IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-304

Filed: 20 December 2016

Alamance County, Nos. 12 CRS 52181–85

STATE OF NORTH CAROLINA

v.

LARRY ANTHONY BOWES

Appeal by defendant from judgments entered 27 July 2016 by Judge Beecher R. Gray in Alamance County Superior Court. Heard in the Court of Appeals 6 September 2016.

Attorney General Roy Cooper, by Assistant Attorney General Natalie Whiteman Bacon, for the State.

Parish & Cooke, by James R. Parish, for the defendant.

BRYANT, Judge.

Where the trial court properly admitted Rule 404(b) testimony to show proof of motive, opportunity, intent, and plan or scheme, we find no error. Where the trial court properly allowed testimony from an expert witness who did not impermissibly vouch for the credibility of the prosecuting witnesses, we find no plain error. Lastly, where the trial court properly instructed the jury as to what constitutes a sexual act

when evidence was presented as to both cunnilingus and fellatio, we find no plain error in the judgments of the trial court.

Identical twin girls, Kara and Ella,[1] were born on 15 December 1998 and were sixteen years old at the time of trial. Defendant Larry Anthony Bowes is Kara and Ella's great uncle. Kara and Ella first met defendant in October 2008 when they were nine years old when defendant moved in with his sister, Jamie Summers. Jamie Summers was known to the family as "Aunt Sissy." Sometimes, when the girls misbehaved, their mother would take one of them to spend the night at Aunt Sissy's house, where Kara or Ella would sleep in the living room, often in the same room as defendant.

1. Kara

After meeting defendant in 2008, Kara grew to trust and confide in him, but their relationship changed when their conversations became sexual and "graphic," and defendant started touching Kara's breasts and vagina over her clothes. The inappropriate touching started when Kara was nine years old. She thought "it was okay because he said it was." After six or seven months, defendant began touching Kara under her clothes by putting his hands under her shirt, dress, or pants. Defendant also put his fingers inside Kara's vagina while she was swimming in Aunt

[1] Pseudonyms will be used in place of the victims' name as the children were minors when the trial division proceedings occurred. N.C. R. App. P. 4(e) (2015).

Sissy's pool, forced Kara to her knees and made her perform fellatio on him while in Aunt Sissy's backyard, and took a photograph of her vagina.

In the early morning hours, around 1:00 or 2:00 a.m., two days after Thanksgiving in 2011, defendant raped Kara for the first time. He told her, "If you scream, everyone will hate you." The following morning, defendant forced Kara to have intercourse again in her grandmother's bedroom, after which he told Kara he loved her and wanted to be with her.

2. Ella

Two months after defendant moved in with Aunt Sissy in 2008 and when Ella was nine years old, Ella spent the night at Aunt Sissy's house. The following morning, defendant took Ella into the hall bathroom, put Ella on her knees, and forced her to perform fellatio on him. During the same incident, defendant had Ella sit on the toilet and he took photographs of her genital area.

On a separate occasion, while in a storage shed in Aunt Sissy's back yard, defendant put his mouth on Ella's vagina and stuck his tongue inside of her. On the same occasion, defendant forced Ella to perform oral sex on him by grabbing her by the hair, moving her head back and forth, and ejaculating in her mouth. Later, when Ella was twelve or thirteen years old, defendant came into the bathroom where Ella was getting ready for school at Aunt Sissy's house and put his penis in Ella's mouth. He then bent her over the toilet and raped her. After that, he raped her again in Aunt

Sissy's bedroom. The same morning, while Ella was in the kitchen eating breakfast, defendant put Ella on her knees and put his penis in her mouth.

In February 2012, Kara and Ella were babysitting with their cousin Kelsey when Kara and Ella told Kelsey that defendant had been sexually abusing both of them for years. When the adults came home, the rest of the family was informed about the sexual abuse. Following disclosure, Kara and Ella were taken to the Alamance County Sheriff's Office and to Crossroads, a child advocacy center, where they were interviewed and medically examined. Corporal James Harris with the Alamance County Sheriff's Office interviewed Kara and Ella at Crossroads on 13 March 2012. Following the interviews, Corporal Harris obtained a search warrant to look for the phone images of Ella taken by defendant. Later, Sergeant David Sykes recovered a deleted image of a nude prepubescent female, identified by Ella as the image defendant took of her when she was nine years old.

