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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 16-21

Filed: 6 September 2016

Chatham County, Nos. 13 CRS 640, 13 CRS 50376-78

STATE OF NORTH CAROLINA

v.

PHILLIP WAYNE BROYAL

Appeal by defendant from judgments entered 15 June 2015 by Judge R. Allen Baddour, Jr. in Chatham County Superior Court. Heard in the Court of Appeals 8 June 2016.

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

*Mark Montgomery for defendant.*

DIETZ, Judge.

Defendant Phillip Broyal appeals from multiple sex offense convictions for sexually abusing his thirteen-year-old daughter. On appeal, Broyal asserts a number of evidentiary arguments not preserved below, contends his counsel was constitutionally ineffective, and argues that the trial court should have granted his motion to dismiss one of the sex offense charges.

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We reject these arguments. Broyal's evidentiary objections are meritless: the State's experts did not impermissibly vouch for the victim; Broyal's status as a registered sex offender and his time in jail were appropriately admitted to explain why he had restricted contact with his daughter; and the trial court did not commit reversible error by referring to Broyal's daughter as "the victim" at various points during the jury charge. Because we find no merit to these arguments, we also reject Broyal's ineffective assistance claims, which are premised on his counsel's failure to preserve those objections at trial. Finally, the State's evidence was sufficient for a reasonable jury to find that Broyal committed two separate acts of statutory sex offense with his daughter, and thus the trial court properly denied his motion to dismiss. Accordingly, we find no error in the trial court's judgment.

**Facts and Procedural History**

Broyal is the father of the victim, "Alice."<sup>1</sup> Alice's mother was just thirteen when Alice was born. Broyal was a few years older. Broyal lived with Alice and her mother for six months following Alice's birth. Alice's mother and Broyal later separated because Broyal impregnated two other girls during the time they lived together.

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<sup>1</sup> We use a pseudonym to protect the victim's identity.

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After that separation, Broyal did not have any contact with Alice for many years. Alice's mother remarried and Alice considered her stepfather to be her father because she had no knowledge of Broyal.

In 2008, when Alice was nine years old, Broyal's sister reached out to Alice through Facebook. Shortly after this contact, Alice's mother took her to meet Broyal. Alice's mother did not know that Broyal was a registered sex offender until after this initial visit, when Franklin County DSS removed Alice from her because of the visit with Broyal. Alice's mother later signed a safety plan agreeing to keep Alice away from Broyal, and regained custody as a result. When Alice was eleven, Broyal began to write Alice from prison and they continued to correspond during the remainder of Broyal's incarceration.

After Broyal was released from prison, he and Alice would talk on the phone. They later began meeting at the home of one of Broyal's friends. Alice's mother was not aware of these meetings. Broyal gave Alice marijuana and they would smoke it together when they met.

A court later granted Broyal supervised visitation with Alice after a custody hearing. The visitation initially happened during the day but, at Alice's request, these visits became overnight. The visits started out well. However, at some point Alice began coming home from the visits, going straight to her room, and locking her door. She would not talk to her parents.

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When Alice would spend the night, she, Broyal, and Broyal's girlfriend would all sleep together in one double bed because it was the only place to sleep in the house. Alice slept between Broyal and his girlfriend, and Broyal would ask Alice if she wanted him to hold her while she fell asleep. Alice would comply, and thought nothing of it because Broyal's girlfriend was in the bed with them.

On the night of 15 December 2012, after smoking "[a] couple of bowls" of marijuana with Broyal and his girlfriend, Alice fell asleep on the bed while Broyal returned to work. She was asleep when he returned. Alice woke because her vagina was hurting. She realized that there were fingers inside her vagina and that Broyal was kissing her on her lips, and using his tongue. Alice tried to roll over and scoot away from him so that he would stop. After she fell back asleep, she awakened again when he was "trying to do it again." This time he had her "pants pulled somewhat down," had his hands on her butt and under her clothes on her breasts, and had his fingers "in the same area" as before. The second time, her vagina was "burn[ing]," "hurting," and "felt like it was swelled [sic]." She rolled over again and tried to get him to stop.

