

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA13-268
NORTH CAROLINA COURT OF APPEALS

Filed: 17 September 2013

STATE OF NORTH CAROLINA

v. Gaston County
Nos. 11 CRS 63435, 63439,
JAMES TERRELL AUSTIN 12 CRS 6449-50, 6455-58,
6461-65

Appeal by defendant from judgments entered 27 July 2012 by Judge Robert C. Ervin in Gaston County Superior Court. Heard in the Court of Appeals 9 September 2013.

Attorney General Roy Cooper, by Assistant Attorney General Melissa H. Taylor, for the State.

Russell J. Hollers, III, for defendant appellant.

McCULLOUGH, Judge.

Defendant appeals from judgments entered after a jury found him guilty of two counts of sex offense with a child, five counts of sex offense in a parental role, four counts of indecent liberties with a child, and three counts of first-degree statutory rape. We find no prejudicial error at trial.

The State presented evidence tending to show the following: Defendant's wife, Rebecca, worked at a foster care licensing

agency and was A.B.'s foster care case manager. A.B. was eleven years old. In December 2009, Rebecca became A.B.'s guardian and A.B. moved in with defendant and Rebecca. A.B. testified that she liked living in the home, but eventually began to feel uncomfortable around defendant. A.B. testified that defendant would grab her butt, kiss her, and lie down with her in the mornings before he went to work. A.B. further testified that defendant put his fingers in her vagina, and also touched her vaginal area with his tongue and penis. On other occasions, defendant penetrated A.B.'s vagina with his penis. Defendant would tell A.B. that he loved her and that they were going to get married. When A.B. went to live with her aunt in Arkansas she told her aunt what happened with defendant.

After A.B. disclosed what happened, she was interviewed in Arkansas. A video of A.B.'s interview was played for the jury at trial. Prior to the video being played, the trial court instructed the jury as follows:

All right. Ladies and Gentlemen, the State is going to play for you at this time State's Exhibit No. 1. You may consider the statements in this video interview not for the truth of what's contained in the statements, but instead compare the statements in this video to the testimony that you've heard earlier this morning and use any consistencies or inconsistencies between the testimony and this statement in

helping you to evaluate the credibility of this witness.

During the charge to the jury, the trial court stated: "Certain videos were also introduced into evidence in this case. These videos may be considered by you as evidence of the facts they illustrate or show." On appeal, defendant argues the trial court erred by not telling the jury in the final charge that the statements contained in the video were only admitted for the limited purpose of corroborating or impeaching A.B.'s trial testimony. Defendant contends, "[i]n essence, the trial court's instruction told the jury that the recorded interview carried the same probative weight as A.B.'s testimony."

Here, defendant did not object to the trial court's jury instructions. "[T]he plain error standard of review applies on appeal to unpreserved instructional or evidentiary error." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "To establish plain error, defendant must show that the erroneous jury instruction was a fundamental error – that the error had a probable impact on the jury verdict." *Id.*

Defendant has not met his burden of showing plain error. Firstly, the trial court did give a limiting instruction prior to the video of A.B.'s interview being played for the jury. Furthermore, there was substantial evidence to support

defendant's convictions. A.B. testified about the many occasions that defendant, who was her guardian at the time, engaged in sexual activity with her. A.B.'s therapist, Shannon Kersey, testified that she attended a "good-bye" session on 27 September 2010 with A.B. and defendant when A.B. was moving to a new foster home. Defendant wanted to give A.B. a necklace that said, "I love you," a jewelry box, and an MP3 player. Ms. Kersey did not believe the items were appropriate. Ms. Kersey testified that she listened to the MP3 player and there was a recorded message from defendant to A.B. stating he loved her and wanted to marry her on her 18th birthday. Ms. Kersey further testified that she found a false bottom in the jewelry box that contained a note from defendant to A.B. stating how much he loved her and could not wait until she was older. Moreover, Sergeant Eric Wiggins with the Gastonia Police Department testified that defendant admitted he had "romantic feelings" for A.B. In light of the overwhelming evidence, defendant cannot show that, absent any error in the instructions to the jury, the jury probably would have returned a different verdict.

No error.

Judges HUNTER (Robert C.) and BRYANT concur.

Report per Rule 30(e).