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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-567

Filed: 6 December 2016

Columbus County, Nos. 14 CRS 52858-59

STATE OF NORTH CAROLINA

v.

ROYAL SPENCER ROBINSON

Appeal by defendant from judgment entered 29 October 2015 by Judge Douglas B. Sasser in Columbus County Superior Court. Heard in the Court of Appeals 17 November 2016.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly N. Callahan, for the State.

Mark Montgomery for defendant-appellant.

TYSON, Judge.

Royal Spencer Robinson (“Defendant”) appeals from judgment entered upon jury conviction of two counts of sexual offense with a child. We find no error.

I. Background

“Sandy,” the child victim, was eleven years old on 12 September 2014. “Sandy” is a pseudonym used herein in accordance with N.C. R. App. P. 4(e) (2015). She attended a sleepover at the home of Tristan Robinson (“Robinson”), who lived in a

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three-bedroom mobile home located in Bolton, North Carolina. Sandy's mother was romantically involved with Robinson, who is the father of two daughters. Robinson lived with his sister, Koseanda Smith ("Smith"). Smith offered to supervise the three girls during the sleepover.

Defendant is the brother of Robinson and Smith. Defendant, his son, and Smith picked Sandy up from her home, stopped at Dale's Seafood restaurant, and then drove to Robinson's and Smith's residence. Sandy and the two Robinson girls ate dinner and played video games until 11:00 p.m., when Ms. Smith told them to go to bed. The three girls shared a queen sized bed and watched a movie in the bedroom until they fell asleep. Defendant, his son, and Smith's boyfriend, Dominick Neal ("Neal"), also spent the night at Robinson's home on 12 September 2014.

A. Sandy's Testimony

Sandy testified she was awakened after midnight by Defendant, who was removing her clothes. She testified Defendant removed her shirt, shorts, and underwear "completely off" her body. She began to cry after Defendant removed her clothes, and she felt Defendant licking her vagina. As Sandy continued to cry, Defendant ordered her to be quiet.

Sandy also testified Defendant stopped licking her vagina and penetrated her vagina with his fingers. When Sandy cried louder, Defendant again instructed her to be quiet. After she began to cry louder, Defendant unsuccessfully attempted to turn

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Sandy over onto her stomach, and then exited the bedroom. Sandy also testified she heard the sound of a zipper while Defendant was in the bedroom. Neither of the other two girls, who were sleeping next to Sandy, woke up during the sexual assaults.

After Defendant left the bedroom, Sandy got out of bed, put on her clothes, and went to the front room. Sandy testified about 15 minutes passed from the time Defendant started to sexually assault her until the time she told Smith “[Defendant] was trying to rape me.” Sandy testified she asked Smith to use her phone, called her mother, but was unable to say anything to her. Smith took the phone and told Sandy’s mother to come right away.

When Sandy’s mother arrived later that morning, Sandy told her about what had occurred. Sandy was taken to the hospital and underwent a physical examination. Hospital staff removed Sandy’s clothes to check if she had any marks on her body and to examine inside her vagina.

Sandy testified she spoke with Columbus County Detective Jason Soles at the hospital. Sandy’s mother discussed what had happened to Sandy with Detective Soles before Sandy spoke with him. Sandy confirmed her testimony in court was consistent with the statements she had given to Detective Soles.

On cross-examination, Sandy testified that after she had informed Smith that Defendant had touched her, Smith went into Defendant’s room to talk with him.

Sandy also testified she did not use the telephone the night of the incident, and her mother did not arrive until 8:00 a.m.

B. Ms. Smith's Testimony

Smith presented a different version of Sandy's arrival at her home and testified Sandy's mother had brought her to Robinson's home on 12 September 2014. After the children ate and played, Smith sent the children to bed and briefly dozed off. Smith's boyfriend, Neal, and Defendant left to go to a nightclub between 11:30 p.m. and midnight. According to Smith, the men returned from the nightclub between 1:00 a.m. and 2:00 a.m., and the three of them sat together and talked for about thirty minutes before Defendant went to bed.

Smith testified she heard someone crying, got up to investigate, and found Sandy awake and sobbing. Sandy told her that a man had touched her. Sandy did not name Defendant as her assailant at that time. Smith testified there were only two adult males in the home at that time, her boyfriend, who was sitting next to her in bed, and Defendant. Defendant's son, who was about Sandy's age at the time, was sleeping in the unoccupied bedroom of one of Robinson's two daughters.

Ms. Smith testified that after Sandy told her a man had touched her, Smith went into Defendant's room. She woke Defendant up and asked him if he had touched Sandy. Defendant responded he had not. Smith called Sandy's mother, but she did not answer. Smith was able to contact Sandy's mother in the morning. Sandy's

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mother came to Robinson's home, and was informed of the alleged abuse. Sandy and her mother left Robinson's and Smith's residence soon thereafter.

C. Officers' Testimonies

Columbus County Sheriff's Deputy Joshua Rising responded to the call regarding alleged sexual abuse of Sandy on 13 September 2014. Deputy Rising spoke directly with Sandy. Sandy informed him Defendant had "committed the act of oral sex on her and inserted his fingers into her vagina." Deputy Rising followed Sandy and her mother to New Hanover Regional Medical Center and waited with them until Detective Soles arrived.

Detective Jason Soles testified he spoke with Sandy at the hospital on 13 September 2014, the day of the alleged assault. Detective Soles interviewed Sandy in the presence of her mother. Sandy told Detective Soles she awoke during the night because someone was pulling down her pants. She initially believed she was dreaming, and began crying when she realized it was not a dream.

