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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-784

Filed: 16 February 2016

Catawba County, Nos. 12 CRS 3754-60

STATE OF NORTH CAROLINA

v.

PAUL STEPHEN HARPER

On writ of certiorari to review judgments entered 3 April 2014 and amended 15 September 2014 by Judge Nathaniel J. Poovey in Catawba County Superior Court. Heard in the Court of Appeals 1 February 2016.

Attorney General Roy Cooper, by Assistant Attorney General Angenette Stephenson, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender David W. Andrews, for defendant-appellant.

CALABRIA, Judge.

Paul Stephen Harper (“defendant”), by writ of certiorari, appeals from judgments entered upon jury verdicts finding him guilty of five counts of attempted statutory rape of a person 13, 14, or 15 years of age and two counts of statutory sexual offense of a person 13, 14, or 15 years of age. We conclude defendant received a trial free from prejudicial error.

I. Background

Defendant's daughter, "Mary,"¹ testified that beginning in the summer of 2011, when she was 15 years of age, defendant "sexually abused" her "[f]ive or six times." Specifically, Mary testified, "He would pull down my pants and get on top of me, and try to put his penis in my vagina. And he would touch me down there." Mary further testified that defendant also twice tried to insert his penis into Mary's mouth, touching her lip. Most of these incidents occurred in the living room of their residence while Mary's mother was at work at a daycare center with Mary's two younger brothers. Mary explained that defendant is disabled and does not work. According to Mary's testimony, the last of the assaults took place the day before Mary's 16th birthday in January 2012. Mary described the incident as follows:

It was night time and [defendant] came into my room. He was standing over my bed. He told me to get up and go downstairs. I did. The TV was on when I went downstairs. And he pulled down my pants and pulled me down to the floor. And then he got on top of me. And at that time my mom was home upstairs sleeping. I tried to scream and he covered up my mouth. And he said to me what he had – would say before, "Do you want me to tell your mom?" And I would say, "No." And I would fight him and move away. And then he would pull me back and try . . . to put his penis inside my vagina.

Defendant's threat to "tell your mom" referred to an earlier instance in which defendant had discovered Mary viewing pornography on her smart phone.

¹ Although Mary was 18 years old at the time of her trial testimony, we use pseudonyms to protect her identity and the identities of her schoolmates "Nora" and "Opal," to whom she first disclosed the incidents at issue.

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At school on 13 January 2012, Mary told two friends, Nora and Opal, that her “dad tried to have sex with [her].” Although Mary was “terrified out of [her] mind[,]” her friends persuaded her to speak to the school counselor, Shirley Mills. After speaking with Mary, Ms. Mills made a child protective services (“CPS”) report to the Catawba County Department of Social Services (“DSS”). The CPS report was forwarded to the Hickory Police Department and assigned to Officer Melissa Christy (“Officer Christy”) for investigation. Officer Christy received the CPS report on 13 January 2012, contacted the DSS case worker, and scheduled a forensic interview and child medical exam for Mary at the Children’s Advocacy and Protection Center. She also left defendant a phone message saying that she “needed to talk with him about the case.”

Defendant arrived unannounced at the Hickory Police Department on 17 January 2012 and was interviewed by Officer Christy and Investigator Heather Cash (“Investigator Cash”). Officer Christy had little information about the case, having spoken only briefly with the DSS caseworker and reviewed the CPS report. Defendant told the officers that he had moved out of his residence when the DSS caseworker arrived to begin her investigation and was living in a hotel room. Defendant claimed to know nothing about Mary’s allegations and said that he had neither asked the caseworker any questions nor spoken to his wife about the situation.

When asked what could have led to the CPS report, defendant suggested that Mary was “doing this to get back at [him]” for taking away her Facebook privileges after catching her on the website without permission. Defendant also recalled that “he had got on to [Mary] last year sometime” for failing to check the mail as part of her chores. When pressed by the officers about why Mary had accused him of sexual abuse, defendant said he “had no idea” but added, “all I know is we do a lot of wrestling.” He also pointed to his chest and said: “She’s very well developed.” When asked whether he was upset by the allegations, defendant said that he would “whoop” Mary with a belt if he was still at home, because his “wife said [his] boys have been crying.” Reminded that he had denied speaking to his wife about the incident, defendant replied: “Well, we just talked about the boys.”

Investigator Cash conducted Mary’s forensic interview on 23 January 2012. Officer Christy observed the live interview by closed-circuit television. A recording of Mary’s interview was admitted into evidence and published to the jury.

