

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA12-1580
NORTH CAROLINA COURT OF APPEALS

Filed: 1 October 2013

STATE OF NORTH CAROLINA

v.

Cumberland County
Nos. 09 CRS 65623-25
10 CRS 50518

WILLIE LEE HOLMES

Appeal from judgments entered 19 July 2012 by Judge Mary Ann Tally in Cumberland County Superior Court. Heard in the Court of Appeals 23 September 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Valerie Bateman, for the State.

Mark Montgomery for defendant-appellant.

ERVIN, Judge.

Defendant Willie Lee Holmes appeals from judgments sentencing him to a term of 192 to 240 months imprisonment based upon his convictions for three counts of statutory rape of a child in violation of N.C. Gen. Stat. § 14-27.7A(a) and three counts of taking indecent liberties with a child and to a consecutive term of 192 to 240 months imprisonment based upon his convictions for one count of statutory rape of a child in

violation of N.C. Gen. Stat. § 14-27.7A(a) and one count of taking indecent liberties with a child. On appeal, Defendant argues that the trial court committed plain error by repeatedly referring to the prosecuting witness as “a victim” or “the victim” in its instructions to the jury. After careful consideration of Defendant’s challenge to the trial court’s judgments in light of the record and the applicable law, we conclude that the trial court’s judgments should remain undisturbed.

I. Factual Background

A. Substantive Facts

T.W.,¹ who was born in August of 1994, was raised by her grandfather until he died. At age five, Terri moved in with Defendant; his wife, Annie Holmes; and Terri’s cousin, B.W.² Defendant began touching Terri in an inappropriate manner when she was six or seven years old and began having intercourse with Terri by the time she was in the third grade. Although Terri told Beatrice that Defendant “did something and it really, really hurted and . . . described it to her[,]” she told

¹T.W. will be referred to throughout the remainder of this opinion as Terri, a pseudonym used for ease of reading and to protect the child’s privacy.

²B.W. will be referred to throughout the remainder of this opinion as Beatrice, a pseudonym used for ease of reading and to protect the child’s privacy.

Beatrice to keep it a secret. Defendant continued to have intercourse with Terri twice a month until the family moved to Buckingham Avenue, where he had sex with her every other day unless she was menstruating.

In April of 2008, Terri got in trouble for having sex with T.D.,³ who was her boyfriend at that time, at school. Ms. Holmes kept Terri out of school for a week and left her alone at home with Defendant during that interval.⁴ After Defendant had intercourse with Terri on three of the days during the week when Ms. Holmes kept Terri out of school, Defendant "swore on the Bible he would never touch [complainant] anymore[.]" However, Defendant resumed having intercourse with Terri less than one month later. At about that time, Terri confided to her then best friend, M.J.,⁵ that Defendant was having sex with her.

Defendant's final act of intercourse with Terri took place in August of 2009 while Ms. Holmes was attending a work-related function. After sending Beatrice outside to feed the dogs,

³T.D. will be referred to throughout the remainder of this opinion as Tommy, a pseudonym used for ease of reading and to protect the child's privacy.

⁴A school official confirmed that Terri was absent from school on an unexcused basis from 25 April to 2 May 2008.

⁵M.J. will be referred to throughout the remainder of this opinion as Michael, a pseudonym used for ease of reading and to protect the child's privacy.

Defendant called Terri into the guest bedroom and had intercourse with her. On the following day, Terri told her best friend at church, C.D.,⁶ what defendant had done. Camille repeated Terri's accusation to her mother, who passed this information along to a social worker. On 8 August 2009, Terri, Camille, Camille's mother, and a social worker told Ms. Holmes what had happened. At that point, Defendant "came and got his stuff" and moved out of their residence.⁷

B. Procedural History

On 12 January 2010, warrants for arrest charging Defendant with four counts of statutory rape of a child in violation of N.C. Gen. Stat. § 14-27.7A(a), four counts of taking indecent liberties with a child, and one count of incest⁸ in violation of N.C. Gen. Stat. § 14-178(b)(1)(B) were issued. On 14 June 2010, the Cumberland County grand jury returned bills of indictment charging Defendant with four counts of statutory rape of a child in violation of N.C. Gen. Stat. § 14-27.7A(a) and four counts of taking indecent liberties with a child. The charges against

⁶C.D. will be referred to throughout the remainder of this opinion as Camille, a pseudonym used for ease of reading and to protect the child's privacy.

⁷ Beatrice, Tommy, Michael, Camille, Camille's mother, and an investigating officer testified at trial for the purpose of corroborating Terri's testimony.

⁸The State subsequently dismissed this incest charge voluntarily.

Defendant came on for trial before the trial court and a jury at the 16 July 2012 criminal session of the Cumberland County Superior Court. After the State rested, Defendant neither testified nor offered evidence. On 19 July 2012, the jury returned verdicts convicting Defendant as charged. At the ensuing sentencing hearing, the trial court consolidated three of Defendant's convictions for statutory rape of a child in violation of N.C. Gen. Stat. § 14-27.7A(a) and three of Defendant's convictions for taking indecent liberties with a minor for judgment and sentenced Defendant to a term of 192 to 240 months imprisonment and consolidated Defendant's remaining convictions for statutory rape of a child in violation of N.C. Gen. Stat. § 14-27.7A(a) and taking indecent liberties with a minor for judgment and sentenced Defendant to a consecutive term of 192 to 240 months imprisonment. Defendant noted an appeal to this Court from the trial court's judgments.

