NO. COA09-17

NORTH CAROLINA COURT OF APPEALS

Filed: 21 July 2009

STATE OF NORTH CAROLINA

v. Forsyth County
No. 07 CRS 060068

RONALD RAY HODGES

Appeal by Defendant from judgment entered 31 July 2008 by Judge R. Stuart Albright in Forsyth County Superior Court. Heard in the Court of Appeals 10 June 2009.

Attorney General Roy Cooper, by Assistant Attorney General Alexandra Gruber, for the State.

Ryan McKaig, for Defendant-Appellant.

ERVIN, Judge.

Ronald Ray Hodges (Defendant) appeals from a judgment entered by the trial court on 31 July 2008 based upon a jury verdict convicting him of taking indecent liberties with a minor and sentencing him to a minimum of 19 months and a maximum of 23 months imprisonment in the custody of the North Carolina Department of Correction. After careful consideration of the record and briefs, we find no error in the proceedings leading to the entry of the trial court's judgment.

On 27 July 2007, eight-year-old A.P. obtained permission from her mother to visit Defendant's home for the purpose of visiting

Defendant's girlfriend, Rhonda McCuiston (McCuiston). A.P. and her mother lived nearby in the same neighborhood as Defendant.

A.P. testified that she and McCuiston played cards and that McCuiston braided A.P.'s hair. Subsequently, A.P. entered the kitchen, where Defendant was playing darts. At that point, McCuiston was outside smoking a cigarette. While she and Defendant were playing darts, A.P. testified that Defendant grabbed her. According to A.P., Defendant moved his hands under her clothing and put his fingers in her "private part" three times. On each occasion, A.P. testified that she pushed Defendant away.

On direct examination, A.P. stated that McCuiston was outdoors during the entire incident and that A.P. ran to her for help after Defendant touched her for the third time. On cross examination, A.P. testified that McCuiston was inside the trailer using the bathroom and discovered Defendant touching her upon walking into the room. McCuiston escorted A.P. home and told A.P.'s mother what had happened, at which point A.P.'s mother called the police. At the time that she brought A.P. home, McCuiston was crying and appeared to be extremely upset.

Officer A.L. Fishel (Officer Fishel) of the Winston-Salem Police Department testified that he responded to an indecent liberties with a minor call on 27 July 2007. Officer Fishel interviewed A.P., who stated that she and Defendant had been wrestling on the floor at the time of the incident. Officer K.D. Israel of the Winston-Salem Police Department, another officer assigned to the case, testified that A.P.'s mother stated that A.P.

told her the same story three days after the alleged touching. At trial A.P. testified that she could not remember wrestling with Defendant on 27 July 2007. Furthermore, A.P.'s mother testified that she did not recall A.P. telling her that there had been any playful wrestling between A.P. and Defendant. Finally, Office T.G. Porter of the Winston-Salem Police Department, who interviewed A.P. and McCuiston on 27 July 2007, observed that A.P. had urinated in her pants to some extent during the course of the evening.

McCuiston and A.P.'s mother took A.P. to the Wake Forest University Baptist Medical Center. Pediatric resident Mary Booth Bade Greiner, M.D. (Dr. Greiner) examined A.P. According to Dr. Greiner, A.P.'s genital area was red. Although Dr. Greiner opined that the physical examination of A.P. was consistent with sexual abuse, she could not state to a reasonable degree of certainty that the redness in A.P.'s genital area resulted from sexual abuse rather than some other factor.

A warrant charging Defendant with first degree sexual offense and taking indecent liberties with a minor was issued on 5 October 2007. On 28 January 2008, the Forsyth County grand jury returned a bill of indictment charging Defendant with first degree sexual offense and taking indecent liberties with a minor. The case against Defendant came on for trial before the trial court and a jury at the 28 July 2008 session of the Superior Court. On 31 July 2008, a jury acquitted Defendant of first degree sexual offense and convicted him of taking an indecent liberty with a minor. Based upon this verdict, the trial court sentenced Defendant to a minimum

of 19 months imprisonment and a maximum of 23 months imprisonment in the custody of the North Carolina Department of Correction. Following the entry of the trial court's judgment, Defendant noted an appeal to this Court.

