to the school. Chief Allen and Deputy Brindle were present when M.P. called defendant on his cellular phone from a telephone in the school's main office.

Dr. Kathleen Russo testified that she was a pediatrician at Salisbury Pediatric Associates. She examined M.P. and E.P. on 19 May 2000. M.P. told her that defendant began dating her mother four to five years ago and that defendant started to sexually abuse her within six to nine months of the time defendant and her mother began dating. The last time the sexual abuse occurred was on 3 April 2000. Dr. Russo testified that M.P.'s examination was consistent with multiple episodes of penile penetration of her hymen and vagina. E.P. told her that the last time defendant sexually abused her was in November 1999. Dr. Russo stated that E.P.'s examination was also consistent with multiple episodes of penile penetration.

Defendant presented no evidence at trial. The jury returned guilty verdicts on all charges. Defendant was sentenced to 269 to 332 months imprisonment on the statutory rape and given a

consecutive sentence of 269 to 332 months for the statutory sex offense and indecent liberties. Defendant appeals.

I.

Defendant assigns error to the trial court's denial of his motion to dismiss the charges against him at the close of all evidence. First, we note that in his assignments of error, defendant asserted a fatal variance between the date of the indecent liberties offense and evidence at trial as a basis for the erroneous denial of the motion to dismiss. But defendant does not make this argument in his brief. Accordingly, we deem this issue abandoned under our Rules of Appellate Procedure. *See* N.C.R. App. P. 28(b)(6).

With respect to the statutory rape charge, defendant argues that there was not sufficient evidence of the essential element that the victim was 13, 14, or 15 at the time of the offense. *See* N.C. Gen. Stat. § 14-27.7A (2005). The State presented sufficient evidence that M.P. was 13 at the time of the offense. M.P. testified that she was born on 4 August 1986. She also testified that she reported defendant's alleged sexual abuse to school officials on 4 April 2000, at which time she was 13 years old. The State's evidence showed that M.P. was 13 years old at the time of the most recent sexual intercourse:

> Q: What do you remember about the night before you went to school and told them?
>
> A: Just that - well, any night that he would come in there, it just seemed like it was really early in the morning, you know, kind of like maybe 11:00 or 12:00, really late at night or something. Then he came in there and

> he took my clothes off and performed oral sex and then he had sexual intercourse.

With respect to the charge of first degree sex offense, defendant again argues that there was insufficient evidence of the essential element that the victim was 13, 14, or 15 at the time of the charged offense. *See* N.C. Gen. Stat. § 14-27.7A. The State's evidence showed that M.P. was 13 years old at the time of the most recent oral sex. M.P. testified that defendant performed oral sex on 3 April 2000. These two assignments of error are overruled.

Defendant also challenges the sufficiency of the evidence to support the charge of taking indecent liberties with a child, involving E.P. Defendant contends, essentially, that the acts were not performed for purposes of arousing or gratifying sexual desires. E.P. testified to the following incidents:

> Q: Between your legs?
>
> A: Uh-huh. Yes, ma'am.
>
> Q: All right. What would he touch you with between your legs?
>
> A: His fingers.
>
> . . .
>
> Q: Did he touch you on the inside or outside of your vagina, your private?
>
> A: Yes.
>
> Q: Which, both or one or the other?
>
> A: Both.
>
> Q: Where else, if anywhere, would he touch you?
>
> A: He tried to go up my shirt a couple times.

This Court has explained that evidence of the defendant's purpose in touching the victim need only be sufficient for a jury to infer arousal or sexual gratification. *See State v. Rogers*, 109 N.C. App. 491, 505-06, 428 S.E.2d 220, 228-29, *cert. denied*, 334 N.C. 625, 435 S.E.2d 348 (1993), *cert. denied*, 511 U.S. 1008, 128 L. Ed. 2d 54 (1994); *State v. Slone*, 76 N.C. App. 628, 631, 334 S.E.2d 78, 80 (1985); *State v. Campbell*, 51 N.C. App. 418, 421, 276 S.E.2d 726, 729 (1981). The fact that the State presented no direct evidence of defendant's purpose is inconsequential, as mental state is seldom provable by direct evidence. *See Campbell*, 51 N.C. App. at 421, 276 S.E.2d at 729. Here, the State presented evidence that defendant touched E.P.'s vagina with his fingers. Such evidence is sufficient to permit rational jurors to infer that defendant had the requisite intent.

II.

Defendant contends that the trial court erred in denying his motion to suppress evidence from the 5 April 2000 search where the State seized blood, saliva, and hair. Defendant argues that in order to collect defendant's bodily fluids and hair sample, the State was required to use a nontestimonial identification order pursuant to N.C. Gen. Stat. § 15A-272. While the State could have elected to use this procedural method of obtaining defendant's bodily fluids and hair sample, it was not required to do so. In *State v. McLean*, 47 N.C. App. 672, 674, 267 S.E.2d 695, 696 (1980), this Court stated that a search warrant was a permissible method to obtain nontestimonial, i.e., physical, evidence from a defendant.

