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NO. COA10-898

NORTH CAROLINA COURT OF APPEALS

Filed: 1 March 2011

STATE OF NORTH CAROLINA

v.

Cleveland County

Nos. 08-CRS-55445, 08-CRS-4379

LOUIS GENE DAVIS

Appeal by Defendant from judgment entered 16 April 2010 by Judge Yvonne Mims-Evans in Cleveland County Superior Court. Heard in the Court of Appeals 9 February 2011.

*Attorney General Roy Cooper, by Assistant Attorney General John F. Oates, Jr., for the State.*

*Mercedes O. Chut for Defendant-appellant.*

HUNTER, JR., Robert N., Judge.

Defendant contends the admission of testimonial evidence infringed upon his Sixth Amendment right to confront witnesses and ran afoul of the North Carolina Evidence Code. Defendant's Sixth Amendment argument fails because it was not preserved for appellate review. Defendant's failure to object at trial requires him to establish the alleged evidentiary error amounted to plain error. Even assuming the trial court erred in admitting the testimonial evidence, that error did not amount to plain error. Defendant also argues his convictions for first-degree kidnapping and several felony sex crimes subject him to double jeopardy. During

Defendant's sentencing hearing, the trial court indicated it would arrest judgment on the first-degree kidnapping charge, but failed to do so. We remand for a hearing to clarify this matter.

### **I. Factual and Procedural Background**

On 13 October 2008, a Cleveland County grand jury indicted Louis Gene Davis ("Defendant") for first-degree rape of a child, taking indecent liberties with a child, first-degree kidnapping, and first-degree sexual offense with a child. The State voluntarily dismissed the first-degree rape charge on 5 April 2010. Defendant entered a plea of not guilty as to all charges. His trial commenced on 14 April 2010.

The State's evidence tended to show the following. On 21 September 2008, Elizabeth, age twelve at the time, and her half-sister Natalie, age five at the time, spent the night at Chinetta Brooks' residence.<sup>1</sup> Natalie views Ms. Brooks as her grandmother, but they are not related by blood. Defendant, while visiting from Charleston, South Carolina, was staying at Ms. Brooks' home. A friend of Ms. Brooks, Horace Wilkins, was also staying there.

After Ms. Brooks and Mr. Wilkins retired to bed, Defendant walked into the kitchen where he found Natalie and Elizabeth eating and playing cards. According to Elizabeth, Defendant smelled of alcohol that night. When Elizabeth tried to leave the kitchen, Defendant told her they could not go downstairs because they were making too much noise and would wake Ms. Brooks. He then changed

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<sup>1</sup> Pseudonyms conceal the identities of the juveniles involved in this case.

his mind and told them they could go downstairs to the living room and watch television.

In the living room, the girls initially sat on a chair across the room from Defendant. Defendant asked the girls to sit with him in his chair, and they complied. Natalie "used the bathroom on herself" and ran upstairs to change. Elizabeth attempted to follow Natalie, but Defendant forced her back into the chair.

According to Elizabeth, Defendant unfastened Elizabeth's pants and placed a hand in her "private area." He used the other hand to cover her mouth, which prevented her from screaming. She felt something enter her vagina, although she could not identify it with specificity at trial. Eventually, Defendant heard Natalie returning to the living room. He stopped touching Elizabeth's "private area" and told her not to tell anyone or "he would kill [her]."

Elizabeth eventually contacted her grandmother, who arrived at Ms. Brooks' residence. Her grandmother reported the incident to the police over the telephone, and an officer arrived and interviewed Elizabeth. Afterwards, Elizabeth's father arrived and took her to the hospital.

At the hospital, Sherry Yokum, a nurse, collected Elizabeth's clothing, examined her for cuts and other injuries, and obtained hairs from her head and vaginal area. Dr. Munoz, a physician, examined Elizabeth and made written findings. At trial, Dr. Munoz did not testify. Rather, Ms. Yokum testified without objection that Dr. Munoz's notes did not indicate "any tears or bleeding or

other injuries" and only noted tenderness in the lower abdomen. Ms. Yokum also testified, "[Elizabeth] probably without me examining her myself, has what we call an intact hymen and all like that [sic]." The State successfully admitted into evidence records of the medical examination without objection.

