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NO. COA14-641
NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

STATE OF NORTH CAROLINA

v.

Mecklenburg County
Nos. 12 CRS 236412,
and 12 CRS 39339

JOE LOUIS PETTY, JR.,

Appeal by defendant from judgment entered 14 November 2013 by Judge Yvonne Mims Evans in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 November 2014.

Attorney General Roy Cooper by Assistant Attorney General Sherri Horner Lawrence for the State.

Goodman Carr, PLLC, by W. Rob Heroy for defendant-appellant.

STEELMAN, Judge.

Where defendant failed to make an offer of proof regarding evidence that was excluded, we cannot determine the admissibility of the evidence. Defendant failed to demonstrate that admission of expert testimony was plain error. We decline to invoke Rule 2 of the Rules of Appellate Procedure to review

the sufficiency of the evidence that defendant committed a statutory sex offense. Defendant's claim of ineffective assistance of counsel is dismissed without prejudice to his right to file a motion for appropriate relief in the trial court.

I. Factual and Procedural Background

W.A. was born in Haiti and moved to the United States in 1988. Her daughter, P.P., was born in December, 1995. W.A. married Joe Louis Petty, Jr., (defendant) in March 2006, and the family moved from Florida to Charlotte. Shortly after they moved, P.P. told W.A. that defendant had touched her inappropriately; however, W.A. took no action. W.A. and defendant separated in 2009, but defendant continued to watch W.A.'s children after school. In May 2012, P.P. told her mother that defendant had molested her for several years. When W.A. confronted defendant, he "smirked" and told her that it "wasn't that type of molestation."

On 27 August 2012 defendant was indicted for two counts of indecent liberties, one count of first degree sex offense, and one count of statutory sex offense against a person 13, 14, or 15 years old. The case came on for trial at the 11 November 2013 Criminal Session of Superior Court for Mecklenburg County.

At trial, P.P. testified that she and her mother began living with defendant when she was ten years old. Less than a month after they began living together, defendant touched her breasts while W.A. was at work. After the first incident, defendant frequently touched her chest, buttocks, and vagina. On four or five occasions while P.P. was in middle school, defendant put his finger inside her vagina. P.P. did not tell anyone because she did not think anything would be done. After W.A. and defendant separated, defendant continued to watch P.P. and her sisters after school, and often touched P.P. inappropriately. P.P. recalled a specific incident when she was 13 or 14 years old and defendant put his finger in her vagina.

When P.P. was in high school, she began dating D.W., and she told him that defendant had molested her. Several days later, D.W. and his mother came to P.P.'s home and met with P.P. and her mother. At that time, P.P. told her mother that defendant had been molesting her. W.A. reported the abuse to law enforcement, and P.P. gave a statement to the police. On cross-examination at trial, P.P. admitted lying to law enforcement officers about when the abuse stopped.

The State's other witnesses corroborated P.P.'s trial testimony. D.W. testified that he and P.P. previously had a dating relationship, during which P.P. had confided to him that

defendant had molested her. A few days later he and his mother met with P.P. and her mother, and P.P. told her mother that she had been abused. D.W.'s mother testified about the meeting. Alyssa Lane, a forensic interviewer at Pat's Place Child Advocacy Center, conducted a videotaped interview of P.P., in which P.P. described the abuse by defendant. Megan Campbell, an expert in child sexual assault medical examinations, performed a physical examination of P.P., including an external examination of her genital area. The results of Ms. Campbell's examination were normal. She testified that this was not surprising, because child victims of sexual abuse often have normal physical examinations. Charlotte-Mecklenburg Police Detective Anthony Pharr interviewed P.P., her mother, and defendant. Defendant denied the allegations of sexual abuse and told the detective that P.P. had tried to initiate inappropriate contact with him and would come into his bedroom and "rub her body" against him. Defendant speculated that P.P. accused him of sexual abuse because she was angry about being disciplined.

Defendant testified that he was taking prescribed hydrocodone at the time of his interview with Detective Pharr, which had made him "groggy headed and dizzy." He further testified that when P.P. was ten years old she came into his room "as an adult" and "rubbed her body" against his, but that

he told her to leave the room. Defendant denied touching P.P. in a sexual way or performing any of the acts of which he was accused.

At the close of all the evidence, the State dismissed the charge of first degree sex offense. On 14 November 2013 the jury returned verdicts finding defendant guilty of two counts of indecent liberties, and of statutory sex offense with a person 13, 14, or 15 years old. The trial court consolidated the convictions for sentencing, sentenced defendant to an active prison term of 195-243 months, and required him to register as a convicted sex offender for a period of thirty years.

