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NO. COA12-1517
NORTH CAROLINA COURT OF APPEALS

Filed: 17 September 2013

STATE OF NORTH CAROLINA

v.

Catawaba County
No. 11 CRS 3984

CHRISTOPHER ANTHONY BLANTON

Appeal by defendant from judgment entered 1 August 2012 by Judge F. Donald Bridges in Catawba County Superior Court. Heard in the Court of Appeals 21 May 2013.

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

Appellate Defender Staples Hughes, by Assistant Appellate Defender David W. Andrews, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Christopher Anthony Blanton ("Defendant") appeals from judgment entered following a jury verdict convicting him of statutory sex offense involving a 13, 14, or 15-year-old. Defendant argues that he is entitled to a new trial because: (1) he received ineffective assistance of counsel when his attorney failed to ask for an instruction stating that certain prior inconsistent statements could be used to impeach a witness'

testimony and (2) the court committed plain error by "allowing the State's expert [witness] to testify on the ultimate question of [Defendant's] guilt." For the following reasons, we deny Defendant's ineffective assistance claim and find no plain error.

I. Factual & Procedural History

On 2 May 2011, the Catawba County grand jury indicted Defendant, a former law enforcement officer, for statutory sex offense involving a 13, 14, or 15-year-old. Defendant was arrested on 3 May 2011, and a jury trial was held on 30 July 2012. The State's evidence tended to show the following.

In the fall of 2009, Defendant, age forty, met Brian Harris,¹ age fourteen, at Tri-City Baptist Church in Conover, where Defendant and the Harris family attended church services. Defendant met Brian through another youth who attended Tri-City Baptist. Defendant would frequently spend time with Brian. Brian's father and mother believed Defendant was serving as an adult friend and mentor to Brian. Brian testified that Defendant "fulfilled three roles in my life, a father at the time, a best friend, and a brother."

¹ A pseudonym is used to protect the juvenile's identity.

Defendant would also buy Brian gifts such as an iPod, cell phone, and clothes.² Defendant would also purchase alcohol for Brian. Defendant provided Brian with alcohol at Defendant's residence on more than one occasion. Defendant also took Brian on work trips with him where Defendant would provide Brian with alcohol. Brian testified to getting intoxicated with Defendant in their hotel room on trips to Virginia and Myrtle Beach.

Brian testified that Defendant would frequently "talk about giving [Brian] oral sex and stuff like that." Further, Brian stated that the topic of oral sex "came up at least once a day or once every other day." On one occasion Brian was staying overnight at Defendant's house, and with whiskey purchased by Defendant, Brian became intoxicated. Brian testified that on that particular night, Defendant tried to convince Brian to allow Defendant to perform oral sex on him. Brian testified that he was drunk and had his pants down when he walked into the room where Defendant was located, and that Defendant proceeded to perform oral sex on Brian. Brian stated that when he realized what was happening, he punched Defendant in the mouth and locked himself in a bedroom. Brian testified that Defendant told him to not tell anyone about what happened.

² At some point Brian's parents told Defendant that the gift giving was inappropriate and requested that he stop.

A few days later, Brian flew to New York to visit family. While in New York, Brian's cousin questioned Brian about his relationship with Defendant. Eventually Brian told his cousin about the incident. Brian made his cousin promise not to tell anyone about what happened. However, Brian's cousin eventually told his parents, who in turn told Brian's mother. After Brian and his mother flew back to North Carolina, Brian's mother told Brian that she knew about the incident and that Brian would not be allowed to see Defendant anymore. Brian's mother instructed Brian to tell his father, which he eventually did. Brian's father notified the sheriff's department.

The sheriff's department subsequently opened an investigation. Officer Rick Younger of the special victims unit was assigned to investigate. Officer Younger specialized in investigating crimes against children. Officer Younger interviewed both Brian and Defendant about the incident. Officer Younger testified that Brian told him that he and Defendant would frequently joke about Defendant having sex with Brian. Often times this was done while Brian and Defendant were drinking. Officer Younger also testified that Brian told him that at the time of the incident, Brian walked into Defendant's bedroom where Defendant was lying on his stomach watching

television. Brian told Officer Younger that he got up and pulled his penis out, at which point Defendant said, "I don't want to." Brian then stuck his penis into Defendant's mouth. Despite this, Officer Younger testified that Brian said Defendant and Brian "really got into" the oral sex, which lasted approximately thirty seconds before they stopped. Brian told Officer Younger that Defendant and he were both intoxicated at the time of the incident.

Following Officer Younger's interview with Brian, Defendant voluntarily went to the sheriff's office to be interviewed by Younger. Officer Younger testified that Defendant admitted to giving Brian alcohol on at least two occasions, and that Brian's penis was in Defendant's mouth for about ten seconds. Officer Younger also testified that Defendant characterized Brian as being the aggressor during the incident. Defendant told Younger that Brian came into his bedroom and dared Defendant to touch his penis, and then Brian stuck his penis into Defendant's mouth.