Alice was afraid to tell anyone what happened because Broyal threatened that "if one of his kids had ever put him in jail that . . . he would hurt them." Broyal told Alice this before and after the incident. Instead of telling her mother, Alice began to make excuses to not visit Broyal. It was a dramatic change from before the incident,

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when Alice had always been very excited to visit Broyal. Alice ultimately told her step-cousin what happened and, at her step-cousin's insistence, then told her mother.

Following the sexual assaults, Alice often had nightmares. She was unable to sleep, and would wake up crying. Her grades declined from A's and B's to almost all F's. She would break down crying anytime she thought of what happened. She lost 20-25 pounds in three or four months because she stopped eating regularly. She got in a fight at school and was charged with simple assault. She started cutting her wrists and legs with a razor blade "or anything sharp [she] could find" because she said it helped her feel better when she could feel something besides the depression and pain. Alice was hospitalized and diagnosed with Post-Traumatic Stress Disorder (PTSD) and she continues to suffer serious psychological consequences from the crime.

On 18 March 2013, the State indicted Broyal on two counts of statutory sexual offense, one count of child abuse inflicting serious bodily injury, four counts of indecent liberties, and having attained habitual felon status. A jury convicted Broyal on all charges.

The State also established that Broyal had 21 prior convictions, including four prior sex offense convictions. The jury found aggravating factors of committing the offense while on pretrial release, delivering a controlled substance to a minor, being

in willful violation of probation within ten years of the date of the offenses, and taking advantage of a position of trust or confidence.

The court sentenced Broyal to life in prison without the possibility of parole for each of the statutory sex offenses, to run consecutively, and nearly 40 years in prison for the remaining charges to run at the expiration of the life sentences. The court also ordered Broyal to be enrolled in lifetime satellite-based monitoring in the event that he is ever released from prison. Broyal timely appealed.

### **Analysis**

#### **I. Testimony of Expert Witnesses**

Broyal first argues that the trial court committed plain error by allowing three expert witnesses to vouch for Alice’s credibility. Broyal contends that, because there was no direct physical evidence of the alleged sexual abuse, these three expert witnesses drew their conclusions solely from Alice’s description of what happened. That, Broyal claims, improperly suggested to the jury that these experts believed Alice’s story. As explained below, we find no error in the experts’ testimony.

Broyal did not object to the challenged testimony at trial and we therefore review for plain error. “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). “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." *Id.* Plain error should be "applied cautiously and only in the exceptional case" where the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.*

A witness is not permitted to vouch for the credibility of the alleged victim in a child sexual abuse case. *State v. Aguallo*, 322 N.C. 818, 822, 370 S.E.2d 676, 678 (1988). But an expert may testify "with respect to the characteristics of sexually abused children and whether the particular complainant has symptoms consistent with those characteristics." *State v. Dixon*, 150 N.C. App. 46, 52, 563 S.E.2d 594, 598, *aff'd per curiam*, 356 N.C. 428, 571 S.E.2d 584 (2002).

The record indicates that each expert witness testified within the limits set by *Dixon*. Dr. Molly Berkoff testified generally about the common behaviors and psychological effects seen in victims of sexual abuse, including sleep problems, substance abuse, eating disorders, PTSD, and self-injury. Dr. Berkoff never suggested that she believed Alice's statements about the crime and never vouched for Alice's testimony. She simply described her observations of Alice and how those observations matched common conditions of sexual assault victims.

Similarly, Dr. Jennifer Richards testified to the symptoms and diagnostic criteria of PTSD. She explained that PTSD manifests when there "is exposure to a traumatic event." Dr. Richards testified that she had examined Alice, and that Alice

displayed symptoms associated with PTSD. She referred to “the trauma” or “the event” that caused the PTSD because, as she explained, PTSD results from some trauma. But she did not say that she believed Alice’s testimony or make any statements which the jury might have interpreted as impermissible vouching.