Mary also received a child medical examination on 23 January 2012 from pediatric nurse practitioner Beth Osbahr, a process Mary described as “painfully awkward” and “[u]ncomfortable.” Ms. Osbahr testified that during the exam, Mary told Ms. Osbahr she had never “done anything sexual with a boy before.” Testifying as an expert in pediatrics and child medical exams, Ms. Osbahr reported that Mary’s genital exam revealed an injury to the posterior part of her hymen, so that “there was

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very little hymen there or virtually no hymen there.” The injury had healed and was thus “at least several days old” and could have been “a few years old.” Ms. Osbahr explained that this type of an injury was “difficult to occur,” given the location of the damaged tissue, and most commonly resulted from “some kind of sexual abuse.” While the injury indicated a “penetrating trauma” to Mary’s vagina, Ms. Osbahr clarified that a “really very, very small” degree of penetration of “just probably two, three millimeters” would be sufficient. Such a “small amount of penetration” could have taken place without Mary “realiz[ing] that [it] even occurred.” According to Ms. Osbahr, the potential for vaginal injury increases with resistance or when someone is not relaxed during penetration. Mrs. Osbahr testified that her findings were consistent with Mary’s account of defendant’s conduct toward her.

Beginning in February 2012, Mary received counseling from Karen Brown, outpatient therapist at the Children’s Advocacy and Protection Center. During her initial assessment, Mary stated her father had attempted to have sex with her. Ms. Brown averred that Mary displayed symptoms consistent with sexual abuse, such as a drop in her grades, sadness, crying, anxiety, “very low self-esteem, . . . issues with peer relationships, . . . thoughts of self-harm[,]” and one episode of cutting herself. During their sessions every two weeks, Mary talked with Ms. Brown about school, the sexual abuse, and her home life. Ms. Brown treated Mary for approximately two years and described their progress as “up and down[.]”

Defendant did not testify or offer evidence. A redacted recording of defendant's 17 January 2012 interview with Officer Christy and Investigator Cash was admitted into evidence and played for the jury.

On 3 April 2014, a Catawba County Jury returned verdicts finding defendant guilty of five counts of attempted statutory rape of a person 13, 14, or 15 years of age and two counts of statutory sexual offense of a person 13, 14, or 15 years of age. The trial court consolidated the offenses into two judgments and sentenced defendant to a minimum of 73 months and a maximum of 93 months for the attempted statutory rape counts and to a minimum of 240 months and a maximum of 297 months for the two statutory sexual offenses to be served in the North Carolina Division of Adult Correction. The court also ordered defendant to register as a sex offender for a period of 30 years upon his release from imprisonment. On 24 September 2014, we allowed defendant's petition for writ of certiorari to review the trial court's judgments.

II. Analysis

Defendant contends the trial court committed plain error by allowing Officer Christy to testify that she and Investigator Cash² were "skeptical" of defendant's statements on 17 January 2012. Specifically, defendant contends Officer Christy's assessment that defendant's explanation for Mary's allegations of sexual abuse

² Investigator Cash was no longer with the Hickory Police Department at the time of defendant's trial and did not testify.

“didn’t make sense” amounted to a lay opinion about his credibility and was inadmissible under N.C. Gen. Stat. § 8C-1, Rule 701 (2013). We disagree.

“In general, we apply the abuse of discretion standard to reviews of the admissibility of lay opinion testimony.” *State v. Collins*, 216 N.C. App. 249, 254, 716 S.E.2d 255, 259 (2011). “However, ‘[i]n order 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 if the specific grounds were not apparent from the context.’” *Id.* (quoting N.C.R. App. P. 10(a)(1)). Having failed to object to Officer Christy’s testimony at trial, defendant must now establish that its admission rose to the level of plain error under N.C.R. App. P. 10(a)(4):

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 affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations, quotation marks, and brackets omitted). In the instant case, to establish plain error, defendant must first show that Officer Christy’s testimony was not admissible for any

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valid purpose. *See State v. Garcia*, 228 N.C. App. 89, 102, 743 S.E.2d 74, 82 (2013), *disc. review denied*, 367 N.C. 326, 755 S.E.2d 619 (2014).

“[O]ur Supreme Court has determined that when one witness ‘vouch[es] for the veracity of another witness,’ such testimony is an opinion which is not helpful to the jury’s determination of a fact in issue and is therefore excluded by Rule 701.” *State v. Gobal*, 186 N.C. App. 308, 318, 651 S.E.2d 279, 286 (2007) (quoting *State v. Robinson*, 355 N.C. 320, 335, 561 S.E.2d 245, 255 (2002); additional citations omitted). However, our courts have also allowed a law enforcement officer to testify about her impressions of an interview subject for the purpose of explaining the subsequent course of the officer’s investigation. *See State v. Houser*, __ N.C. App. __, __, 768 S.E.2d 626, 631-32 (concluding that officer’s “testimony that the hair embedded in the wall was inconsistent with defendant’s version of the incident” was not an improper lay opinion of defendant’s credibility but “served to provide the jury a clear understanding of why the officers returned to the home after their initial investigation and how officers came to discover the hair and request forensic testing of that evidence”), *disc. review denied*, __ N.C. __, 775 S.E.2d 869 (2015); *State v. Westall*, 116 N.C. App. 534, 546-47, 449 S.E.2d 24, 31-32 (1994) (upholding admissibility of officer’s testimony that he did not believe the defendant was telling the truth in order to explain why the officer did not take notes during the interview); *see also State v. O’Hanlan*, 153 N.C. App. 546, 562-63, 570 S.E.2d 751, 761-62 (2002)

(allowing officer to testify that he did not conduct a forensic investigation of the rape because the victim had positively identified the defendant).

