NO. COA12-251
NORTH CAROLINA COURT OF APPEALS

Filed: 18 December 2012

STATE OF NORTH CAROLINA

v. Buncombe County
No. 10 CRS 52760

DANIEL DEWAYNE OWENS,
Defendant.

Appeal by defendant from judgment entered 23 September 2011 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 11 September 2012.

Attorney General Roy Cooper, by Assistant Attorney General Brenda Menard, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kristen L. Todd, for defendant-appellant.

GEER, Judge.

Defendant Daniel Dewayne Owens appeals from his conviction of second degree rape. On appeal, defendant primarily contends that the trial court committed reversible error by allowing the prosecutor and several lay witnesses to refer to "Katie,"[1] the prosecuting witness in this case, as having been raped. We hold

[1]Katie is a pseudonym used throughout this opinion for ease of reading and to protect the privacy of the minor.

that the prosecutor was properly acting as an advocate representing the State and seeking the conviction of defendant for rape. As for the lay witnesses, we hold that their references to "rape" were a proper shorthand statement of facts. Since defendant's remaining arguments are unpersuasive, we conclude that defendant received a trial free of prejudicial error.

Facts

The State's evidence tended to show the following facts. Katie was defendant's 16-year-old second cousin. On 6 March 2010, Katie was spending the night at the trailer defendant shared with his girlfriend in order to babysit defendant's three-year-old son while defendant and his girlfriend went out with friends. After a few hours, defendant and his girlfriend returned to the trailer with their friends, started a bonfire, and began drinking. Katie accepted sips from defendant's girlfriend's drink, but Katie drank less than a cup of alcohol.

At some point during the night, Katie went to go to sleep on the twin bed in the defendant's son's room, leaving the child with defendant. Defendant and his girlfriend subsequently put the child to bed on the couch in the boy's bedroom and then went to bed in their bedroom at the other end of the trailer.

Sometime around 4:00 a.m., Katie was awakened by the pain of defendant's penis in her vagina.

Katie did not cry out because she was scared. When defendant had completed the sex act, Katie rolled over and cried. Defendant told Katie not to tell anyone, that he was sorry, that he would get her the Plan B pill in the morning, and that she was the best he had ever had. Katie agreed not to tell anyone what had happened in order to get defendant to leave the room.

After defendant had left, Katie called several people in order to find someone to come pick her up because her car was blocked in by other cars. When she called her cousin Andrea's phone, Andrea's boyfriend Bryan answered. Katie then spoke to Andrea, who agreed to come get Katie. While Katie was on the phone with Andrea, defendant came back in the room and told her not to call anyone and that he would take her somewhere if she wanted to go. After defendant again left the bedroom, Katie went outside and began walking around while talking to Andrea on the phone to coordinate their meeting.

Andrea and Bryan took Katie to the hospital. Bryan told the doctors that Katie had been raped. A sexual assault nurse examined Katie and obtained a rape kit. The examination

revealed evidence of injuries, including a laceration of the hymen, redness, swelling, and inflammation.

Katie's mother and stepfather were notified that morning, 7 March 2010. When Katie's stepfather and Bryan went to defendant's trailer to retrieve Katie's car, defendant at first denied any wrongdoing, but then said that he had not known what he was doing because he was drunk and thought he was in bed with his girlfriend. At 10:51 a.m. that day, Katie received a text message from defendant that purported to apologize to her.

Defendant was indicted for one count of second degree rape. At trial, defendant testified that he was awakened during the night by a noise and went into his son's room to check on him. He found his son still asleep, so he went to the window to see whether he could discover the source of the noise. As he was passing by the bed on which Katie was sleeping, she rolled over onto her back. Thinking she was awake, defendant walked over to her to see if she knew what the noise was. When he realized she was in fact still asleep, defendant attempted to wake her by touching her shoulder and kissing her cheek and neck.

