NO. COA13-625
NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2013

STATE OF NORTH CAROLINA

v. Lee County
No. 10 CRS 53428

ETHERIDGE EVERETT GRUBB, III,
Defendant.

Appeal by defendant from judgment entered 28 November 2012 by Judge C. Winston Gilchrist in Lee County Superior Court. Heard in the Court of Appeals 18 November 2013.

Roy Cooper, Attorney General, by Anne M. Middleton, Assistant Attorney General, for the State.

Mark Montgomery, for defendant-appellant.

MARTIN, Chief Judge.

Defendant appeals from a judgment entered upon a jury verdict finding him guilty of statutory sex offense against a victim who was fourteen years of age at the time of the offense. The sole issue he presents is whether the court committed plain error by repeatedly referring to the complaining witness as "the victim" in its charge to the jury. We hold that the court did not commit plain error.

The complaining witness (hereinafter referenced by the pseudonym "Sarah"), who was born on 7 March 1996, testified that she had engaged in sexual activity with defendant, her grandfather, since she was in the seventh grade. She further testified that on 3 December 2010 she accompanied defendant to his workplace after it had closed for business that day. While they were there, one of defendant's co-workers, Santos Orlando Gaitan, dropped by and picked up his paycheck. About ten minutes later, Mark Stevenson, another co-worker, arrived and saw Sarah "giving oral sex to the defendant." Upon seeing Mr. Stevenson, defendant remarked, "[W]ell, I guess I'm busted now." Mr. Stevenson uttered profane words and left immediately.

Mr. Gaitan testified that he worked with defendant. He came to his employer's office to pick up his paycheck after the office had closed for the day on 3 December 2010 and encountered Sarah and defendant coming out of a restroom. He called Mr. Stevenson as he drove home because he and Mr. Stevenson had seen defendant and Sarah at the office after hours about four months earlier. When defendant came to the door on that occasion, Mr. Gaitan observed that defendant was sweating.

Mr. Stevenson testified that he worked with defendant for ten years and socialized with defendant's family, including

Sarah. On 3 December 2010, he received a call from Mr. Gaitan, who reported that he had seen defendant and Sarah coming out of the bathroom together at the office. Mr. Stevenson immediately drove to his place of employment. He entered an office and found defendant sitting in a chair with his pants down to his ankles and Sarah on her knees with defendant's erect penis in her mouth. When defendant saw Mr. Stevenson, he leaned back in the chair and said "he was busted." Mr. Stevenson responded, "[Y]ou damn right you busted you fat, nasty, perverted son of a bitch." Sarah asked how Mr. Stevenson got in there and he responded that it did not matter because what she was doing with her grandfather "was nasty." In shock and disbelief, Mr. Stevenson returned to his truck, called his wife and drove to the police station to report what he had witnessed.

Sarah's counselor testified on behalf of defendant that she engaged in biweekly therapy sessions with Sarah, and that she never heard or saw anything to cause her to report suspected abuse to local law enforcement authorities as required by law. Defendant's wife testified that she recalled that on the date in question, defendant and Sarah left the residence together and were gone for about two hours. When they returned, they were acting normally. She produced receipts showing that defendant

and Sarah had been to Wal-Mart, a gas station, and the bank during that time frame. She also indicated that defendant had a stroke on Christmas Day 2009 and that defendant sought treatment for erectile dysfunction in November 2010.

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Defendant concedes that trial counsel did not object to the use of the term "victim" by the court in its charge to the jury. Because counsel did not object, we apply the plain error standard of review under which a defendant must demonstrate that the court committed a fundamental error, one which had a probable impact upon the jury's finding of guilt. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). It is the truly exceptional case in which plain error will be found. *Id.* Indeed, this Court and our Supreme Court have held in a number of cases that the use of the term "victim" in referring to a prosecuting witness in the court's jury instructions does not constitute plain error. *See, e.g.*, *State v. McCarroll*, 336 N.C. 559, 566, 445 S.E.2d 18, 22 (1994); *State v. Richardson*, 112 N.C. App. 58, 67, 434 S.E.2d 657, 663 (1993), *disc. review denied*, 335 N.C. 563, 441 S.E.2d 132 (1994).

We decline to find plain error given the compelling evidence of defendant's guilt. Sarah's testimony was

corroborated in detail by Mr. Stevenson, who actually witnessed the act. Defendant's evidence failed to establish that the act could not have happened. The jury deliberated for less than 90 minutes before it returned with a verdict. We conclude it is not probable that the jury would have reached a different verdict if the court had not referred to Sarah as "the victim" in its charge.

No error.

Judges HUNTER, Jr and DILLON concur.

Report per Rule 30(e).