Finally, Nancy Berson testified that she had conducted a diagnostic interview with Alice in which Alice indicated that her father had sexually abused her. Berson testified to general “patterns of disclosure” in children who have been sexually abused. She described common effects of this type of trauma, but she never testified that she believed Alice was being truthful during the interview.

In sum, the challenged testimony was not impermissible vouching. Each expert testified about observations or diagnoses of Alice and, where appropriate, compared those characteristics with those common to sexually abused children. That testimony is permitted by our State’s case law. *Dixon*, 150 N.C. App. at 52, 563 S.E.2d at 598. Accordingly, we reject Broyal’s argument.

## **II. Evidence That Broyal Was a Registered Sex Offender**

Broyal next argues that the trial court committed plain error in allowing the State to present evidence that he was a registered sex offender and that he had been in prison. Broyal argues that the State used this evidence to substantiate Alice’s allegations of sexual abuse. Again, as explained below, we disagree.



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As with his challenge to the State's expert testimony, Broyal did not object to this evidence at trial and we review it for plain error. *State v. Conaway*, 339 N.C. 487, 521, 453 S.E.2d 824, 846 (1995).

Broyal argues that the trial court should have excluded this evidence of his status and past criminal activity, presumably under Rule 403 of the North Carolina Rules of Evidence. Rule 403 states in pertinent part that, “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” N.C. R. Evid. 403. But it is well-settled that “evidence, not part of the crime charged but pertaining to the chain of events explaining the context, motive, and set-up of the crime, is properly admitted if linked in time and circumstance with the charged crime.” *State v. Agee*, 326 N.C. 542, 548, 391 S.E.2d 171, 174 (1990).

Here, the evidence establishing that Broyal was a registered sex offender and had served time in prison was introduced as necessary background to explain Broyal's relationship with his daughter. The jury heard this evidence to understand why Alice was living with her mother and visiting her father in the restricted way that she did. Even if an objection had been made to this evidence, the trial court would have been well within its sound discretion to overrule the objection. Accordingly, we find no error, and certainly no plain error, in the trial court's admission of this evidence.

### III. Referring to Alice as the “Victim”

Broyal next challenges the jury instructions, which referred to Alice as “the victim.” Again, Broyal did not object to the instructions at trial and thus we review this issue for plain error.

Our Supreme Court has considered and rejected a nearly identical argument, finding no plain error where the trial court referred to the alleged juvenile victim in a sexual assault case as “the victim”:

[Defendant] says first that the trial court erred in referring to the prosecuting witness as the “victim” throughout the charge to the jury. She contends that this was an expression of an opinion by the court that she was guilty. She concedes that no objection to this reference was made at the trial and it must be examined as plain error. . . . There is no intimation that the court expressed an opinion on the evidence other than as argued in this assignment of error. The judge properly placed the burden of proof on the State. We cannot hold that the reference to the prosecuting witness as the victim was an error so basic and lacking in its elements that justice could not have been done.

*State v. McCarroll*, 336 N.C. 559, 565–66, 445 S.E.2d 18, 22 (1994). Indeed, even when a challenge is preserved by a timely objection at trial, our courts have found no error in similar jury instructions. See *State v. Gaines*, 345 N.C. 647, 675, 483 S.E.2d 396, 413 (1997); *State v. Hill*, 331 N.C. 387, 411, 417 S.E.2d 765, 777 (1992); *State v. Boyett*, 224 N.C. App. 102, 112–14, 735 S.E.2d 371, 378–79 (2012); *State v. Henderson*, 155 N.C. App. 719, 721–24, 574 S.E.2d 700, 702–04 (2003). Accordingly, we reject Broyal’s argument.