The State at trial also tendered Jeanna Frye as an expert in substance abuse, sex offender treatment, and child sex abuse. Ms. Frye testified in her capacity as an expert witness as well as in her capacity as Brian's counselor. Ms. Frye testified to

the contents of her clinical notes regarding some of the activities that Defendant and Brian would engage in when they were together. Ms. Frye referred to Defendant as "the offender" in her notes, and also testified using the term "offender" to describe Defendant during her testimony. Ms. Frye also stated that Brian described his relationship with Defendant as like a father, a friend, and a brother. Ms. Frye testified that she responded to Brian's characterization of Defendant by explaining to him that:

Father figures or best friends don't groom their sons for oral sex or masturbation. Best friends don't look at their sons to give them oral sex or masturbation. And brothers don't do the same either. That is usually called incest.

Ms. Frye further testified that Brian told her that Defendant would show him pornography, wrestle and tickle him, tell Brian that he would protect him from other kids and his father, would purchase things to gain Brian's trust, and try to find out what sexual things Brian would be willing to do with him.

Defendant did not offer any evidence. The following instruction was included in the court's jury charge:

On a couple of occasions during the course of this trial I gave you some limiting instructions as to the purposes for which you could consider certain testimony. In particular you'll recall that on more than

one occasion a witness may have been testifying and then that witness made reference to a statement made to that witness by another person. Now, you should not consider those secondhand comments or out-of-court statements for purposes of proving the truth of what was contained in those statements. You should limit your consideration of those statements to the question of whether or not those statements made by those persons to the witness corroborated or supported the testimony given by that person having made the statement when that person actually testified here in court. You should not consider those statements for any other purpose except to help you decide whether or not to believe the testimony of that witness when that person testified.

After deliberation, the jury unanimously found Defendant guilty of a statutory sex offense against a victim who is 13, 14, or 15-years-old. Defendant was sentenced to 192-240 months imprisonment and classified as a sexually violent predator. Defendant gave oral notice of appeal in open court.

II. Jurisdiction

As Defendant appeals from the final judgment of a superior court, an appeal lies of right to this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2011).

III. Analysis

Defendant asserts that he was denied the effective assistance of counsel when his attorney failed to ask for an

instruction explaining that Brian's statements to Officer Younger could be used not only to corroborate his in-court testimony, but also to impeach it. Defendant also asserts that the trial court committed plain error by allowing the State's expert to "testify on the ultimate question of [Defendant's] guilt." We disagree.

A. Ineffective Assistance of Counsel

Defendant first argues that he was denied the effective assistance of counsel because his attorney consented to the admission of Brian's statements to Officer Younger, but failed to ask the court to instruct the jury that it could consider those statements not only for the purposes of corroborating Brian's testimony, but also to impeach Brian's testimony to the extent the jury found the testimony and prior statements inconsistent. Defendant alleges that this distinction was crucial, and therefore his counsel's failure to request an instruction on impeachment constitutes ineffective assistance necessitating a new trial. We disagree.

The Sixth Amendment to the United States Constitution, as well as Article I, §§ 19 and 23 of the North Carolina Constitution, guarantee a criminal defendant the effective assistance of counsel. In order to prevail on a claim of

ineffective assistance of counsel, a criminal defendant must meet a two-pronged test:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (quotation marks, citation, and emphasis omitted). When ineffective assistance of counsel claims are brought, "[r]elief should be granted only when counsel's assistance is so lacking that the trial becomes a farce and mockery of justice." *State v. Pratt*, 161 N.C. App. 161, 163, 587 S.E.2d 437, 439 (2003) (quotation marks and citation omitted). Accordingly,

claims of ineffective assistance of counsel should [generally] be considered through motions for appropriate relief and not on direct appeal. [Ineffective assistance of counsel] claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required.

In re C.W.N., Jr., ___ N.C. App. ___, ___, 742 S.E.2d 583, 585 (2013) (citations and quotation marks omitted) (second

alteration in original).

An attorney's performance is evaluated under the standard of "reasonableness under prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). A defense attorney's chief duty is to "advocate the defendant's cause." *State v. Dockery*, 78 N.C. App. 190, 191, 336 S.E.2d 719, 721 (1985). In order to effectively advocate for his client, the defense attorney must present evidence in support of his theory of the case and in support for his client's plea of not guilty. *State v. Moorman*, 320 N.C. 387, 402, 358 S.E.2d 502, 511 (1987); *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507 (1985). Consistent with the reasonableness standard, a defense attorney should seek to ensure the trial court's instructions are proper. See National Legal Aid and Defender Association, *Performance Guidelines for Criminal Defense Representation*, Guideline 7.7. However,

[j]udicial scrutiny of counsel's performance must be highly deferential. . . . Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Strickland, 466 U.S. at 689 (quotation marks and citation omitted).