On 19 March 2012, Dr. Dana Hagele performed medical examinations on both Kara and Ella at Crossroads. Ella's exam included a genital exam, but Kara's did not.[2] Dr. Hagele noted that the physical exams of both girls were unremarkable, but that this was expected given that Ella reported her last contact with defendant was two to three months prior to the exam. She recommended that both Kara and Ella

[2] Dr. Hagele testified that Kara's medical exam did not include a genital exam because Kara "refused the genital exam and got into [the] fetal position on the table." Dr. Hagele further explained that "we don't traumatize kids more by forcing them. There would be absolutely no point to forcing that exam in such a traumatized kid."

receive intensive trauma-specific treatment. Later, she testified at trial on behalf of the State as an expert in child abuse pediatrics.

On 2 July 2012, defendant was indicted on multiple counts of first-degree rape of a child, first-degree sex offense with a child, and indecent liberties with a child. The indictments involved offenses occurring between 1 November 2008 and 15 December 2011. The cases were tried before a jury beginning on 20 July 2015, the Honorable Beecher R. Gray, Judge presiding.

Prior to trial, defendant filed several motions, including motions to suppress a photograph of Ella and the Rule 404(b) testimony of defendant's niece, Crystal Wood, regarding sexual abuse defendant perpetrated on her. In a written order, the trial court denied defendant's motions to suppress the photograph and Wood's testimony following a pretrial evidentiary hearing.

On 27 July 2015, the jury convicted defendant of three counts of first-degree rape of a child, four counts of first-degree sex offense with a child, and two counts of indecent liberties with a child. Defendant was sentenced as a prior record level VI to a minimum of 386 months and a maximum of 473 months in prison, with two sentences to run concurrently and one to run consecutively. Defendant was also ordered to register as a sex offender and enroll in satellite-based monitoring. Defendant gave oral notice of appeal in open court.

I

Defendant first argues the trial court erred by admitting testimony from State's witness Crystal Wood under Rule 404(b) in order to show opportunity, motive, intent, and plan or scheme. Specifically, defendant contends Wood's testimony regarding defendant's molestation of her was too dissimilar to be relevant and was therefore inadmissible. We disagree.

> When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling . . . we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b).

State v. Beckelheimer, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2015). Rule 404(b) is a "general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278–79, 389 S.E.2d 48, 54 (1990). The *Coffey* rule of inclusion is "constrained by the requirements of similarity and temporal

proximity." *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002) (citations omitted). But, North Carolina courts have been markedly liberal in admitting evidence of similar sex offenses committed by a defendant. *State v. Bagley*, 321 N.C. 201, 207, 362 S.E.2d 244, 247 (1987) (citation omitted).

Here, in its order denying defendant's motion to suppress Wood's testimony, the trial court found and concluded as follows:

> 6. In her 404(b) testimony about [d]efendant's prior bad acts, Crystal Wood testified that she twice had been awakened when Defendant had, during the year 2010, placed his hand on her vagina on the outside of her pajamas on two occasions while she was asleep at the Holts Cross Roads house of Jamie Summers, where both she and [d]efendant often stayed, and that he touched her breasts and tried to touch her vagina while she was asleep in a chair at a Waffle House where she and [d]efendant then worked.
>
> CONCLUSIONS OF LAW
>
> 1. The court determined, in the matter of the 404(b) prior bad acts testimony from Crystal Wood, that her allegations were admissible under 404(b) to show proof of motive, opportunity, intent to commit uninvited sexual acts on females, and plan or scheme to carry out such acts. The court finds that the tests for similarities and temporal proximity of these acts and the acts in the present case on trial have been met.

Wood's testimony meets the requirements of Rule 404(b). Defendant is Wood's uncle, and defendant is also the uncle of Kara and Ella. Wood was assaulted by defendant in 2010, and Kara and Ella testified to being assaulted by defendant in

2010, which clearly establishes temporal proximity. *See Al-Bayyinah*, 356 N.C. at 154, 567 S.E.2d at 123. Both Wood and Kara described events in which defendant would touch their vagina over their clothing. Furthermore, the same people (Aunt Sissy, Grandma Brenda, and Sissy's son, Philip) who resided in Aunt Sissy's home when Kara and Ella would occasionally stay over were the same individuals who lived there when Wood resided there as well. This evidence was of particular importance to show defendant's opportunity to carry out the sexual abuse alleged by Kara and Ella because one of defendant's primary themes at trial was that the abuse could not have occurred because one of the residents would have heard or seen something.

Lastly, as a precaution, the trial court read a limiting instruction to the jury prior to the presentation of Wood's Rule 404(b) testimony and again at the close of trial, which "reveals that the trial court was aware of the potential danger of unfair prejudice to defendant and was careful to give . . . proper limiting instruction[s] to the jury." *See State v. Mangum*, ___ N.C. App. ___, ___, 773 S.E.2d 555, 564 (2015) (alterations in original) (quoting *State v. Hipps*, 348 N.C. 377, 406, 501 S.E.2d 625, 642 (1998)). Accordingly, the trial court did not err in admitting Wood's testimony. Defendant's argument is overruled.