After defendant kissed Katie, she woke up with a smile on her face. Defendant wondered how far Katie "would let [him] go, how far -- if she would let me sleep with her." He then climbed into bed with Katie. When he reached down and grabbed the

waistband of her pants, she raised her hips and let him take them off. Defendant claimed they then had consensual intercourse. After defendant went into the bathroom to clean up, he returned to the bedroom and found Katie crying. Defendant asked her what was wrong, and she said she did not want to get pregnant. Before defendant could say anything else, Katie asked him to leave the room, and he went back to his bedroom.

The jury found defendant guilty on 23 September 2011. The trial court sentenced defendant to a presumptive-range term of 73 to 97 months imprisonment. The trial court also ordered lifetime registration and satellite-based monitoring. Defendant timely appealed to this Court.

I

Defendant first contends that several of the lay witnesses "intruded into the domain of the court and the jury when they were repeatedly permitted to use the word 'rape' in their testimony." Defendant further contends that the trial court should not have allowed the prosecutor to refer to Katie as having been "raped."

Because defendant did not object at trial, he seeks plain error review. Our Supreme Court has recently held:

> 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, ___ N.C. ___, ___, 723 S.E.2d 326, 334 (2012) (internal citations and quotation marks omitted).

Defendant points to the following testimony. Andrea testified that Katie told her in the phone call that "she had been raped and that she wanted me to come get her right away." Bryan similarly testified that Katie told him that "Daniel raped her" and that he and Andrea took Katie to the hospital because "[s]he was raped." Bryan further testified that when they got to the hospital, he "told the doctor that she was raped, and then they took [Katie] back." Finally, defendant points to Katie's stepfather's testimony that on the way to the hospital, he learned that Katie "had been raped."

Defendant contends that, under Rule 704 of the Rules of Evidence, the witnesses' references to "rape" amounted to improper lay opinion testimony because "rape" is a legal term of art. Defendant relies upon *State v. Najewicz*, 112 N.C. App. 280, 293, 436 S.E.2d 132, 140 (1993), in which this Court upheld

the trial court's ruling that the defendant could not ask his work supervisor whether she believed that the defendant was capable of rape. The Court explained that "while opinion testimony may embrace an ultimate issue, the opinion *may not* be phrased using a legal term of art carrying a specific legal meaning not readily apparent to the witness." *Id.* Because, the Court concluded, "'[r]ape' is a legal term of art," the supervisor's "opinion testimony concerning whether defendant was 'capable of rape' was properly excluded." *Id.*

Our Supreme Court has, however, on multiple occasions explained that not all testimony referring to "rape" constitutes an improper legal conclusion. In *State v. Goss*, 293 N.C. 147, 154, 235 S.E.2d 844, 849 (1977), the prosecuting witness testified that "'[w]hen I say he started raping me, I mean he got on top of me and he started having sexual intercourse with me and I begged him to leave me alone and to get off.'" The Court, in rejecting the defendant's argument that use of the word "raping" was an improper legal conclusion, explained:

> In *State v. Vinson*, 287 N.C. 326, 215 S.E. 2d 60 (1975), *death sentence vacated*, [428 U.S. 902, 49 L. Ed. 2d 1206,] 96 S.Ct. 3204 (1976), we held the use of the word "rape" by a witness did not constitute an opinion on a question of law. The same issue was presented in *State v. Sneeden*, 274 N.C. 498, 501, 164 S.E. 2d 190, 193 (1968), where we held that the victim's statement that "defendant was in the act of raping her

> was merely her way of saying that he was having intercourse with her. She was not expressing her opinion that she had been raped. Rather, she was stating in shorthand fashion her version of the events . . . ." [The prosecuting witness, in this case,] testified, "When I say he started raping me, I mean he got on top of me and he started having sexual intercourse with me and I begged him to leave me alone and to get off." She also testified that "on both of these occasions he penetrated me." Her use of the term "rape" was clearly a convenient shorthand term, amply defined by the balance of her testimony.