Defendant appeals.

II. Plain Error

Defendant's appellate arguments are based upon alleged errors to which he did not object at trial. Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure requires that "to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make" and must have "obtain[ed] a ruling upon the party's request, objection, or motion." Rule 10(a)(4) provides that "[i]n criminal cases, an issue that was not preserved by objection noted at trial . . . nevertheless may be

made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error."

"Plain error review allows appellate courts to alleviate the potential harshness of preservation rules." *State v. Lawrence*, 365 N.C. 506, 514, 723 S.E.2d 326, 332 (2012) (citing *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). However:

> 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[.]"

Lawrence, 365 N.C. at 518, 723 S.E.2d at 334 (quoting *Odom*, 307 N.C. at 660, 300 S.E.2d at 378) (internal citations and quotation marks omitted).

On appeal, defendant contends that plain error "is not limited solely to circumstances in which the jury might have returned a different verdict" and that *Lawrence* "leaves open an alternate standard for plain error[.]" We disagree, and note that in *Lawrence* our Supreme Court applied the plain error

standard to the facts of the case and held that "defendant cannot show that, absent the error, the jury probably would have returned a different verdict. Thus, he cannot show the prejudicial effect necessary to establish that the error was a fundamental error." *Lawrence* at 519, 723 S.E.2d at 335.

III. Exclusion of Evidence Under Rule 412

In his first argument, defendant contends that the trial court erred by "refusing to allow defense counsel to present evidence of a sexual relationship between [D.W.] and P.P. as evidence of motive." Defendant argues that P.P. and D.W. had a sexual relationship for which D.W. was potentially subject to criminal prosecution, and that the sexual nature of their relationship gave P.P. a "motive" to falsely accuse defendant of sexual offenses. Defendant also asserts that evidence of P.P.'s sexual activity with D.W. should not have been excluded under North Carolina Rule of Evidence 412. However, defendant failed to make an offer of proof or seek an *in camera* hearing to document the testimony of witnesses on the alleged sexual relationship between P.P. and D.W. As a result, we cannot evaluate the admissibility of the evidence.

Rule 412(d) provides that:

> Before any questions pertaining to . . . evidence [of sexual activity of the complainant] are asked of any witness, the proponent of such evidence shall first apply

> to the court for a determination of the relevance of the sexual behavior to which it relates. . . . When application is made, the court shall conduct an *in camera* hearing, which shall be transcribed, to consider the proponent's offer of proof and the argument of counsel, including any counsel for the complainant, to determine the extent to which such behavior is relevant. In the hearing, the proponent of the evidence shall establish the basis of admissibility of such evidence. . . . If the court finds that the evidence is relevant, it shall enter an order stating that the evidence may be admitted and the nature of the questions which will be permitted.

"'Rule 412(d) contemplates that the party desiring to introduce evidence of a rape complainant's past sexual activity must offer some proof as to both the existence of such activities and the relevancy thereof.' *State v. Cook*, 195 N.C. App. 230, 237, 672 S.E.2d 25, 30 (2009) (quoting *State v. Black*, 111 N.C. App. 284, 289, 432 S.E.2d 710, 714 (1993)). In addition, "[t]he defendant bears the burden of establish[ing] the basis of admissibility of such evidence." *Id.* (citing N.C.R. Evid. 412(d)).

"[O]ur Supreme Court has held that failure to make offers of proof is not necessarily fatal if 'the essential content of the excluded testimony and its significance are obvious' from the record." *State v. Rankins*, 133 N.C. App. 607, 611, 515 S.E.2d 748, 750-51 (1999) (quoting *State v. Hester*, 330 N.C. 547, 555, 411 S.E.2d 610, 615 (1992)). However, in support of his argument, defendant cites only his attempt to elicit hearsay

testimony from defendant regarding the purported nature of P.P.'s relationship with D.W. as allegedly reported to him by W.A. Defendant failed to request an *in camera* hearing to establish whether P.P. or D.W. would testify that they had a sexual relationship, or whether W.A. had asked defendant to be at the house in response to "allegations of statutory rape." It is not "obvious" what testimony might have been offered by W.A., P.P., or D.W. on this subject.

We hold that defendant has failed to preserve for appellate review the admissibility of defendant's testimony regarding why he was asked to be at W.A.'s home after school. Further, although defendant makes a conclusory statement that exclusion of this evidence was plain error, he fails to offer any argument that the jury would probably have acquitted him had the unspecified testimony from defendant been admitted.

This argument is without merit.

