NO. COA13-299
NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2013

STATE OF NORTH CAROLINA

v. Haywood County
Nos. 11 CRS 54230-31

RICKY RAY RICH, JR.

Appeal by defendant from judgments entered 24 August 2012 by Judge Alan Z. Thornburg in Haywood County Superior Court. Heard in the Court of Appeals 14 October 2013.

Attorney General Roy Cooper, by Assistant Attorney General Lauren M. Clemmons, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Emily H. Davis, for defendant-appellant.

CALABRIA, Judge.

Ricky Ray Rich, Jr. ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of statutory sex offense and indecent liberties with a child. We find no error.

On Friday, 8 April 2011, defendant and his wife Crystal (collectively "the Riches") had a cookout at their home to celebrate defendant's birthday. Those in attendance included

defendant, his friend Cecil, the Riches' fifteen-year-old niece "Sarah[1]" and Sarah's fifteen-year-old friend "Beth[2]." Beth received permission from her father to spend the weekend with Sarah at the Riches' home. After dinner, Crystal, Sarah and Beth watched television in the living room and drank alcohol. Defendant and Cecil sat outside by the fire and drank beer. Crystal and Sarah eventually relocated to a bedroom to drink and watch television, and Beth fell asleep on the living room sofa.

Around 4:30 a.m. the next morning, Beth felt something on her ankle and then felt someone get on top of her. From the light of the television, Beth identified defendant, who held Beth's arms above her head. Defendant then touched Beth's breast, pulled her pants and underwear down, and inserted his fingers in her vagina "[o]ver and over." Defendant only stopped when Sarah emerged from the bedroom to use the bathroom. Once Sarah exited the bathroom, Beth ran into it and locked the door.

Later, Beth left the bathroom and joined Crystal and Sarah in the bedroom where the two were watching television. Beth did not want to talk to Sarah in front of defendant's wife, so Beth typed a text message into Sarah's cell phone telling Sarah what

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[1] Pseudonyms are used to protect the identity of the minor children involved in the instant case.
[2] A pseudonym.

defendant did to her. Beth handed the phone to Sarah who read the message and then deleted it. Twenty minutes later, Sarah responded to text messages she received from defendant and showed the texts to Beth.

While Sarah slept, Beth lay awake in bed next to her until morning. When Beth got home, she showered and changed clothes. Beth did not tell her father what happened because she was scared. However, that Monday, a classmate asked Beth if she was okay and Beth started to cry. Beth told her classmate that "she had been violated" by defendant. Beth then told a school counselor that she was drinking at a party and "briefly told her what happened." Afterwards, Beth's father and the Waynesville Police Department were contacted.

Beth was interviewed twice by Detective Scott Muse ("Detective Muse") and gave a written statement that she fell asleep on the couch and awoke to "[defendant's] finger in my private area[.]" Beth was sent to a registered nurse for a child medical evaluation. During the examination, Beth told the nurse that defendant "pulled my pants down, and he was touching me inappropriately."

Beth told Sergeant Christopher Chandler ("Sergeant Chandler") that when she was staying at the Riches' house with

her friend Sarah, she fell asleep on the couch and awoke to defendant rubbing her leg, pulling down her pants and putting his fingers in her vagina. She also stated that defendant touched her breast and that she told him to stop, but that defendant stopped when she heard a noise in the house. In a written statement to law enforcement, Beth stated that defendant texted Sarah, "Ask [Beth] if she likes me." Law enforcement officers subsequently received the cellular telephone records showing the text conversation between defendant and Sarah.

On 5 December 2011, defendant was indicted for statutory sex offense and indecent liberties with a child. Beginning 20 August 2012, defendant was tried by a jury in Haywood County Superior Court. Prior to trial, the trial court denied defendant's motion *in limine* to exclude the text messages Sarah received on the morning of the incident. A Verizon employee then testified at trial, without objection, that the texts were sent from defendant's phone to his niece's phone. The Verizon employee also testified to the contents of the text messages, which included suggestive texts to his niece such as defendant telling Sarah that he thought she was "hot" and defendant asking Sarah "[w]hat kind [of] things u like to do[?]" The Verizon

employee confirmed that defendant sent Sarah a text stating, "Ask [Beth] if she likes me[.]"

On 23 August 2012, the jury returned verdicts finding defendant guilty of statutory sexual offense and indecent liberties with a child. The trial court sentenced defendant to a minimum of 317 to a maximum of 390 months for the statutory sexual offense conviction and a minimum of 21 months to a maximum of 26 months for the indecent liberties conviction. The sentences were to be served consecutively in the North Carolina Division of Adult Correction. Defendant appeals.

Defendant's sole argument on appeal is that the trial court erred "by admitting evidence of inappropriate and sexually suggestive text messages [he] sent his 15-year-old niece[.]" Defendant asserts the evidence was not admissible under Rule 404(b) of the North Carolina Rules of Evidence. We disagree.

As defendant acknowledges, he did not object to the admission of the text messages at trial, and, therefore, he asks for plain error review. *See State v. Bonnett,* 348 N.C. 417, 437, 502 S.E.2d 563, 576 (1998)(A motion *in limine* fails to preserve for appeal the question of the admissibility of evidence if no objection is made at the time that evidence is offered at trial.). "For error to constitute plain error, a

defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citing *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). A fundamental error is one where, "after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* at 518, 723 S.E.2d at 334 (citations and internal quotation marks omitted). The burden of demonstrating the existence of this prejudice is on the defendant. *Id.* at 516, 723 S.E.2d at 333 (citing *State v. Melvin*, 364 N.C. 589, 593-94, 707 S.E.2d 629, 632-33 (2010)).

In the instant case, even assuming, *arguendo*, that it was error for the trial court to admit the suggestive text messages, defendant cannot demonstrate that the admission of this evidence "had a probable impact on the jury's finding that the defendant was guilty." *See id.* at 518, 723 S.E.2d at 334 (citations omitted). Beth testified at trial that when she was fifteen years of age, defendant held her down on the couch and repeatedly penetrated her vagina with his fingers. Beth then told a classmate, a school counselor, and a nurse about the sexual assault. These individuals all provided testimony which was consistent with Beth's statements at trial. Additionally,

Beth made statements to Sergeant Chandler and Detective Muse which were also consistent with her testimony at trial.

In light of the victim's direct testimony regarding the sexual assault and the testimony from multiple individuals that the victim's reports of the assault remained entirely consistent, defendant has failed to show that the admission of the text messages had a probable impact on the jury's finding that the defendant was guilty. Accordingly, defendant has failed to show that the admission of the text messages rose to the level of plain error. This argument is overruled. Defendant received a fair trial, free from error.

No error.

Judges STEELMAN and STROUD concur.

Report per Rule 30(e).