I. Curative Instruction

Defendant initially contends that the trial court committed plain error by failing to strike, or instruct the jury to disregard, a statement made by a clinical social worker that Defendant contends constituted an impermissible expert opinion that A.P. was "believable, credible or telling the truth." *State v. Bailey*, 89 N.C. App. 212, 219, 365 S.E.2d 651, 655 (1988). After careful consideration of the briefs and record, we disagree.

At trial, Susan Vaughn (Vaughn) was allowed, without objection, to testify as an expert in the field of clinical social work, specializing in counseling and conducting forensic interviews of children. According to Vaughn, she interviewed A.P. on 21 August 2007. During her testimony, Vaughn stated:

> Q: Ms. Vaughn, after you completed the interview, did you have an opinion in regards to your forensic interview of [A.P.]?
>
> A: Yes, ma'am.
>
> Q: Did you make an assessment of that interview?
>
> A: Yes, ma'am.
>
> Q: And what was your opinion?
>
> A: Did you want me to read it off my conclusions?
>
> Q: (Nods head)

> A: That she presented history that supported the concern that the identified assailant had exposed her to sexual maltreatment or inappropriate contact.
>
> [DEFENSE COUNSEL]: Objection, Your Honor.
>
> [THE COURT]: Well, sustained.
>
> [DEFENSE COUNSEL]: Thank you.
>
> [PROSECUTOR]: What recommendations did you make?
>
> A: That she – that [A.P.] continue the therapeutic interventions that she had already been receiving, that she be maintained in a safe, secure and stable home environment. And that she continue to be provided opportunities for social interaction with peers.

Defendant neither moved to strike this portion of Vaughn's testimony nor requested the trial court to deliver a curative instruction, and the trial court never took either action on its own motion. Furthermore, after the trial court instructed the jury following the presentation of all of the evidence, Defendant did not object to the trial court's failure to instruct the jury to disregard Vaughn's statement.

Even if the challenged testimony constituted an impermissible expression of an opinion from an expert witness concerning the credibility of an alleged child victim of sexual abuse, *State v. Aguallo*, 318 N.C. 590, 598, 350 S.E.2d 76, 81 (1986); *State v. Heath*, 316 N.C. 337, 342, 341 S.E.2d 565, 568 (1986); *State v. Baymon*, 108 N.C. App. 476, 482, 424 S.E.2d 141, 144 (1993); *Bailey*, 89 N.C. App. at 219, 365 S.E.2d at 655; *State v. Holloway*, 82 N.C. App. 586, 587-88, 347 S.E.2d 72, 73 (1986), "a trial court does not

err by failing to give a curative jury instruction where, as here, it is not requested by the defense," since "[d]efense counsel could well conclude that a curative instruction would do more harm than good." *State v. Williamson,* 333 N.C. 128, 139, 423 S.E.2d 766, 772 (1992). Although he acknowledges in his brief both this basic principle and the fact that the trial court sustained the only objection that he actually made, Defendant argues that "the facts of this case are distinguishable from prior cases in which no curative instruction was required absent a request by the defense" since "the error strengthens the State's only real evidence."

The North Carolina Rules of Appellate Procedure clearly require litigants to present legal issues to the trial court before bringing them before an appellate court for review. For example, N.C. App. P. R. 10(b)(1) provides that, "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." Similarly, N.C. App. P. R. 10(b)(2) states:

> A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

As a result, in the absence of an objection or request by the defendant, this Court reviews alleged errors in the trial court's

evidentiary rulings or jury instructions under a "plain error" standard. *State v. Golphin*, 352 N.C. 364, 460, 533 S.E.2d 168, 230 (2000); *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

> [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.