Defendant argues that he was denied the effective assistance of counsel because his attorney consented to the admission of Brian's out-of-court statement to Officer Younger, and then failed to request an instruction regarding impeachment. Defendant argues that his attorney should have asked the court to instruct the jury that it could not only consider if Brian's statement *corroborated* Brian's in-court testimony, but also if it *conflicted* with that testimony. Defendant argues that such an instruction was necessary, because Brian's in-court testimony conflicted with his previous out-of-court statements on a few points. Specifically, Brian testified in-court that Defendant "tried to convince" Brian to engage in oral sex together, whereas Brian previously told Officer Younger that Defendant did not want to perform oral sex on Brian. Brian also previously told Officer Younger that he grabbed Defendant's head and "stuck his penis in [Defendant's] mouth," suggesting Brian was the aggressor.

However, Defendant fails to point out that the trial judge instructed the jury during Officer Younger's testimony that "[Officer Younger's testimony regarding Brian's previous out-of-

court statements] is not additional evidence as to what actually happened. *It's simply offered for helping you to decide whether or not to believe [Brian's prior in-court testimony].*" A similar instruction also appeared in the jury charge.

Thus, the trial judge implicitly instructed the jurors that they could consider whether Brian's out-of-court statements conflicted with his in-court testimony, since the jury was instructed to use the testimony to determine "whether or not" to believe Brian's in-court testimony. This should have been all the more clear to the jurors given defense counsel's strategy of highlighting discrepancies in Brian's accounts of the night in question. For example, defense counsel cross examined Brian as follows:

Q. Do you recall telling Officer Younger that you then walked into [Defendant's] bedroom?

A. Yes.

Q. And that [Defendant] was laying on his bed watching television?

A. Yes.

Q. And he was laying on his stomach on his bed, his head was at the foot of the bed?

A. Yes.

Q. So, in other words, he was laying backwards on his stomach and he was facing

the television?

A. Yes.

Q. And you recall telling Officer Younger that you stuck it out there, meaning your penis, and that [Defendant] said, "I don't want to"?

A. [Defendant] did not say "I don't want to."

Q. Do you know why Officer Younger would have written down that you said that?

[THE STATE]: Objection.

THE COURT: Sustained.

Q. Do you deny you said that to Officer Younger?

A. I'm not denying it. I don't remember.

Q. Okay. And do you recall that you told Officer Younger that you grabbed [Defendant's] head and then it happened?

A. Yes. He was motioning towards it.

Q. So you're saying [Defendant] was motioning towards his head?

A. No. He was more -- He wouldn't -- Like, he opened his mouth and kind of reached out there more.

Q. Do you know why you didn't tell Officer Younger that?

A. No.

Q. Do you think your memory was fresher thirty days after all that happened versus

two years[?]

Accordingly, we do not believe that Defendant's trial became a "farce and mockery of justice," merely because his attorney failed to request an explicit instruction which used the words "impeachment" or "conflicted." *Pratt*, 161 N.C. App. at 163, 587 S.E.2d at 439. We therefore deny Defendant's ineffective assistance of counsel claim.

B. Plain Error

Defendant next argues that the trial court committed plain error by allowing the State's expert to "testify on the ultimate question of [Defendant's] guilt." Defendant argues that the trial court improperly allowed the State's expert witness, Ms. Frye, to give her opinion on Defendant's guilt by equating the incident to incest and by referring to Defendant as "the offender" throughout her testimony. However, even assuming Ms. Frye's testimony was impermissible, Defendant cannot demonstrate that admission of that testimony rises to the level of plain error.

The 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.

State v. Lawrence, 365 N.C. 506, 516-17, 723 S.E.2d 326, 333 (2012) (citation, quotation marks, and alterations omitted).

Defendant acknowledges that the statutory sex offense he was convicted of is a "strict liability" crime, to which consent is not a defense. Thus, Defendant's strategy at trial did not involve a denial that he and Brian engaged in oral sex. Instead, Defendant argued that the act was forced on him by Brian, and thus was not volitional. Indeed, the jury heard evidence that Defendant admitted to Officer Younger that the incident occurred.

Thus, the question of Defendant's guilt at trial hinged on whether the jury believed that Defendant, a 40-year-old man with a law enforcement background, had been forced against his will to perform oral sex on a 14-year-old boy. Viewed in this light, we cannot hold that Ms. Frye's use of the word "offender," or her brief allusion to the concept of incest in recounting her conversation with Brian, would have damaged Defendant's credibility such that it "had a probable impact on the jury's

finding that the defendant was guilty." Defendant's argument is overruled.

INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM DENIED; NO PLAIN ERROR.

Judges MCGEE and STEPHENS concur.

Report per Rule 30(e).