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NO. COA08-628

NORTH CAROLINA COURT OF APPEALS

Filed: 17 March 2009

STATE OF NORTH CAROLINA

v.

MARVIN JACKSON COOK

Haywood County  
Nos. 06 CRS 589 and  
06 CRS 994

Appeal by Defendant from judgment entered 16 January 2008 by Judge Mark E. Royell in Haywood County Superior Court. Heard in the Court of Appeals 12 January 2009.

*Attorney General Roy Cooper, by Assistant Attorney General Lauren M. Clemmons, for the State.*

*Jon W. Myers, for Defendant.*

BEASLEY, Judge.

Marvin Cook (Defendant) appeals from judgments entered on his conviction of taking indecent liberties with a child, and of attaining habitual felon status. We find no error.

The evidence tends to show the following: In 2005, A.L.M. was twelve years old. He was friends with C.B.C. They lived near each other, had been friends since the first grade, and spent a considerable amount of time together, including over-night visits, at each other's residences. C.B.C lived with his mother, Cathy Singleton and Defendant. Singleton had dated Defendant

**Court of Appeals**

**Slip Opinion**

sporadically for a period of sixteen years. Defendant, age 34, was C.B.C.'s father.

In July of 2005, A.L.M spent the night at C.B.C's house. A.L.M. testified that, when he got ready for bed that night, only C.B.C., Singleton, and he were in the residence. A.L.M. went to sleep alone in a bedroom located at the back of the residence and C.B.C. slept on a couch in the living room. A.L.M. awoke in the middle of the night to find Defendant lying on top of him. A.L.M. had been sleeping on his stomach and felt Defendant's penis in his "butt." A.L.M rolled over and, while reaching for the covers to pull over his head, saw Defendant's penis. Defendant then left the room.

After this incident, A.L.M. went to the bathroom because his stomach was hurting. A.L.M. went into the living room where he saw Singleton. She gave him Pepto-Bismol for his stomach and Tylenol because his "butt hurt." Singleton realized that Defendant was in a back bedroom. Defendant entered the hallway and A.L.M. saw Defendant holding a bag containing white powder. The next morning, as Singleton and Defendant were leaving the house, Defendant warned A.L.M. that he "better not tell." A.L.M. returned home, but did not immediately tell his mother, Tracy Sisk, about the incident. When A.L.M. learned three to four days later, that Defendant was in jail on an unrelated charge, he told his mother what had happened. His mother took A.L.M. to the emergency room, where he was examined

by a physician.

Defendant was charged with taking indecent liberties with a child and first-degree sexual offense. The jury returned a verdict of guilty to indecent liberties with a child and a verdict of not guilty to first-degree sexual offense with a child under the age of 13. The Defendant was also found guilty of attaining habitual felon status. From this judgment, Defendant appeals.

Defendant's Medical Condition

Defendant argues that the trial court committed prejudicial error by denying Defendant and his mother the opportunity to "provide full testimony" about the Defendant's medical condition known as "hypospadias." We disagree.

During Defendant's testimony, defense counsel attempted to introduce testimony from Defendant and Defendant's mother concerning his medical condition and the prosecutor objected. The trial court ruled that questions relating to the length and shape of Defendant's penis caused by a medical problem with Defendant's penis were allowed, but that all other information was irrelevant.

Defendant argues that the excluded evidence was a "key element" in his defense. Defendant contends that his condition has lead him to be able to only have sex if "accommodated" due to his irregularly shaped penis. Therefore, it would have been impossible for him to penetrate the child's rectum. He further states that since the trial court erred by excluding admissible evidence,

Defendant was prevented from explaining how he could not have sex like a normal person because of his surgeries. Defendant believes that this testimony would have aided the jury in better understanding his defense.

"A defendant is prejudiced by errors . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2007). The burden of showing this prejudicial error rests on the defendant. G.S. § 15A-1443(a). Therefore, Defendant has the burden of showing that if the trial court had allowed full testimony regarding his medical condition, a different verdict would have been reached. G.S. § 15A-1443(a).

