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NO. COA06-620

NORTH CAROLINA COURT OF APPEALS

Filed: 20 March 2007

STATE OF NORTH CAROLINA

v. Hoke County
Nos. 04 CRS 50772
04 CRS 50773

MARTIN LEWIS BLACK,
Defendant.

Appeal by defendant from judgments entered 11 January 2006 by Judge B. Craig Ellis in Hoke County Superior Court. Heard in the Court of Appeals 14 December 2006.

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

Sue Genrich Berry for defendant-appellant.

GEER, Judge.

Defendant Martin Lewis Black appeals from his convictions for first degree rape and indecent liberties with a child. When the victim ("Olivia") was 12 years old, she gave birth to "Andrew."[1] DNA testing established that there was a 99.98% chance that defendant was Andrew's father. On appeal, defendant primarily challenges the admission of various exhibits on the grounds of hearsay, arguing that in the absence of this evidence the State failed to prove his age and that sexual intercourse occurred. We

[1]The pseudonyms "Olivia" and "Andrew" will be used throughout the opinion to protect the children's privacy.

disagree. The pregnancy provided ample evidence of intercourse, and the State properly proved that defendant was 23 at the probable time that Andrew was conceived. We also find unpersuasive defendant's contention that the trial court erred by providing the jury with definitions of "lewd" and "lascivious" taken from *Black's Law Dictionary*.

Facts

At trial, the State's evidence tended to show the following facts. In August 2003, Olivia's maternal aunt called the Hoke County Department of Social Services ("DSS") and reported that her 12-year-old niece Olivia had just given birth to a child. Olivia's birth date is 7 December 1990, while her son Andrew's birth date is 18 August 2003. Evidence at trial indicated that Olivia is learning disabled, with one test suggesting an I.Q. of 67. DSS placed Olivia and Andrew into the aunt's custody pending an investigation.

Detective David Stewart of the Hoke County Sheriff's Department began the investigation and spoke with the aunt. Following Detective Stewart's deployment to Iraq, Detective Michael Hallman of the Hoke County Sheriff's Department took over the investigation. As a result of his review of Detective Stewart's case file, Detective Hallman interviewed the aunt and obtained a search warrant for defendant's DNA. Afterward, based on conversations with Detective Hallman, the aunt took Olivia and Andrew for DNA testing. LabCorp compared the DNA samples provided by Olivia, Andrew, and defendant and determined that there was a

99.98% chance that defendant was Andrew's father. An investigator with the District Attorney's Office obtained defendant's birth certificate, which revealed that he had a birth date of 16 December 1979.

In April 2005, defendant was indicted on charges of first degree rape and taking indecent liberties with a child. The case was tried before a jury during the 9 January 2006 criminal session of Hoke County Superior Court. The jury returned verdicts of guilty as to both charges, and the trial court imposed a presumptive range sentence of 336 to 413 months for the first degree rape conviction and a consecutive presumptive range sentence of 21 to 26 months for the indecent liberties conviction. Defendant timely appealed to this Court.

I

Defendant first argues that the trial court committed plain error by admitting defendant's birth certificate "as well as other hearsay evidence" of defendant's birth date. In his assignments of error, however, defendant only specifically assigns error to the admission of his birth certificate. Our review is, therefore, limited to consideration of the admission of that exhibit. N.C.R. App. P. 10(a) (providing that "the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10").[2]

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[2]Defendant's reference in his assignment of error to "other hearsay evidence" is not sufficient to preserve for review the admission of other exhibits. N.C.R. App. P. 10(c)(1) requires that the assignment of error "direct[] the attention of the appellate court to the particular error about which the question is made,

Since defendant's trial counsel did not object to the birth certificate, we must review the admission of the exhibit for plain error. "'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. 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.'" *State v. Duke*, 360 N.C. 110, 138-39, 623 S.E.2d 11, 29-30 (2005) (internal quotation marks and citation omitted) (quoting *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986)), *cert. denied*, __ U.S. __, 166 L. Ed. 2d 96, 127 S. Ct. 130 (2006).

In this case, the State was required to prove with respect to the first degree rape charge that defendant was "at least 12 years old and is at least four years older than the victim[.]" N.C. Gen. Stat. § 14-27.2(a)(1) (2005). As for the indecent liberties charge, defendant was required to be 16 years of age or older and at least five years older than the victim. N.C. Gen. Stat. § 14-202.1 (2005).