#### **IV. Ineffective Assistance of Counsel**

Broyal also argues that each of his unpreserved evidentiary challenges discussed above gives rise to a claim for ineffective assistance of counsel for failure to preserve the objection.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that counsel's deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Generally, "to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006).

Broyal cannot satisfy either prong of the *Strickland* test because, as explained above, Broyal's arguments lack merit. Thus, we cannot fault his counsel for not pursuing them and, even if counsel had, it would not have changed the outcome of his case. Accordingly, we reject Broyal's ineffective assistance of counsel claims.

#### **V. Motion to Dismiss One Count of Sexual Offense**

Finally, Broyal argues that the trial court erred by failing to dismiss one of the two counts of statutory sex offense. Broyal contends that there was sufficient evidence only to show he committed one act of statutory sex offense, not two. As

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explained below, we reject this argument because the evidence was sufficient for the jury to find two separate acts of statutory sex offense.

“This Court reviews the trial court’s denial of a motion to dismiss *de novo*.” *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). “Upon defendant’s motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense.” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980).

“In ‘borderline’ or close cases, our courts have consistently expressed a preference for submitting issues to the jury, both in reliance on the common sense and fairness of the twelve and to avoid unnecessary appeals.” *State v. Hamilton*, 77 N.C. App. 506, 512, 335 S.E.2d 506, 510 (1985). Thus, “[i]f the trial court determines that a *reasonable* inference of the defendant’s guilt *may* be drawn from the evidence, it must deny the defendant’s motion and send the case to the jury.” *State v. Walker*, 332 N.C. 520, 530, 422 S.E.2d 716, 722 (1992).

Broyal argues that there was insufficient evidence of two separate acts of digital penetration, a necessary element of the sex offense crime with which he was charged. N.C. Gen. Stat. § 14-27.7(a). But Alice’s testimony was sufficient for a

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reasonable mind to conclude that Broyal committed one act of digital penetration, then Alice fell asleep, and then at some future point Broyal committed a second, similar act. This reasonable inference follows from the following testimony by Alice:

Q. And can you tell me: Do you know why you woke up?

A. Because I was hurting.

Q. Where were you hurting?

A. In my vagina.

Q. All right. Can you tell me what it felt like?

A. It hurt.

Q. Okay. And when you woke up, what's the first thing you – you saw or experienced?

A. That I had fingers inside of me and that I was being kissed.

Q. Okay. And who was kissing you?

A. Phillip.

Alice then testified that she was scared, so she rolled away from Broyal to get him to stop. She then described the second instance of penetration:

Q. Okay. And did you go back to sleep?

A. Yeah.

Q. And what's the next thing you remember?

A. I woke back up to him trying to do it again.

Q. Okay. And when you say doing it again, what was he doing?

A. He had my pants pulled somewhat down, and then he had his hands on my butt and on my boobs.

Q. Okay. And did he have his fingers in the same area or not?

A. Yeah.

Q. Okay. When you say he had his hand on your boob, was that under your clothes or on top of your clothes?

A. Under.

Q. All right. On the second time you woke up, can you describe the sensation in your vagina?

A. It burnt [sic] and it was hurting; felt like it was swelled

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[sic].

Q. It was what?

A. Swelled up.

In short, Alice testified to two separate instances, separated by sleep, in which she woke up because her vagina was hurting, and Broyal's fingers were inside her vagina or "in the same area." Although Alice did not expressly state that Broyal penetrated her vagina with his fingers upon waking up the second time, her description of his hand "in the same area" and her testimony that her vagina "burnt [sic] and it was hurting" is sufficient for a reasonable jury to conclude that, like the first time Broyal assaulted her, Broyal penetrated her vagina during this second assault, resulting in the pain Alice experienced.

**Conclusion**

For the reasons discussed above, we find no error in the trial court's judgment.

NO ERROR.

Judges ELMORE and DAVIS concur.

Report per Rule 30(e).