Id. The Court, therefore, overruled the assignment of error. *Id.*

The Supreme Court addressed the same issue in *State v. Pearce*, 296 N.C. 281, 250 S.E.2d 640 (1979). In *Pearce*, the prosecuting witness had testified that she told a doctor that the defendant raped her. *Id.* at 285, 250 S.E.2d at 644. The doctor in turn confirmed that the prosecuting witness had reported to him that she was raped. *Id.* Relying on *Goss*, the Court held that "the word 'rape' was used by the prosecuting witness upon a background of testimony in which she had made a detailed statement of the actual assault upon her. The use of the word 'rape' was obviously a 'shorthand statement' of the assault which she had previously described in detail. Also, as in *Goss*, testimony by [the doctor] which included use of the word 'rape' was properly admitted since it was offered purely

for the purpose of corroborating the prosecuting witness's trial testimony." *Id.* at 286, 250 S.E.2d at 645.

In this case, each of the instances of lay testimony challenged by defendant involved witnesses repeating Katie's shorthand statement of fact describing what happened to her. Under *Goss* and *Pearce*, the trial court properly admitted the testimony.

With respect to the prosecutor, defendant contends that the prosecutor's use of the word "rape" in her questions amounted to an improper expression of the prosecutor's personal belief that defendant was guilty. On redirect of Katie, after Katie had already described in detail defendant penetrating her while she was asleep, the prosecutor asked: "While the defendant was raping you, were you looking around for a clock?" Defendant also complains about the prosecutor referring to Katie having been raped in questions to three officers of the Buncombe County Sheriff's Department involved with the investigation of the case.

Defendant contends that these questions violated the principle that a prosecutor may not, in argument or during the questioning of witnesses, "place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs, and personal opinions not supported by the evidence." *State v.*

Britt, 288 N.C. 699, 711, 713, 220 S.E.2d 283, 291, 292 (1975) (holding that prosecutor's cross-examination questions that revealed defendant had, in prior trial, been found guilty of murder and sentenced to death "were highly improper and incurably prejudicial").

As support for his argument that the prosecutor should have been barred from using the word "rape," defendant points to *State v. McEachern*, 283 N.C. 57, 194 S.E.2d 787 (1973). *McEachern*, however, addressed a trial judge's expression of opinion and did not involve conduct by a prosecutor. In *McEachern*, the trial judge, at a point in the trial when the victim had not yet testified that she had been raped, asked whether the victim was "in the car when [she was] raped?" *Id.* at 59, 194 S.E.2d at 789. The Court held that the trial judge's question was error because he had asserted facts not in evidence and his statement was likely interpreted by the jury as reflecting his opinion of the defendant's guilt. *Id.* at 62, 194 S.E.2d at 790.

Defendant's reliance on *McEachern* mistakes the differing role of a trial judge, who must remain neutral, from the role of a prosecutor who is an advocate. As our Supreme Court has previously explained:

> The prosecution of one charged with a criminal offense is an adversary proceeding.

> The prosecuting attorney, whether the solicitor or privately employed counsel, represents the State. It is not only his right, but his duty, to present the State's case and to argue for and to seek to obtain the State's objective in the proceeding. That objective is not conviction of the defendant regardless of guilt, not punishment disproportionate to the offense or contrary to the State's policy. It is the conviction of the guilty, the acquittal of the innocent and punishment of the guilty, appropriate to the circumstances, in the interest of the future protection of society. *In the discharge of his duties the prosecuting attorney is not required to be, and should not be, neutral. He is not the judge, but the advocate of the State's interest in the matter at hand.*

State v. Westbrook, 279 N.C. 18, 36-37, 181 S.E.2d 572, 583 (1971) (emphasis added), *vacated in part on other grounds*, 408 U.S. 939, 33 L. Ed. 2d 761, 92 S. Ct. 2873 (1972).

It is well established that a prosecutor "has much latitude in the language and manner of presenting his side of the case consistent with the facts in evidence." *State v. Stegmann*, 286 N.C. 638, 656, 213 S.E.2d 262, 275 (1975) (internal quotation marks omitted), *vacated in part on other grounds*, 428 U.S. 902, 49 L. Ed. 2d 1205, 96 S. Ct. 3203 (1976). *See also Britt*, 288 N.C. at 711, 220 S.E.2d at 291 ("Language may be used *consistent with the facts in evidence* to present each side of the case.").