In that case, as the Court noted, the State's investigative officers *elected* not to use a nontestimonial identification order pursuant to N.C. Gen. Stat. § 15A-272. *See id.*; N.C. Gen. Stat. § 15A-272 (2005) ("A request for a nontestimonial identification order may be made prior to the arrest of a suspect or after arrest and prior to trial. Nothing in this Article shall preclude such additional investigative procedures as are otherwise permitted by law."). Here, the State executed a search warrant for defendant's bodily fluids and hair sample. Defendant does not challenge the probable cause to support the search warrant issued for this nontestimonial evidence. We overrule defendant's assignment of error.

III.

Defendant assigns error to the trial court's denial of his motion to suppress the recorded phone call between M.P. and defendant. Defendant contends that M.P., who was 13 years old at the time, was incapable of giving consent to a recorded phone conversation. Defendant is correct that an interception of an oral communication violates N.C. Gen. Stat. § 15A-287 unless at least one party to the communication gives consent to the recording. However, defendant's contention that a minor is absolutely incapable of giving such consent is unpersuasive. In support of his contention, defendant cites to *Kroh v. Kroh*, 152 N.C. App. 347, 567 S.E.2d 760 (2002), *disc. review denied*, 356 N.C. 673, 577 S.E.2d 120 (2003). In that case, the plaintiff placed voice-activated recorders throughout the family home to record her

husband's communications. This Court considered whether the plaintiff's actions violated the Electronic Surveillance Act, N.C. Gen. Stat. § 15A-287, because neither her husband nor the other parties to the communications gave consent to the interception. However, the Court noted that a custodial parent can vicariously consent to a recording on behalf of a minor child based upon a good faith, reasonable belief that it is in the best interest of the child. *See Kroh*, 152 N.C. App. at 352-53, 567 S.E.2d at 764.

In *Kroh*, the Court addressed the validity of a parent's consent on behalf of her children where the children were not aware of the recording. *Kroh* is inapposite to the instant case because M.P. was an informed and willing participant in the recording of the phone call between herself and defendant. Chief Allen testified that M.P. agreed to participate in the recorded conversation because she felt that she needed some proof. Defendant cites no authority, and we are aware of none, defining a minor as incapable of giving valid consent to a phone recording. In fact, our adoption statues require the consent of a minor the age of twelve or older prior to an adoption. *See* N.C. Gen. Stat. § 48-3-601(1) (2005) (a minor over the age of twelve must consent to adoption). We hold that M.P.'s consent to the recorded phone call was effective and that the trial court properly denied defendant's motion to suppress.

IV.

Defendant's next assignment of error relates to the opinion testimony of Dr. Kathleen Russo. Dr. Russo testified that, based

upon her physical examination, both M.P. and E.P. were victims of sexual abuse. Defendant contends that the testimony of Dr. Russo improperly bolstered the credibility of the victims.

In the absence of physical evidence supporting a medical diagnosis of sexual abuse, an expert's testimony that sexual abuse occurred is impermissible under Rule 702. *See State v. Stancil*, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002); *State v. Dixon*, 150 N.C. App. 46, 52, 563 S.E.2d 594, 598, *per curiam aff'd*, 356 N.C. 428, 571 S.E.2d 584 (2002). If there is clinical evidence supporting child sexual abuse, however, it is proper for the expert to testify that the child was in fact abused even though such testimony also tends to corroborate the child's statements. *See State v. Dick*, 126 N.C. App. 312, 315-16, 485 S.E.2d 88, 89-90, *disc. review denied*, 346 N.C. 551, 488 S.E.2d 813 (1997). Here, there was clinical evidence of sexual abuse. Dr. Russo testified that the hymen was asymmetrical, thinner in some areas and thicker in other areas. In her expert opinion, this clinical evidence is consistent with repeated penile penetration. Dr. Russo conducted her physical examinations of M.P. and E.P. on 19 May 2000. This was approximately one month after the most recent date of the alleged sexual abuse of M.P. and six months after the most recent date of alleged sexual abuse of E.P. We find the cases of *State v. Trent*, 320 N.C. 610, 359 S.E.2d 463 (1987), and *State v. Parker*, 111 N.C. App. 359, 432 S.E.2d 705 (1993), in which this Court held an expert's opinion testimony on sexual abuse was improperly admitted, distinguishable. *See Trent*, 320 N.C. at 614, 359 S.E.2d

at 465-66 (pelvic exam, done four years after date of alleged sexual abuse, revealed only that victim's hymen was not intact); *Parker*, 111 N.C. App. at 366, 432 S.E.2d at 709-10 (expert's opinion of sexual abuse based only upon interview of victim and that the hymenal ring was not intact). Defendant's assignment of error is overruled.

V.

