NO. COA12-723
NORTH CAROLINA COURT OF APPEALS

Filed: 20 November 2012

STATE OF NORTH CAROLINA

v. Davie County
No. 10 CRS 1217, 50947

CARLOS HERNANDEZ

Upon writ of certiorari from judgment entered 14 September 2011 by Judge Tanya Wallace in Davie County Superior Court. Heard in the Court of Appeals 22 October 2012.

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

Cheshire Parker Schneider & Bryan, PLLC by John Keating Wiles for defendant-appellant.

STEELMAN, Judge.

Where defendant made no request for a limiting instruction, the trial court did not err, much less commit plain error, in failing, *ex mero motu*, to give a limiting instruction concerning testimony that corroborated the child's testimony. Defendant's ineffective assistance of counsel claim is dismissed without

prejudice to defendant's right to raise that issue in a motion for appropriate relief.

I. Factual and Procedural Background

Carlos Hernandez (defendant) was indicted for two counts of first-degree statutory sexual offense and two counts of taking indecent liberties with a child. On 14 September 2011, a jury found defendant guilty of all charges. Defendant was sentenced to an active term of imprisonment of 240-297 months and satellite-based monitoring for his natural life.

On 19 December 2011, this Court granted defendant's petition for writ of *certiorari*.

II. Admission of Testimony

In his first argument, defendant contends that the trial court committed plain error in failing to give a limiting instruction to the jury with respect to testimony concerning prior statements by the child to four of the State's witnesses at trial. We disagree.

A. Standard of Review

Defendant concedes that he made no objection at trial to the admission of the witnesses' testimony.

Our review is limited to plain error. To show 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." *State v. Lawrence*, ___ N.C. ___, ___, 723 S.E.2d 326, 334 (2012) (internal citation and quotation marks omitted).

"Under the plain error standard, defendant must show that the instructions were erroneous and that absent the erroneous instructions, a jury probably would have returned a different verdict." *State v. Goforth*, 170 N.C. App. 584, 587, 614 S.E.2d 313, 315 (2005).

B. Analysis

"The law of this State is that an instruction limiting admissibility of testimony to corroboration is not required unless counsel specifically requests such an instruction." *State v. Smith*, 315 N.C. 76, 82, 337 S.E.2d 833, 838 (1985). In the instant case, defendant made no such request. The trial court did not err, much less commit plain error, in failing to give *ex mero motu* a limiting instruction as to the witnesses' testimony.

As a portion of this argument, defendant contends that the trial court erred in admitting State's Exhibit 1 into evidence. State's Exhibit 1 was the redacted interview report of Detective

Palmer from her interview of the child. Portions of the statement had been redacted based upon prior motions.

When the State moved that Exhibit 1 be received into evidence, defendant objected on the basis that the exhibit was "cumulative." Defendant then requested that, if the trial court admitted the exhibit, a limiting instruction be given. Based upon that request, the trial court gave the following instruction: "Ladies and gentlemen, you will consider State's Exhibit 1 only for the purpose of corroborating the witness's testimony, if indeed you find that it corroborates the witness's testimony, and for that purpose only."

While defendant objected to the admission of Exhibit 1, he did not object to the limiting instruction that he requested.

We hold that, having redacted State's Exhibit 1 and having given a proper limiting instruction, the trial court did not err in receiving that exhibit into evidence. Detective Palmer had previously testified to its contents.

This argument is without merit.

III. Ineffective Assistance of Counsel

In his second argument on appeal, defendant contends that he received ineffective assistance of counsel at trial.

"In general, claims of ineffective assistance of counsel

should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001). "In order to determine whether a defendant is in a position to adequately raise an ineffective assistance of counsel claim, we stress this Court is limited to reviewing this assignment of error only on the record before us[.]" *Stroud*, 147 N.C. App. at 554, 557 S.E.2d at 547. We are "without the benefit of information provided by defendant to trial counsel, as well as defendant's thoughts, concerns, and demeanor[,] that could be provided in a full evidentiary hearing on a motion for appropriate relief." *Stroud*, 147 N.C. App. at 554-55, 557 S.E.2d at 547 (alteration in original) (internal citation and quotation marks omitted).

"Our Supreme Court has instructed that should the reviewing court determine the IAC claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's rights to reassert them during a subsequent MAR proceeding." *Stroud*, 147 N.C. App. at 554, 557 S.E.2d at 547 (internal quotation marks omitted).

Based on the record before us, the claim of ineffective assistance of counsel cannot properly be decided on the merits. "Trial counsel's strategy and the reasons therefor are not

readily apparent from the record, and more information must be developed to determine if defendant's claim satisfies the *Strickland* test." *State v. Al-Bayyinah*, 359 N.C. 741, 753, 616 S.E.2d 500, 509-10 (2005). We dismiss this issue without prejudice to the right of defendant to raise this claim in a motion for appropriate relief.

NO ERROR IN PART and DISMISSED IN PART.

Chief Judge MARTIN and Judge ERVIN concur.

Report per Rule 30(e).