As defendant acknowledges in his brief, numerous exhibits were submitted to the jury without objection that set out defendant's date of birth. Because defendant has failed to properly preserve

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with clear and specific record or transcript references." Defendant's assignment of error neither more particularly describes the "other hearsay evidence" nor references any particular page of the record or transcript.

for appellate review the admission of those exhibits, they were properly before the jury, and any admission of the birth certificate was necessarily harmless.

In any event, the trial court properly admitted defendant's birth certificate. Our Supreme Court has previously held that a properly authenticated birth certificate is, in a first degree rape case, "competent evidence of the facts recorded, *viz*, the date of defendant's birth." *State v. Joyner*, 295 N.C. 55, 62, 243 S.E.2d 367, 372 (1978). *See also* N.C.R. Evid. 803(8) (providing that certain public records and reports are not excluded by the hearsay rule). Further, under the North Carolina Rules of Evidence, documents that, as here, bear an official seal are self-authenticating and do not need further authentication by a custodian of those records. N.C.R. Evid. 902(1).

Defendant argues, however, that "[n]o witness linked that certificate of birth to the Defendant on trial." To the contrary, an investigator with the District Attorney's Office testified without objection that he obtained the place of birth of defendant, went to the register of deeds' office in the county of defendant's place of birth, and obtained a certified copy of defendant's birth certificate from that office. The investigator then identified, without objection, Exhibit 9: "This is also a copy of a certificate of birth from Scotland County. It's a certified copy of the defendant, Martin Lewis Black." This testimony — unchallenged by defendant — is sufficient to support the admission of Exhibit 9, the birth certificate.

Defendant also argues that his trial counsel committed ineffective assistance of counsel by failing to object to Exhibit 9 and the other evidence of his birth date. In arguing ineffective assistance of counsel, a defendant must show not only that his counsel made errors, but that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, 104 S. Ct. 2052, 2064 (1984). To establish the required prejudice, a defendant must show there is "'a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings.'" *State v. Wade*, 155 N.C. App. 1, 18, 573 S.E.2d 643, 655 (2002) (quoting *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 248 (1985)), *appeal dismissed and disc. review denied*, 357 N.C. 169, 581 S.E.2d 444 (2003).

Defendant has never disputed that his date of birth is 16 December 1979, as stated on Exhibit 9. Indeed, the judgment filed in this case identifies that date as defendant's birth date. The record contains no indication that had defendant's counsel objected, the State would have been unable to prove defendant's date of birth.[3] In short, defendant cannot establish that there is a reasonable probability that he would have been acquitted, or the charges dismissed, but for his trial counsel's failure to object.

[3]We note that our courts have repeatedly held "that a jury may base its determination of a defendant's age on its own observation of him even when the defendant does not testify." *State v. Banks*, 322 N.C. 753, 761, 370 S.E.2d 398, 404 (1988) (internal quotation marks omitted). *See also State v. Bynum*, 111 N.C. App. 845, 850, 433 S.E.2d 778, 781, *disc. review denied*, 335 N.C. 239, 439 S.E.2d 153 (1993) (accord). Here, the jury could observe defendant and decide whether he was the required age even in the absence of other evidence.

See Braswell, 312 N.C. at 563, 324 S.E.2d at 249 (holding that where there is no reasonable probability that, in the absence of the alleged error, a different result would have occurred, the appellate court is not required to determine whether the performance of counsel was actually deficient). These assignments of error are, therefore, overruled.

II

Defendant next argues that the trial court committed plain error in admitting Detective Hallman's affidavit in support of his application for a search warrant. Detective Hallman's affidavit, to which defendant's trial counsel did not object, reads in pertinent part:

> [T]hat in or about November 2002, [Olivia's] mother in return for crack cocaine rented out her daughter [Olivia], approximately 11 years of age, for sex. Investigation has revealed that the victim did engage in sexual intercourse with [defendant], approximately 22 years of age. As a result of the sexual intercourse the victim became pregnant and approximately eight (8) months and one (1) week later, . . ., the victim had [Andrew].