Defendant next contends that the trial court committed plain error in failing to intervene, *ex mero motu*, to rule inadmissible the testimony of the State's witnesses on certain prior bad acts of defendant. Defendant points to testimony on the following incidents during the time that defendant lived with M.P. and E.P. in the Cleveland, North Carolina home: (1) on the day before M.P. and E.P. reported sexual abuse to school officials, defendant hit them with a belt; (2) defendant purchased cigarettes for M.P. and E.P.; and (3) defendant hit the 16-year-old brother of M.P. and E.P. during a fight with him. Defendant argues that this evidence was inadmissible under Rule 404(b), irrelevant, and prejudicial.

"The plain error rule applies only in truly exceptional cases. 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. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986). Defendant cannot show plain error in the instant case. Viewed in context, it cannot be said that the three incidents of misconduct referenced by defendant caused the jury to convict defendant of the offenses

charged. Defendant's disciplinary methods were not connected to any of the elements of the sexual offenses charged or to a propensity to commit sexual abuse. Defendant's assignment of error is without merit.

VI.

Defendant contends that his conviction should be reversed based upon a conflict of interest that affected the performance of his trial counsel. He asserts that this conflict violated his Sixth Amendment right to effective assistance of counsel. Defendant had two attorneys representing him at trial, Mr. Jordan and Mr. Brackett. Mr. Jordan had represented M.P. in a juvenile matter in 2001. The State filed a motion *in limine* to protect the attorney-client privilege that Mr. Jordan had with M.P. The trial court ruled that any cross-examination of M.P. would not be based upon information that Mr. Jordan received as a result of his past representation of M.P.

In order to prevail on his ineffective assistance claim, defendant must show prejudice. *See Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984) (defendant must demonstrate that counsel's performance was deficient and that it prejudiced his defense); *State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985) (adopting *Strickland* prejudice analysis for ineffective assistance claims). In the context of conflicts of interest, "[p]rejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's

performance.'" *Strickland*, 466 U.S. at 692, 80 L. Ed. 2d at 696.

Here, the trial court held a hearing on the State's motion. Mr. Jordan testified that his representation of M.P. three years earlier consisted of a brief conversation with M.P.'s mother in his office and making one court appearance; Mr. Jordan stated that he was not involved in the disposition of M.P.'s juvenile matter, which is usually where the attorney finds out the most information about the juvenile. Mr. Jordan stated that he pulled his file on M.P.'s representation but did not share any of it with Mr. Brackett. Mr. Brackett confirmed that he never received any material from Mr. Jordan from this representation of M.P. The trial court ruled that Mr. Brackett would be permitted to use any appropriate material for cross-examination of M.P., so long as the material was not obtained from the prior representation of M.P. Defendant has simply failed to show that his attorneys were actively representing conflicting interests. As he cannot establish prejudice, his claim must fail. *See State v. Roache*, 358 N.C. 243, 278, 595 S.E.2d 381, 404 (2004).

VII.

Finally, defendant assigns error to the trial court's ruling not to admit evidence proffered by defendant that he asserts is relevant to the credibility of E.P. and M.P. as witnesses. Defendant argues that the trial court erred in ruling that he could not inquire into the following subjects on cross-examination: (1) a statement that E.P. made to Dr. Russo in May of 2000 that she had sex for the first time two years ago, when she was 13 years old,

with a young man; (2) a statement that E.P. made to a social worker in 2001 that M.P. was a trouble maker and lied all the time; and (3) statements E.P. made to social workers that she was living with her grandmother when E.P. was instead staying overnight with her boyfriend.

Rule 608 of the North Carolina Rules of Civil Procedure provides that a party may inquire into specific acts of conduct on cross-examination of a witness if such acts are probative of the witness's character for truthfulness or untruthfulness. *See* N.C. Gen. Stat. § 8C-1, Rule 608(b) (2005). The determination of whether to permit this inquiry is within the discretion of the court. *Id.* "The propriety or unfairness of cross-examination rests largely in the trial judge's discretion and his ruling thereon will not be disturbed without a showing of gross abuse of discretion." *State v. Kimble*, 140 N.C. App. 153, 168, 535 S.E.2d 882, 892 (2000) (internal quotations omitted).

We hold that the trial court did not abuse its discretion in ruling that defendant could not inquire into the specified acts. At the time that Dr. Russo examined E.P. and found clinical evidence of multiple episodes of penile penetration, E.P. was fifteen years old. Defendant argues that E.P.'s sexual intercourse at age 13 could have resulted in the hymenal abnormalities observed by Dr. Russo. However, there is no evidence in the record to support the theory that sexual intercourse two years prior to a physical examination could have caused the injuries instead of more recent activity of penile penetration.

With respect to E.P.'s statement that M.P was a trouble maker and liar, E.P. testified on *voir dire* that this was not true but that she thought it was true at the time she said it. As to the statement to social services that she was living with her grandmother, E.P. testified that the statement was in fact untrue when she made it. Although these false or inconsistent statements by E.P. are arguably probative of her general character for truthfulness, we do not agree with defendant that he has shown a gross abuse of the trial court's discretion.

We have reviewed defendant's remaining assignments of error and determined that they are without merit.

No error.

Judges McCULLOUGH and LEVINSON concur.

Report per Rule 30(e).