II

Defendant next argues the trial court committed plain error when it allowed a pediatrician to testify that the two victims had been sexually abused despite the lack

of any physical evidence to support such a conclusion. Specifically, defendant contends that the pediatrician's expert testimony that sexual abuse had in fact occurred is not admissible because it is an impermissible opinion regarding the victims' credibility. We disagree.

When an issue is not preserved in a criminal case, it "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." N.C. R. App. P. 10(a)(4) (2015). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent that error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted).

"Expert opinion testimony is not admissible to establish the credibility of the victim as a witness." *State v. Dixon*, 150 N.C. App. 46, 52, 563 S.E.2d 594, 598 (2002) (citation omitted). Nonetheless, "[w]ith respect to expert testimony in child abuse prosecutions, our Supreme Court has approved, upon a proper foundation, the admission of expert testimony with respect to the characteristics of sexually abused children and whether the particular complainant has symptoms consistent with those characteristics." *Id.* (citations omitted). "The fact that this evidence may support the credibility of the victim does not alone render it inadmissible." *Id.* (quoting *State v. Kennedy*, 320 N.C. 20, 32, 357 S.E.2d 359, 367 (1987)).

In *State v. Hammond*, an expert was presented with the question of whether the child victim's symptoms were consistent with abuse. 112 N.C. App. 454, 461, 435 S.E.2d 798, 802 (1993). The expert answered that the symptoms showed "that there [was] a very high probability that she had been sexually abused." *Id.* This court held that this was an admissible expert opinion that the child exhibited similar symptoms to those characteristic of sexually abused children and was not an assessment of the child's credibility. *Id.*

In the instant case, Dr. Hagele testified that her role is to establish a medical diagnosis following a medical evaluation. While the exams of both Kara and Ella were physically "unremarkable," Dr. Hagele explained that "[i]n less than 5 percent of cases, when a child has been sexually abused, [are there] ever . . . physical findings particularly two to three months out." Dr. Hagele did not testify that Kara and Ella had in fact been abused, nor did she identify defendant as the abuser. Rather, when the prosecutor asked her if an unremarkable exam rules out any potential for sex abuse, she testified as follows:

> I would say the complete opposite is true for a couple of reasons that I'm happy to describe. . . .
>
> Well, the first thing I would -- I do want to say is that [Ella] had described the last potential physical contact with [defendant] had been two to three months before. So we are talking about two- to three-month delay in physical contact and a trained expert looking.
>
> . . .

> So what we have left is we just do a head-to-toe physical. And really the point of doing the physical is to look for -- to look for the signs of infection and to reassure a child that they're okay despite what they've been through. So it's more about being reassuring.

Dr. Hagele also noted that as a practice she recommends, *inter alia*, a protocol of testing for sexually transmitted diseases and mental health treatment, both of which she recommended for Ella. When asked if there was anything else she would recommend, Dr. Hagele testified that "there is no circumstance [Kara and Ella] should ever be near [defendant] again."

On cross-examination, Dr. Hagele testified further as follows:

> Q. Okay. Now [was] it not your testimony earlier that the physical examination was consistent with sexual abuse?
>
> A. No, I did not say that.
>
> Q. Okay. What did you say?
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> A. I said two things. One is that – two separate but related statements. One is that the physical exam was unremarkable on both girls. In the case of [Ella], that also included the genital exam. Then I went on to testify it was two to three months since she was last in physical contact with [defendant], and so given the passage of time and how healing works, I would not expect to see physical findings two to three months out. I would not expect DNA or physical findings. I'd expect healing.
>
> Q. And did you base that off of her history, or what she told you, right? She told you that it had been two or three months?

> A. Yes, [Ella] had told me that. I asked her, when was the last contact, and she said about two to three months before.

Defendant appears to argue that because Dr. Hagele recommended protocol treatment (testing for sexually transmitted diseases and pregnancy) "due to the unprotected sex" Kara and Ella disclosed, and mental health treatment, she impermissibly vouched for the credibility of the children. Defendant also argues that her recommendation that the girls never be near defendant again was an implicit identification of defendant as the abuser.