Odom, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)) (internal quotations omitted). In order to determine if an evidentiary ruling or defective jury instruction amounts to "plain error," an appellate court will examine the entire record to determine if the error had "a probable impact on the jury's finding of guilt." *State v. Maready*, 362 N.C. 614, 621, 669 S.E.2d 564, 568 (2008) (quoting *Odom*, 307 N.C. at 661, 300 S.E.2d at 378-79)). In other words, in order for an appealing defendant to obtain relief under the "plain error" doctrine, the error in question must have been "so fundamental that it denied the defendant a fair trial and quite probably tilted the

scales against him." *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993).

Assuming *arguendo* that plain error analysis applies in this instance, we are unable to conclude that the trial court's failure, acting *ex mero motu*, to strike the statement in question or to instruct the jury to disregard the challenged portion of Vaughn's testimony had "a probable impact on the jury's finding of guilt." *Maready*, 362 N.C. at 621, 669 S.E.2d at 568. Immediately after the trial jury had been impaneled, the trial court instructed the jury that, "[w]hen the court sustains an objection to a question, you must disregard the question and the answer, if one has been given, and draw no inference from the question or answer or guess as to what the witness would have said if permitted to answer." As a result, the record reflects that the jury was, in fact, instructed to disregard both the question and the answer in the event that an objection was sustained. *State v. Long*, 280 N.C. 633, 641, 187 S.E.2d 47, 52 (1972) ("the law presumes the jury followed the judge's instructions"). Furthermore, unlike the situation in *Holloway*, 82 N.C. App. at 587-88, 347 S.E.2d at 73, the record does not reflect that Vaughn testified that A.P.'s trial testimony was truthful; instead, Vaughn's statement was that A.P. "presented history that supported the concern that the identified assailant had exposed her to sexual maltreatment or inappropriate contact," a statement that could be understood to mean no more than that the account that A.P. gave in her interview with Vaughn was consistent with A.P.'s claim to have been subject to sexual abuse rather than

that Vaughn vouched for the credibility of A.P.'s trial testimony. Finally, there is no indication in the record that the State in any way attempted to exploit Vaughn's comment for an inappropriate purpose in the aftermath of the trial court's sustention of Defendant's objection. As a result, while we acknowledge that there was substantial evidence that conflicted with A.P.'s trial testimony, we are unable to say that the trial court's failure to strike the challenged portion of Vaughn's testimony or to instruct the jury to disregard it *sua sponte* had a "probable impact" on the jury's decision to convict Defendant. Thus, this assignment of error is overruled.[1]

II. Motion to Dismiss

Secondly, Defendant contends that the trial court erred by denying his motion to dismiss the indecent liberties charge on the grounds of evidentiary insufficiency. After a careful review of the record, we conclude that the evidence was sufficient to support the jury's verdict.

[1] The State also contends that Defendant invited the alleged error by failing to note a timely objection to Vaughn's testimony. According to *State v. Gay*, 334 N.C. 467, 485, 434 S.E.2d 840, 850 (1993) (citation omitted), a "defendant may not complain of prejudice 'resulting from [his] own conduct.'" The doctrine of "invited error" does not, however, apply in this case, because Defendant did not do anything leading to the presentation of the challenged statement, such as seek its admission or take any other action that invited its presentation. The mere fact that Defendant did not object as soon as Vaughn proposed reading from her report simply does not constitute invited error, particularly given that Defendant immediately objected to the statement which is the subject of the discussion in the text. Thus, Defendant's argument regarding the trial court's failure to strike the challenged testimony or to deliver a curative instruction on its own motion is not subject to rejection under the "invited error" doctrine.

"Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged . . . and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987). In reviewing a challenge to a trial court's denial of a dismissal motion predicated on the alleged insufficiency of the evidence, this Court "considers whether the evidence, taken in the light most favorable to the State and allowing every reasonable inference to be drawn therefrom, constitutes substantial evidence of each element of the crime charged." *State v. Taylor*, 362 N.C. 514, 538, 669 S.E.2d 239, 261 (2008). "If the evidence [when considered in this fashion] is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed." *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002).