Defendant testified on his own behalf and denied the allegations of sexual misconduct. He stated that he attended a party the night of the incident, where he drank gin and beer for about three hours. He admitted to being intoxicated that evening and stated he returned to Ms. Brooks' home at around 2:00 a.m. His testimony suggested, but did not indicate specifically, that he had sexual relations with a woman that evening before returning to the residence. Defendant testified he told the girls they needed to go to bed, but they refused.

Defendant claimed he fell asleep on the couch while the girls continued to play in the living room, but he also stated that he remembered Natalie wetting herself and leaving the room to change.

He testified he did not remember anything else until Ms. Brooks woke him and informed him he needed to leave for his own safety. The police arrested Defendant the following day at Ms. Brooks' residence.

At the conclusion of his trial, the jury convicted Defendant of first-degree kidnapping, first-degree sexual offense with a child, and taking indecent liberties with a child. During sentencing, the following colloquy occurred between defense counsel and the court:

[Defense Counsel:] Your honor, it's my understanding that the Court will arrest judgment on the first degree kidnapping charge. It's my understanding that that does not mean that the lesser included offense kicks in; is that right?

The Court: That's correct.

The trial court did not arrest judgment, but consolidated all three offenses for one judgment and sentenced Defendant to a term of 210 to 261 months in prison. Defendant gave oral notice of appeal.

## **II. Jurisdiction**

We have jurisdiction over Defendant's appeal of right. See N.C. Gen. Stat. § 15A-1444(a) (2009) ("A defendant who has entered a plea of not guilty to a criminal charge, and who has been found guilty of a crime, is entitled to appeal as a matter of right when final judgment has been entered."); N.C. Gen. Stat. § 7A-27(b) (2009) (stating appeal shall be to this Court).

## **III. Analysis**

Defendant raises two arguments regarding Ms. Yokum's testimony: he claims (1) her testimony violates the Sixth Amendment of the United States Constitution and (2) her testimony was inadmissible hearsay. Defendant failed to object at trial on either ground. Consequently, we do not address the substance of his constitutional argument as it was not preserved for appellate review. See *State v. Creason*, 313 N.C. 122, 127, 326 S.E.2d 24, 27 (1985) (stating this Court is not "required to pass upon a constitutional issue unless it affirmatively appears that the issue was raised and determined in the trial court"); *State v. Greene*, 351 N.C. 562, 566, 528 S.E.2d 575, 578 (2000) ("[P]lain error

analysis applies only to instructions to the jury and evidentiary matters." ).

With respect to his hearsay argument, Defendant must demonstrate the trial court committed plain error in order to secure a new trial. See N.C. R. App. P. 10(a)(4).

[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 (4th Cir. 1982)) (alterations in original). We must determine whether, absent the alleged error, the "jury probably would have returned a different verdict." *State v. Davis*, 321 N.C. 52, 59, 361 S.E.2d 724, 728 (1987).

Even assuming the trial court erred by admitting Ms. Yokum's testimony and the documentary evidence, we fail to see how such an error had a probable impact on the case. The evidence indicated a *lack* of physical abnormalities. It likely *aided* Defendant rather than weighing against him in the eyes of the jury. Defendant's argument is meritless.

Defendant also argues his convictions violate his constitutional protection against double jeopardy. The trial court did not arrest judgment on Defendant's first-degree kidnapping charge despite stating it would do so. Unfortunately, the trial court's precise intent is not clear from our review of the record. The State does not object to remanding this case to clarify this issue, which could potentially resolve Defendant's claim. Therefore, we remand for a hearing at which the trial court will address this matter and re-sentence Defendant in light of whether the trial court arrests judgment on Defendant's first-degree kidnapping charge.

No error in part; remanded.

Judges CALABRIA and STROUD concur.

Report per Rule 30(e).