In *State v. Taylor*, the defendant argued that the trial court committed plain error by allowing the investigating officer “to testify that she moved forward with her investigation into the allegations that Ms. Medina had made against [the d]efendant because she believed that Ms. Medina was telling her the truth.” *State v. Taylor*, __ N.C. App. __, __, 767 S.E.2d 585, 589 (2014) (Bryant, J., dissenting), *rev’d per curiam for reasons stated in dissenting opinion*, __ N.C. __, 776 S.E.2d 680 (2015). Adopting this Court’s dissenting opinion, our Supreme Court concluded that the admission of the officer’s opinion testimony did not meet the standard for plain error:

When asked what made her move forward, Detective Tindall testified, “[Ms. Medina] seemed to be telling me the truth, she gave me all the information possible that she had and we are required to investigate everything to the fullest.” Detective Tindall expressed a lay opinion in response to a proper question regarding why she moved forward with her investigation and charges. Furthermore, Detective Tindall provided the basis for her opinion: “she gave me all the information possible that she had”

Id. at __, 767 S.E.2d at 591 (Bryant, J., dissenting). The Supreme Court concluded the officer’s testimony did not impede “the jury’s ability to make such a credibility determination about Ms. Medina[.]” *Id.*

In the instant case, the prosecutor asked Officer Christy about her impressions of defendant’s 17 January 2012 statements as part of a line of questions designed to

elicit the step-by-step course of her investigation. Prior to the challenged testimony, Officer Christy characterized defendant's unannounced appearance at the police station on 17 January 2012 as unusual, explaining that she had "never had anyone just to show up" in her nine years as a police officer. The prosecutor then proceeded (emphasis added) as follows:

Q. Okay. Is it fair to say that you and Investigator Cash ha[d] some skepticism towards this defendant?

A. Yes.

Q. And why were you so skeptical towards him without having the benefit of the interview of [Mary, on 23 January 2012]?

A. From the information that we received from the DSS report, him just showing up, and then as you saw in the interview, some of the questions we asked him such as had he had contact, you know, with your wife. "Did you all speak about the incident?" Then he said, "No." Then he retracted and said, "Yes." And then the incident with Facebook, him connecting that with her allegations. *And that just didn't make sense.* And then the wrestling, you know, how you get f[ro]m wrestling with your daughter to sexual abuse.

Defendant specifically challenged the admissibility of Officer Christy's assessment that defendant's explanation for Mary's allegations of sexual abuse "didn't make sense." After the contested exchange, Officer Christy's direct examination proceeded as follows:

Q. In that interview [defendant] indicated to you that he would avail himself to you again if need be?

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.....

A. Yes.

.....

Q. Right. Did he in fact make himself available for you again?

A. No.

Q. After you interviewed the defendant what did you then do in this investigation?

.....

Q. Okay. And then what did you do next?

.....

Q. What did you do next?

.....

Q. Did you in fact do that?

.....

Q. What'd you do after [interviewing Mary again on January 31st]?

.....

Q. What else did you do in this investigation?

Viewed contextually, we believe that Officer Christy's brief expression of skepticism toward defendant's explanation for Mary's accusations was proffered to explain why Officer Christy and Investigator Cash proceeded with the criminal investigation.³

Assuming, *arguendo*, that Officer Christy's testimony crossed the line into impermissible lay opinion of defendant's credibility, we hold that the trial court's failure to strike this testimony *ex mero motu* does not reach the high standard required for plain error. *See Taylor*, __ N.C. App. at __, 767 S.E.2d at 589 (Bryant, J., dissenting). In addition to observing Mary's live testimony at trial, the jury was able to view for itself Mary's and defendant's interviews with Officer Christy and Investigator Cash and to make its own assessment of their believability. Moreover, Nora, Opal, Ms. Mills, Officer Christy, Ms. Osbahr, and Ms. Brown all testified at defendant's trial and corroborated Mary's testimony by recounting her prior statements about the abuse.

III. Conclusion

In light of the totality of the evidence, defendant cannot show that the trial court's failure to strike Officer Christy's opinion testimony *ex mero motu* had a likely effect on the jury's verdict or undermined the "fairness, integrity or public reputation of [the] proceedings." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. Therefore, defendant has failed to meet his burden under plain error.

³In defendant's videotaped interview published to the jury, Investigator Cash expressed that she was "highly skeptical" of his statements.

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No plain error.

Judges BRYANT and STEPHENS concur.

Report per Rule 30(e).