IV. Admission of Expert Testimony

In his second argument, defendant contends that the trial court committed plain error "in allowing Megan Campbell to testify for the State as an expert in child sexual medical exams." We disagree.

Defendant does not dispute Ms. Campbell's general qualifications as an expert, or challenge her testimony

regarding the results of her physical examination of P.P. Instead, he argues that it was plain error to allow her to testify, without objection, that it was common for the physical examination of a victim of child sexual abuse not to reveal physical evidence of abuse. Even assuming, *arguendo*, that it was error to admit this testimony, defendant has failed to show that it was plain error.

Defendant has the burden of establishing a reasonable probability that he would not have been convicted without Ms. Campbell's testimony that child victims of sexual abuse often have no physical signs of the abuse. He fails to offer any analysis of the effect of this evidence on the jury's verdict, and our own review suggests that the challenged testimony likely was of little significance. P.P. testified that defendant had touched her inappropriately and put his finger in her vagina several times, but she did not testify that he had attempted to have sexual intercourse or that his actions were painful. And, Ms. Campbell's examination of P.P., which included examination of her external genitalia, occurred several months after the last incident of alleged abuse. Therefore, it is not surprising that Ms. Campbell did not note any physical indicia of trauma. As a result, Ms. Campbell's opinion that this was a common result in physical examinations of victims of child sex abuse

appears to have little relevance to the credibility determinations that the jury was required to make. Because defendant has failed to show that admission of Ms. Campbell's testimony had an effect on the verdict, he has failed to establish that it was plain error, and we do not reach the issue of the admissibility of Ms. Campbell's testimony.

V. Evidence of Statutory Sexual Offense

In his third argument, defendant contends that the trial court erred "in failing to dismiss the statutory sex offense charge when the State failed to present substantial evidence as to the age of the victim at the time of the alleged sexual act and [as] to the element of penetration." Defendant acknowledges that he failed to preserve this issue for our review, but asks us to apply N.C.R. App. 2, which allows this Court to "suspend or vary the requirements" of the rules of appellate procedure to "prevent manifest injustice to a party[.]" Our Supreme Court has held that:

> Aside from the possibility of plain error review in criminal appeals, Rule 2 permits the appellate courts to excuse a party's default in both civil and criminal appeals when necessary to "prevent manifest injustice to a party" or to "expedite decision in the public interest." N.C. R. App. P. 2. Rule 2, however, must be invoked "cautiously," and we reaffirm our prior cases as to the "exceptional circumstances" which allow the appellate courts to take this "extraordinary step."

Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008) (quoting *State v. Hart*, 361 N.C. 309, 315, 317, 644 S.E.2d 201, 205-06 (2007)).

Defendant acknowledges that P.P. testified that defendant had "fingered" her, that she described this as his putting his finger in her vagina, and that she testified that this occurred when she was between 13 and 15 years old. In support of his argument challenging the sufficiency of the evidence, defendant directs our attention to inconsistencies in P.P.'s testimony, and argues that the "cumulative effect" of her "inconsistent stories" would leave "the reviewer uncertain of the dates" on which the offense occurred. "Such variance in the evidence, however, is one which goes to the credibility rather than the sufficiency. It is within the province of the jury to pass upon the credibility of the witnesses and weight to be accorded the evidence." *State v. Upright*, 72 N.C. App. 94, 100, 323 S.E.2d 479, 484 (1984). We decline to exercise our authority under Rule 2 and hold that the sufficiency of the evidence of statutory sex offense was not preserved for our review.

VI. Ineffective Assistance of Counsel

Defendant's final argument is that he was denied the effective assistance of counsel. "Generally, claims of ineffective assistance of counsel should be considered through

motions for appropriate relief and not on direct appeal. A motion for appropriate relief is preferable to direct appeal, 'because in order to defend against ineffective assistance of counsel allegations, the State must rely on information provided by defendant to his trial counsel, as well as defendant's thoughts, concerns, and demeanor.'" *State v. Johnson*, 203 N.C. App. 718, 722, 693 S.E.2d 145, 147 (2010) (quoting *State v. Stroud*, 147 N.C. App. 549, 554, 557 S.E.2d 544, 547 (2001)). Defendant's claim of ineffective assistance of counsel is dismissed, without prejudice to his right to file a motion for appropriate relief in the trial court.

VII. Conclusion

For the reasons discussed above, we conclude that defendant had a fair trial, free of reversible error, and that his claim of ineffective assistance of counsel should be dismissed without prejudice.

NO ERROR AS TO TRIAL, INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM DISMISSED WITHOUT PREJUDICE.

Judges GEER and STEPHENS concur.

Report Per Rule 30(e).