This Court has held that "those cases in which the disputed testimony concerns the credibility of a witness's accusation of a defendant must be distinguished from cases in which the expert's testimony relates to a diagnosis based on the expert's examination of the witness." *State v. Bailey*, 89 N.C. App. 212, 219, 365 S.E.2d 651, 655–56 (1988) (citations omitted). Thus, to accept defendant's argument would be to hold that *any* routine practice such as a subsequent referral by a physician for testing or treatment following a disclosure unaccompanied by physical evidence would constitute improper vouching. This we decline to do. Dr. Hagele never testified either that Kara and Ella were telling the truth, that they had been abused, or that defendant was their abuser. *Cf. State v. Towe*, 366 N.C. 56, 62–64, 732 S.E.2d 564, 568–69 (2012) (finding plain error where expert testified that the child fell into category of children who have been sexually abused where no abnormal findings were present in the exam); *State v. O'Connor*, 150 N.C. App. 710, 711–12, 564 S.E.2d 296,

297–98 (2002) (finding plain error and ordering new trial where expert testified that the child's disclosure was "credible"); *State v. Hannon*, 118 N.C. App. 448, 449–50, 455 S.E.2d 494, 495–96 (1995) (finding plain error and ordering new trial where expert testified that the prosecuting witness "was telling the truth"). Accordingly, the trial court properly allowed Dr. Hagele's testimony, and defendant's argument is overruled.

III

Lastly, defendant argues the trial court committed plain error by instructing the jury in count three of the indictment 12 CRS 52181 that it could convict defendant if it was convinced beyond a reasonable doubt that he had performed either cunnilingus or fellatio upon the named victim when the evidence introduced by the State tended to show that only cunnilingus was performed. Therefore, defendant argues, the jury was allowed to convict defendant of a crime for which the State produced no evidence, denying him his right to a fair trial. We disagree.

Again, defendant failed to preserve an issue for review and, again, requests that we review this issue, raised for the first time on appeal, for plain error. To show plain error, "defendant must convince this Court not only that there was error, but that absent that error, the jury probably would have reached a different result." *Jordan*, 333 N.C. at 440, 426 S.E.2d at 697 (citation omitted).

To be convicted of first-degree sexual offense, the State must prove that (1) a defendant engaged in a sexual act, (2) the victim was under the age of thirteen years, and (3) at the time of the act the defendant was at least twelve years old and was at least four years older than the victim. N.C. Gen. Stat. § 14-27.4(a)(1) (2015). " 'Sexual act' means cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body . . . ." N.C. Gen. Stat. § 14-27.1(4) (2015).

Here, in count three of indictment 12 CRS 52181, defendant was charged with committing a "sex offense" with a minor child. The verdict sheet identified count three as "first-degree sex offense child (prosecuting witness storage shed)." Ella testified that, in the storage shed, defendant pulled down her bathing suit around her knees and put "his mouth on [her] vagina and he stuck his tongue inside of [her]."

Defendant contends the trial court erred when it included fellatio in the jury instructions because the State did not present any evidence of fellatio with regard to the sex offense perpetrated in the storage shed. With respect to count three of 12 CRS 52181, the court instructed the jury as follows:

> For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt: first, that the defendant engaged in a sexual act with the victim. The sexual act means cunnilingus, which is the – which is any touching, however slight, by the lips or the tongue of one person to any part of the female sex organ of

> another or fellatio, which is any touching by the lips or tongue of one person and the male sex organ of another.

Defendant relies on *State v. Hughes* for the following premise:

> Where the trial court instructs on alternative theories, one of which is not supported by the evidence and the other which is, and it cannot be discerned from the record upon which theory or theories the jury relied in arriving at its verdict, the error entitles defendant to a new trial.

114 N.C. App. 742, 746, 443 S.E.2d 76, 79 (1994) (citing *State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990)). In *Hughes*, the trial court instructed the jury it could find the defendant guilty of first-degree sexual offense upon a finding that the defendant committed a sexual act defined as "fellatio . . . and/or any penetration, however slight, by any object into the genital opening of a person's body." *Id.* However, in *Hughes* a new trial was required not only because there was no evidence of penetration by an object, but also because the victim specifically testified to the contrary, stating the defendant did not put his finger in her vagina. *Id.*

Hughes is easily distinguishable. In the present case, there is evidence supporting both theories—cunnilingus and fellatio—and, unlike in *Hughes*, there is no evidence to the contrary. Ella testified specifically that while in the storage shed with defendant at Aunt Sissy's house, defendant put his mouth "on [her] vagina and he stuck his tongue inside of [her]." Ella also testified about an incident that occurred the same day in the same storage shed, where defendant forced Ella to perform oral sex on him by grabbing her hair and moving her head back and forth until he

ejaculated. Accordingly, defendant's argument that the trial court's instruction to the jury constituted plain error because there was no evidence that fellatio occurred is without merit.

NO ERROR.

Judges STEPHENS and DILLON concur.

Report per Rule 30(e).