\_\_\_\_\_A person is guilty of taking indecent liberties with children if he or she "[w]illfully 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 (1) (2007). That person must be at least "16 years of age or more and at least five years older than the child in question[.]" N.C. Gen. Stat. § 14-202.1 (a) (2007). The charge of indecent liberty with a child does not require penetration. See G.S. § 14-202.1; *State v. Rogers*, 322 N.C. 102, 104, 366 S.E.2d 474, 476 (1988). Nor is it necessary that there be a touching of the child by the defendant in

order to support a charge of indecent liberties with a minor. *State v. Turman*, 52 N.C. App. 376, 377, 278 S.E.2d 574, 575 (1981).

There have been numerous decisions where the State was not required to produce any evidence of actual touching. See *State v. Kistle*, 59 N.C. App. 724, 727, 297 S.E.2d 626, 628 (1982) (an indecent liberties conviction that was upheld after defendant photographed a nude child in a sexually suggestive position), and *State v. Strickland*, 77 N.C. App. 454, 456, 335 S.E.2d 74, 75 (1985) (where the court refused to hold that a defendant must be within a certain proximity to the victim in order to uphold an indecent liberties conviction). These cases demonstrate the wide scope of the statute.

Defendant has failed to show that any prejudicial error occurred. A.L.M. testified that he was awakened by the Defendant laying on top of him with Defendant's penis in "his butt." These facts are consistent with the behavior contemplated by G.S. § 14-202.1 and the jury's decision. Assuming testimony regarding his Defendant's condition had been admitted, it is unlikely that the jury would have reached a different result. Defendant's argument that he is incapable of penetrating A.L.M is irrelevant because neither penetration nor touching is required for the commission of taking indecent liberties with a child. We find no error.

#### Emotional and Behavioral Impact Testimony

Defendant argues that the trial court committed plain error by

admitting evidence detailing the emotional and behavioral impact of the incident on A.L.M. Defendant argues that because the testimony of A.L.M.'s parents regarding A.L.M.'s emotional and behavioral changes after the incident had no tendency to prove that Defendant committed the alleged crime, it should have been excluded at trial and should have only been admissible during sentencing. Defendant asserts that the admitted testimony constitutes "victim-impact testimony."

"Victim-impact" testimony refers to the right of a victim to introduce admissible evidence of the "impact of the crime, which shall be considered by the court or jury in sentencing the defendant." N.C. Gen. Stat. § 15A-833 (2007). Examples of such evidence include the "nature and extent of any physical, psychological, or emotional injury suffered by the victim as a result of the offense committed by the defendant." G.S. § 15A-833.

Sisk offered extensive testimony about A.L.M.'s mental health treatment subsequent to Defendant's sexual contact with A.L.M. Sisk testified that A.L.M. began "acting out, hitting himself, begging his stepdad to kill him." She described A.L.M. as previously being a "normal" and "happy" child. A.L.M. has since been evaluated by doctors, a child forensic evaluator, and a counselor. Sisk further testified that A.L.M. had received counseling for over a year at Life Counseling Center, but was sent to a hospital in Winston-Salem after he became suicidal "because of

the sexual abuse" and was diagnosed as "bipolar." A.L.M. also would become "stressed" before every court date.

Throughout Sisk's testimony, Defendant failed to object to the admission of this evidence. "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. 10(c)(4). Since Defendant failed to object to this evidence at trial, it is evaluated under the plain error rule. *State v. Mitchell*, 328 N.C. 705, 711, 403 S.E.2d 287, 290 (1991).

In *State v. Odom*, the Supreme Court defines the plain error rule as follows:

"[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a 'fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused,' or the error has 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' or where the error is such as to 'seriously affect the fairness, integrity, or public reputation of judicial proceedings' or where it can be fairly said 'the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.'"

*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 (4<sup>th</sup> Cir. 1982)). Accordingly, Defendant must show that the testimony given by witnesses concerning the emotional and physical effects of the crime was such a fundamental error that he was denied a fair trial. Defendant, however, has not proven that the exclusion of this evidence would have yielded a different verdict. This Court will not conclude that the jury's verdict would have been different given the considerable amount of evidence pointing to Defendant's guilt.