> The elements of taking indecent liberties with a minor are: (1) the defendant was at least 16 years of age; (2) he was five years older than his victim; (3) he willfully took or attempted to take an indecent liberty with the victim; (4) the victim was under 16 years of age at the time the alleged act or attempted act occurred; and (5) the action by the defendant was for the purpose of arousing or gratifying sexual desire.

State v. Thaggard, 168 N.C. App. 263, 282, 608 S.E.2d 774, 786-87 (2005) (citing *State v. Rhodes*, 321 N.C. 102, 104-05, 361 S.E.2d 578, 580 (1987); *State v. Hicks*, 79 N.C. App. 599, 602, 339 S.E.2d 806, 808 (1986); N.C. Gen. Stat. § 14-202.1(a) (2003)). According to Defendant, the record lacks substantial evidence that he actually committed a lewd and lascivious act upon A.P. or that he acted for an immoral, improper, or indecent purpose.

In support of his challenge to the sufficiency of the evidence to support his conviction for taking indecent liberties with a minor, Defendant focuses upon what he contends are discrepancies in the evidence, with particular attention being paid to A.P.'s various accounts of the event. According to Defendant's brief, these discrepancies establish that the record did not contain "substantial" evidence tending to show that Defendant "committed any lewd and lascivious act upon the child" for an "immoral, improper or indecent purpose." Thus, Defendant argues that the trial court should have dismissed the indecent liberties charge set out in the indictment returned against him.

Admittedly, Officer Fishel testified that A.P. stated during the investigative process that she and Defendant had been wrestling on the floor at the time of the incident. In addition, the record contains evidence tending to show that A.P. made a similar statement to her mother three days after the alleged improper touching. On the other hand, during her trial testimony, A.P. denied any memory of having been wrestling with Defendant prior to or during the time that the alleged inappropriate touching took

place. Instead, A.P. affirmatively asserted that Defendant slid his hands beneath her clothing and touched her in an inappropriate location. Furthermore, Dr. Greiner testified that the exterior of A.P.'s vagina was red at the time of the physical exam, a finding that Dr. Greiner said was consistent with, although not conclusive evidence of, sexual abuse. Finally, A.P. gave statements to others that were consistent with her trial testimony. As a result, the record simply reveals a conflict in the evidence between a version of the relevant events which was sufficient to allow a jury to conclude that Defendant committed a violation of law, or, on the other hand, a version which would allow a jury to decide that Defendant and A.P. engaged in an act of innocent horseplay. *State v. Rhodes*, 321 N.C. 102, 105, 361 S.E.2d 578, 580 (1987) (stating that "the purpose of arousing or gratifying sexual desire[] may be inferred from the evidence of the defendant's actions").

According to well-established North Carolina law, "[c]ontradictions and discrepancies do not warrant dismissal of the case – they are for the jury to resolve." *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992); *see also State v. Casey*, 59 N.C. App. 99, 116, 296 S.E.2d 473, 483 (1982) ("contradictions and discrepancies [in evidence] are for the jury to resolve"). For this reason, the mere existence of conflicts and inconsistencies in the evidence of the type upon which Defendant relies does not suffice to support a challenge to the sufficiency of the evidence to support a conviction. In light of the record evidence and a proper understanding of the relevant legal principles, the extent

to which any inappropriate touching actually occurred and whether any such inappropriate touching was motivated by an immoral, improper, or indecent purpose were questions for the jury's determination. As a result, when viewed in the light most favorable to the State, the record contained substantial evidence tending to show Defendant's guilt of taking indecent liberties with a minor. This assignment of error is overruled.

III. Conclusion

Thus, for all of the reasons set forth above, we conclude that Defendant received a fair trial free from prejudicial error and is not entitled to relief on appeal.

NO ERROR.

Judges MCGEE and JACKSON concur.

Recommend: Report per Rule 30(e).