As the State acknowledges, "[g]enerally, the allegations in an affidavit for a search warrant and the contents of the warrant itself are inadmissible at trial because of their hearsay nature." *State v. Wilson*, 322 N.C. 117, 137, 367 S.E.2d 589, 601 (1988). *See also State v. Weathers*, 339 N.C. 441, 449, 451 S.E.2d 266, 271 (1994) ("[I]t is error to allow a search warrant and supporting affidavit to be admitted into evidence over defendant's objections."). The State contends, however, that any error did not constitute plain error. We agree.

Defendant contends that he was prejudiced because the affidavit's reference to defendant's "sexual intercourse" with Olivia was the only evidence of vaginal penetration. To the contrary, "evidence . . . disclosing a subsequent pregnancy is admissible as tending to prove penetration, an essential element of the crime of forcible rape." *State v. Stanton*, 319 N.C. 180, 185, 353 S.E.2d 385, 388 (1987). Defendant argues, however, that "[i]n this age of medical advancement, vaginal intercourse is no longer the only way in which a female can become pregnant." We note that under "plain error" review, we must be convinced that absent the error, the jury probably would have acquitted defendant. *Duke*, 360 N.C. at 138-39, 623 S.E.2d at 29-30. We do not believe that, in the absence of the affidavit, it is probable that the jury would have concluded that the State failed to meet its burden of proof because a *12-year-old girl* theoretically could have become pregnant by defendant through some medical means other than sexual intercourse.

Defendant also argues that the affidavit's suggestion that Olivia was "rented out" for sex by her mother in exchange for crack was "extraordinarily prejudicial." Although no one can deny the extraordinarily troubling nature of this statement, the evidence presented at trial was undisputed for each element of the offenses of first degree rape and indecent liberties with a child. As a result, even if the information about the mother's conduct had been omitted, we cannot conclude that there is any reasonable probability that the jury would have failed to convict defendant.

As with the birth certificate, defendant also argues on appeal that he received ineffective assistance of counsel because of his counsel's failure to seek exclusion of the affidavit. We note that defendant's counsel specifically referenced the statement in the affidavit regarding the mother's conduct and, therefore, may have had a strategic reason for failing to object, such as a desire to shift the focus of the jury from defendant to Olivia's mother. Nevertheless, because of the undisputed evidence of pregnancy, defendant's fatherhood, and the ages of the individuals, defendant cannot show prejudice. *Braswell*, 312 N.C. at 563, 324 S.E.2d at 249.

III

Defendant next contends that the trial court erred by providing the jury with *Black's Law Dictionary* definitions of "lewd" and "lascivious" during its instructions for the charge of taking indecent liberties with a child. *See* N.C. Gen. Stat. § 14-202.1(a)(2) (indecent liberties involves willful commission or attempt to commit "any lewd or lascivious act" upon a child). Defendant does not contest the accuracy of the trial court's definitions, but argues that "the number of possible [alternative] definitions is great" and, therefore, the trial court erred by altering the pattern jury instructions. The terms are not defined by the applicable statute.

A jury charge will be held sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. *State v. Blizzard*, 169

N.C. App. 285, 296-97, 610 S.E.2d 245, 253 (2005). If a trial court undertakes to define a term not otherwise defined in a statute, it must do so in substantial accord with definitions approved by our appellate courts. *State v. Every*, 157 N.C. App. 200, 214, 578 S.E.2d 642, 652 (2003).

Using *Black's Law Dictionary*, the trial court defined "lewd" as "obscene, lustful, indecent, lascivious or lecherous" and "lascivious" as "tending to invite lust, lewd, indecent, obscene, sexual impurity, tending to deprave the morals with respect to sexual relations." These definitions are substantially consistent with those previously employed by our appellate courts. *See, e.g.*, *State v. Manley*, 95 N.C. App. 213, 217, 381 S.E.2d 900, 902, *disc. review denied*, 325 N.C. 712, 388 S.E.2d 467 (1989); *State v. Wilson*, 87 N.C. App. 399, 402, 361 S.E.2d 105, 108 (1987), *disc. review denied*, 321 N.C. 479, 364 S.E.2d 670 (1988). Accordingly, as defendant makes no argument suggesting that the jury was misled or otherwise misinformed, we overrule this assignment of error.

No error.

Judges CALABRIA and JACKSON concur.

Report per Rule 30(e).