Testimony regarding A.L.M.'s emotional and behavioral changes were also admissible as relevant evidence. Relevant evidence is any evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2007). "Whether or not to exclude evidence . . . is a matter within the sound discretion of the trial court and its decision will not be disturbed on appeal absent a showing of an abuse of discretion.'" *State v. Campbell*, 359 N.C. 644, 674, 617 S.E.2d 1, 20 (2005) (quoting *State v. McCray*, 342 N.C. 123, 131, 463 S.E.2d 176, 181 (1995)). The admitted evidence to which Defendant is referring included testimony from A.L.M.'s mother about how A.L.M. was a "normal," "happy" child with no problems at school prior to August and July of 2005. However, after this time period, A.L.M was diagnosed with



bipolar disorder and was unable to focus, "rebellious," "suicidal," and "filled with a lot of hate".

A.L.M.'s mental health before and after Defendant took indecent liberties is relevant evidence. Permitting the jury to evaluate testimony about A.L.M.'s behavioral and emotional health before and after Defendant's sexual perpetration against A.L.M. is relevant in determining whether the sex act was "more probable or less probable than it would be without the evidence." Rule 401. This evidence suggested that the alleged offense must have happened during a specific time period, causing A.L.M.'s deteriorating behavioral and mental health to include suicidal behavior.

A.L.M. unequivocally described Defendant's actions. It was reasonable for the jury to find Defendant guilty based on the presented evidence. This Court rejects Defendant's argument that the admission of the behavioral and emotional changes of the victim constituted "plain error" by the trial court. We find no error.

#### Recollection Refreshed

Defendant argues that the trial court committed plain error by improperly allowing a witness to testify after having her recollection refreshed. Defendant asserts that the court permitted the witness to review her previous interview with law enforcement officers, although the witness had not testified that she could not recall the answers to the prosecutor's questions. Defendant contends that this violated the United States and North Carolina

Constitutions and the North Carolina Rules of Evidence. We disagree.

Defendant is referring to the testimony provided by A.L.M.'s mother, Tracy Sisk. During questioning, Sisk was asked to read from an interview previously completed with Detective Heidi VanDine. The following exchange took place between Sisk and the prosecutor:

Q: Now, I'm going to hand you what's been marked State's Exhibit 2 and see if you can identify that, see if you have ever seen that document before?

A: Yes.

Q: What is that document?

A: That's the interview that I done with Heidi.

Q: And have you had a chance to look that over in the last couple days?

A: Yes.

Q: And did you use that document to refresh your memory, or did you need your memory refreshed?

A: No.

Q: No, you didn't need your memory refreshed?

A: I didn't, no.

Q: And I want you to look over that statement and see if that statement refreshes your recollection about anything else that might have happened, and if you would just take a minute and read that.

. . . .

Q: Did A.L.M. tell you anything about what Mr. Cook said to him?

A: Looking at what?

Q: At your exhibit there. Does that help you refresh your memory about what, if anything, A.L.M. told you that Mr. Cook might have said to him?

A: After it happened, he told A.L.M. that he better not tell.

Defendant argues that the prosecutor failed to lay a sufficient foundation by establishing that "Ms. Sisk could not remember the events contained in the document, that the writing would refresh her memory, and that after reviewing the document, she could then independently remember the events." Defendant's assertion that the prosecutor failed to establish a foundation prior to the witness using notes to refresh her memory is without merit. *State v. Gibson*, 333 N.C. 29, 49, 424 S.E.2d 95, 106 (1992), *overruled on other grounds*, *State v. Lynch*, 334 N.C. 402, 432 S.E.2d 349 (1993).

Defendant refers to North Carolina Rules of Evidence Rules 612 which addresses the use of a writing or object to refresh a witness's memory. Rule 612 states that, "[i]f, while testifying, a witness uses a writing or object to refresh his memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying." N.C. Gen. Stat. § 8C-1, Rule 612 (2007). Rule 612

merely requires the party seeking to refresh the recollection of a witness to provide the adverse party with a copy of the writing or object offered to refresh the witness's recollection. There is no additional requirement that the witness state he or she cannot remember the events contained in the document. Therefore, no foundation is required prior to refreshing a witness' recollection under this rule. *Gibson*, 333 N.C. at 49, 424 S.E.2d at 106.

| There are generally two ways a witness may be aided in his or her recollections: past recollection recorded and present recollection refreshed. *State v. Smith*, 291 N.C. 505, 516, 231 S.E.2d 663, 670 (1977). N.C. Gen. Stat. § 8C-1, Rule 803(5) (2007) states, in reference to "past recollection recorded," that a recorded recollection is:

A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. . . .