II. Substantive Legal Analysis

In his sole challenge to the trial court's judgments, Defendant contends that the trial court committed prejudicial or plain error by referring to Terri as the "victim" twenty-two times during its instructions to the jury. More specifically, Defendant argues that these references to Terri as a "victim" constituted an impermissible expression of the trial court's

opinion that a crime had been committed in violation of N.C. Gen. Stat. §§ 15A-1222 and 15A-1232. According to Defendant, the trial court's "repeated characterization of the complainant as 'the victim' subtly and inadvertently yet impermissibly suggested that, in the trial court's view, the [S]tate had met its burden of proving that a crime was committed," thus entitling him to a new trial. We do not find Defendant's argument persuasive.

As Defendant candidly concedes, he failed to preserve the challenge to the trial court's jury instructions set out in his brief by lodging a contemporaneous objection. N.C.R. App. P. 10(a)(2) (stating that "[a] party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection"). Although N.C.R. App. P. 10(a)(4) specifically provides that our review of jury instructions to which no objection was offered is limited to plain error, Defendant claims that the trial court's reference to Terri as a "victim" violated the statutory mandates embodied in N.C. Gen. Stat. §§ 15A-1222 and 15A-1232, obviating the necessity for a contemporaneous objection as a precondition for properly preserving this claim for appellate review. See

State v. Ashe, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985) (citing *State v. Bryant*, 189 N.C. 112, 115, 126 S.E. 107, 109 (1925)). However, we recently rejected an essentially identical argument in *State v. Phillips*, __ N.C. App. __, __, 742 S.E.2d 338, __ (2013) (stating that, “where our courts have repeatedly stated that the use of the word ‘victim’ in jury instructions is not an expression of opinion, we will not allow defendant, after failing to object at trial, to bring forth this objection on appeal, couched as a statutory violation, and thereby obtain review as if the error was preserved”). As a result, we will review Defendant’s challenge to the trial court’s instructions using a plain error standard of review.

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice--that, after examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (quotation marks and citations omitted) (alterations in original). As a result, the ultimate issue raised by Defendant’s challenge to the trial court’s instructions is

whether any error embodied in the trial court's instructions had "a probable impact on the jury's finding that the defendant was guilty." *Id.*

In charging the jury concerning the elements of statutory rape in violation of N.C. Gen. Stat. § 14-27.7A(a), the trial court quoted from N.C.P.I. -Crim. 207.15.2, Statutory Rape Against a Victim who was Thirteen, Fourteen, or Fifteen Years Old (Replacement Mar. 2002).⁹ The Supreme Court has rejected arguments that the pattern jury instructions' use of the term "victim" in delineating the elements of the offense set out in N.C. Gen. Stat. § 14-27.7A(a), without more, constitutes error, an improper expression of opinion by the instructing court, or a violation of the defendant's right to due process. *State v. Gaines*, 345 N.C. 647, 675, 483 S.E.2d 396, 413 (1997) (rejecting a claimed that references to "the victim" constituted a "violation of N.C. [Gen. Stat.] §§ 15A-1222 and -1232 and the Fourteenth Amendment to the United States Constitution"), *State v. Hill*, 331 N.C. 387, 411, 417 S.E.2d 765, 777 (1992) (stating that, "[b]y using the term 'victim,' the trial court was not intimating that the defendant committed the crime"), *cert. denied*, 507 U.S. 924, 113 S. Ct. 1293, 122 L. Ed. 2d 684. The

⁹Defendant has not cited any portion of the trial court's instructions concerning the indecent liberties charge in support of his challenge to the trial court's judgments.

trial court instructed the jury concerning the presumption of innocence and the fact that the State bore the burden of proving Defendant's guilt beyond a reasonable doubt and admonished the members of the jury that they were "the sole judges of the believability of witnesses" and "of the weight to be given any evidence." In addition, the trial court explicitly told the jury that "[t]he law requires the presiding judge to be impartial" and stated that the jurors "should not infer from anything I have done or said that the evidence is to be believed or disbelieved, that a fact has been proved or what your findings ought to be." Absent the presence of contrary information in the record, "[w]e presume, as we must, that the jury followed the instructions as submitted to it by the trial court." *State v. Thompson*, 359 N.C. 77, 112, 604 S.E.2d 850, 875 (2004) (citation omitted), *cert. denied*, 546 U.S. 830, 126 S. Ct. 148, 163 L. Ed. 2d 80 (2005). As a result, given the Supreme Court's previous decisions with respect to this issue, the trial court's repeated emphasis upon the fact that Defendant was presumed to be innocent and that the State bore the burden of proving his guilt beyond a reasonable doubt, the trial court's express disclaimer of having any opinion concerning any issue which the jury was required to consider, and the substantial evidence of Defendant's guilt, we are unable to

conclude that it is probable that a different outcome would have occurred at Defendant's trial had the trial court refrained from referring to Terri as a "victim" while instructing the jury.¹⁰ As a result, the trial court's judgments should, and hereby do, remain undisturbed.

NO ERROR.

Judges STROUD and DILLON concur.

Report per Rule 30(e).

¹⁰ Although this Court has recently held that a trial court erred by referring to the prosecuting witness as "the victim," rather than "the alleged victim," *State v. Walston*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ 2013), under the particular facts present in that case, *Walston* is not controlling here given that the defendant in *Walston* properly presented this issue for appellate review; that the issue of Defendant's guilt in this case does not strike us as a close one; and that the record in this case, unlike the record in *Walston*, contains no evidence tending to show that the offenses with which Defendant was charged never occurred.