Here, when the prosecutor referred to Katie as having been raped, Katie had already testified regarding what happened and

testified that she was "raped." The prosecutor, in her questions, was using language consistent with the facts in evidence as an advocate seeking conviction of defendant for rape. Defendant has failed to cite any authority -- and we know of none -- precluding the State from referring to a defendant's alleged conduct as "rape" when prosecuting that defendant for rape.

II

Defendant next contends that the trial court erred, under Rule 404(b) of the Rules of Evidence, in admitting testimony of defendant's girlfriend regarding his sexual tastes. Specifically, defendant argues that the trial court erred in overruling his objection and admitting testimony that defendant liked to look at pornography involving teenage girls. In addition, defendant argues that the court committed plain error in admitting his girlfriend's testimony that she did not like his "kinky sex," that he had engaged in "extremely painful" anal sex with her, that he begged her to get on the bedpost in their bedroom, that he wanted her to engage in lesbian sex, and that he liked to watch pornography involving "girl on girl sex."

We need not address whether this evidence was admissible under Rule 404(b) because we hold that defendant has failed to show sufficient prejudice. In this case, there is no dispute

that sexual intercourse occurred between defendant and Katie and that defendant wanted to have sex with Katie. The only issue defendant raised in his defense was that his intercourse with the teenage girl was consensual. Given Katie's sexual assault examination, defendant's statements to Katie's stepfather and Bryan, defendant's text message to Katie, Katie's statements to others shortly after the alleged rape, Katie's testimony, and defendant's testimony at trial that he woke Katie and wanted to see if she would let him sleep with her, we cannot conclude that there is a reasonable possibility the jury would have found defendant not guilty had the testimony that defendant liked to watch pornography involving teenage girls been excluded. *See* N.C. Gen. Stat. § 15A-1443(a) (2011).

With respect to the remaining evidence, although arguably more prejudicial, defendant did not sufficiently object and, therefore, must demonstrate, based on an "examination of the entire record," that the admission of the testimony "'had a probable impact on the jury's finding that the defendant was guilty.'" *Lawrence*, ___ N.C. at ___, 723 S.E.2d at 334 (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). We are not permitted to consider the collective effect of all the alleged errors, but rather must determine whether defendant has shown as to each piece of evidence he contends was plain

error that the evidence had a probable impact on the verdict. *See State v. Dean*, 196 N.C. App. 180, 194, 674 S.E.2d 453, 463 (2009) ("[T]he plain error rule may not be applied on a cumulative basis, but rather a defendant must show that each individual error rises to the level of plain error."). Based on our review of the evidence, we conclude that defendant has failed to show that the jury would have probably found defendant not guilty had it not heard each individual piece of evidence.

III

Finally, defendant contends that the trial court erred in finding that his conviction was an aggravated offense that subjected him to lifetime registration as a sex offender and satellite-based monitoring. We note that the record on appeal does not contain a written notice of appeal as required for appeal from an order requiring satellite-based monitoring. *See State v. Clark*, ___ N.C. App. ___, ___, 714 S.E.2d 754, 761 (2011) ("[A] defendant seeking to challenge an order requiring his or her enrollment in SBM must give written notice of appeal in accordance with N.C.R. App. P. 3(a) in order to properly invoke this Court's jurisdiction. . . . In view of the fact that Defendant noted his appeal from the trial court's SBM order orally, rather than in writing, he failed to properly appeal the

trial court's SBM order to this Court, necessitating the dismissal of his appeal.").

Nevertheless, treating defendant's brief as a petition for writ of certiorari and allowing it, this Court has already concluded that the offense of second degree rape as set forth in N.C. Gen. Stat. § 14-27.3(a) (2011), the charged offense in this case, is an aggravated offense requiring lifetime registration and satellite-based monitoring. *See State v. Oxendine*, 206 N.C. App. 205, 209, 696 S.E.2d 850, 853 (2010). Although defendant quarrels with this Court's analysis in *Oxendine*, we are bound by it and may not accept defendant's invitation that we reconsider its holding.

No error.

Chief Judge MARTIN and Judge STROUD concur.

Report per Rule 30(e).