For the above, a foundation is required if the notes were introduced because the witness could not remember the events. *Gibson*, 333 N.C. at 49, 424 S.E.2d at 106. For admissibility under Rule 803(5), a witness would indeed need to indicate that she could not remember the matter in question. *Id.* This is because the evidence introduced in a past recollection recorded is the content of the writing itself. However, in a present recollection

refreshed, "the evidence is the testimony of the witness at trial[.]" *Id.* at 50, 424 S.E.2d at 107. "'Under present recollection refreshed the witness' memory is refreshed or jogged through the employment of a writing, diagram, smell or even touch,' and he testifies from his memory so refreshed." *Id.* (quoting *State v. Corn*, 307 N.C. 79, 83, 296 S.E.2d 261, 264 (1982)). "Because of the independent origin of the testimony actually elicited, the stimulation of an actual present recollection is not strictly bounded by fixed rules but, rather, is approached on a case-by-case basis looking to the peculiar facts and circumstances present." *Smith*, 291 N.C. at 516, 231 S.E.2d at 670-71.

However, "'[w]here the testimony of the witness purports to be from his refreshed memory but is *clearly* a mere recitation of the refreshing memorandum, such testimony is not admissible as present recollection refreshed and should be excluded by the trial judge.'" *Gibson*, 333 N.C. at 50, 424 S.E.2d at 107 (quoting *Smith*, 291 N.C. at 518, 231 S.E.2d at 671). During the entire line of questioning Sisk insisted that she did not need her memory refreshed, but was directed by the prosecutor to answer questions referring to the exhibit.

The record suggests that Sisk was testifying based on her recollection.

Defendant asserts that the inclusion of Sisk's testimony constituted plain error, which is the applicable standard since he

did not object at trial. The previous analysis of the "plain error" standard applies here. The record suggests that Sisk twice referred directly to the exhibit. Sisk was asked what, if anything, A.L.M. had told her about Defendant's warning and on what date she had an interview with Detective VanDine, from the Haywood County Sheriff's Office. All other questions directed to Sisk were answered without reference to the exhibit. The record suggests that Sisk's answers were from memory.

The record shows that the State offered compelling evidence that Defendant had warned A.L.M. that he "better not tell". Jerri Szlizewski, a child forensic interviewer, Heidi VanDine and Russell Gilliland, both officers at the Haywood County Sheriff's office, each corroborated A.L.M.'s testimony that the morning after the incident, Defendant had warned A.L.M. that he "better not tell." More importantly, A.L.M. also testified that Defendant had warned he "better not tell". Therefore, the admission of Sisk's testimony regarding the above issues did not deny Defendant a fair trial. This assignment of error is overruled.

#### Sequestration of Witnesses

Finally, Defendant argues that the trial court committed plain error by failing to ensure that the State's witnesses were sequestered. Both the State and the Defendant agreed to sequestration, but the State's witness, Officer Russell Gilliland remained in the courtroom during A.L.M.'s testimony and testified

thereafter. Defendant acknowledges that defense counsel did not object to the trial court's failure to sequester witnesses in violation of its own order.

Although Defendant directs us to review this assignment for plain error, the Supreme Court "has applied the plain error analysis only to instructions to the jury and evidentiary matters." *State v. Atkins*, 349 N.C. 62, 81, 505 S.E.2d 97, 109 (1998). A ruling on a motion to sequester witnesses is within the trial court's discretion and is subject to review for abuse of discretion. *State v. Call*, 349 N.C. 382, 400, 508 S.E.2d 496, 507 (1998). However, there was no ruling made because Defendant did not make a motion or object, therefore the abuse of discretion standard does not apply. More importantly, the plain error rule is not applicable to issues that are within the trial court's discretion. *State v. Steen*, 352 N.C. 227, 256, 536 S.E.2d 1, 47-48 (2000). Defendant did not present a timely request, objection or motion to the trial court, and thus his assignment of error is not properly preserved for appellate review. N.C.R. App. P. 10(b). This assignment of error is overruled.

For the foregoing reasons, we conclude that the Defendant had a fair trial, free from prejudicial error.

No error.

Chief Judge MARTIN and Judge BRYANT concur.

Report per Rule 30(e).