Sandy identified Defendant as the man who had licked her vagina and inserted his fingers inside of her vagina, which caused her to cry louder. Sandy further told Detective Soles that after Defendant digitally penetrated her, he attempted to flip her body over onto her stomach. She then heard the noise of a zipper, but she was crying so loudly, Defendant left the room.

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Detective Soles testified Sandy was “very upset. She was crying, nervous, very standoffish like she didn’t really want to tell what had happened. I think it was just more nerves and being uncomfortable.” When Detective Soles spoke with Sandy a second time on 22 October 2014, she provided the same information to him.

Detective Soles continued his investigation and met with Defendant. Defendant waived his Miranda rights and agreed to speak with Detective Soles. Defendant stated on the night and morning of the alleged sexual assault, he had accompanied Neal to a nightclub and had “drunk a lot of alcohol and snorted a lot of cocaine.” Defendant recalled returning to his brother’s home with Neal and eating, but was unable to recall anything else.

D. Medical Testimony

Jessica McAlear, R.N., (“Nurse McAlear”) examined Sandy at the hospital and testified for the State as an expert in “the field of sexual assault nursing and emergency trauma nursing.” Prior to Sandy’s physical examination, Nurse McAlear reviewed the background provided by the triage nurse and spoke with Sandy’s mother. Nurse McAlear inspected Sandy’s body for injuries before conducting the genital exam.

Nurse McAlear employed a Wood’s lamp to check Sandy’s skin for the presence of bodily fluids not visible to the naked eye. While using the Wood’s lamp, an area on Sandy’s pubic region illuminated so Nurse McAlear swabbed the area. Nurse

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McAlear examined Sandy's vaginal opening, and noted "the majority of everything looked very normal," except for "between 2 and 3 o'clock I saw a small break in the skin inside the vestibule, which is the area right outside the hymen." When Nurse McAlear applied gentle pressure to the area around the tear, Sandy expressed some localized pain. Based upon her training and experience, Nurse McAlear testified "the injury that I saw on her was consistent with her story, what she related to her mother and what her mother related to me."

Defendant did not present any evidence. The jury deliberated for three days, and returned a verdict finding Defendant guilty of two counts of sexual offense on a child. The trial court imposed two consecutive prison terms of 310 to 432 months. Defendant appeals.

II. Jurisdiction

Jurisdiction lies in this court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2015), which provides for an appeal of right from any final judgment of a superior court. Jurisdiction also lies in this court pursuant to N.C. Gen. Stat. § 15A-1444(a) (2015) which provides, "[a] defendant who has entered a plea of not guilty to a criminal charge, and who has been found guilty of a crime, is entitled to appeal as a matter of right when final judgment has been entered."

III. Issues

Defendant argues the trial court committed plain error by: (1) admitting Nurse McAlear's testimony that Sandy's trauma was "consistent with" her allegation of sexual assault; and (2) in instructing the jury that Sandy was a "victim."

IV. Nurse McAlear's Expert Testimony

Nurse McAlear testified about her qualifications and expertise. Defendant's attorney objected and asked to be heard. After hearing arguments from counsel, the trial court ruled Nurse McAlear was qualified as an expert witness, but could not express an opinion on the ultimate question of whether Sandy was, in fact, sexually assaulted. After consulting with Defendant, defense counsel withdrew the objection.

During physical examination of Sandy's genital area, Nurse McAlear stated the small tear she observed was abnormal in a child of Sandy's age. Nurse McAlear testified the injury was indicative of "some kind of blunt force trauma to that area of the vestibule." She further testified, "the injury that I saw on her was consistent with her story, what she related to her mother and what her mother related to me."

Defendant argues Nurse McAlear's testimony constituted improper "vouching" for the credibility of Sandy's allegations against Defendant.

A. Standard of Review

Defendant failed to object to the admission of the challenged testimony, and his argument is subject only to plain error review. N.C. R. App. P. 10(a)(4) (2016). In conducting plain error review, our Court "examine[s] the entire record [to] determine

if the . . . error had a *probable* impact on the jury’s finding of guilt.” *State v. Odom*, 307 N.C. 655, 661, 300 S.E. 2d 375, 379 (1983) (emphasis supplied) (citation omitted).

The plain error rule is “always to be applied cautiously and only in the exceptional case.” *Id.* at 660, 300 S.E.2d at 378; *see also State v. Lawrence*, 365 N.C. 506, 516, 723 S.E. 2d 326, 333 (2012). The burden upon the defendant to show plain error is “much heavier” than that imposed upon defendants who have preserved their rights by timely objection. *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986).

B. Analysis

N.C. Gen. Stat. § 8C-1, Rule 702(a) sets forth the requirements for the admissibility of expert testimony. The statute provides:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:

- (1) The testimony is based upon sufficient facts or data.
- (2) The testimony is the product of reliable principles and methods.
- (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2015).

Defendant withdrew his challenge to Nurse McAlear’s qualification as an expert witness in the field of sexual assault and emergency trauma nursing and failed

to object to her testimony. Defendant concedes Nurse McAlear conducted a physical examination of Sandy's genitals and found a small break in the skin of the vestibule near her hymen. Nurse McAlear concluded the small break she observed in the skin near the hymen was consistent with the sexual assault Sandy had described.

Defendant argues this Court's holding in *State v. Frady*, 228 N.C. App. 682, 747 S.E.2d 164, *disc. review denied*, 367 N.C. 273, 752 S.E.2d 465 (2013) is controlling authority. In *Frady*, the expert testified the child's disclosure was "consistent with sexual abuse" because of "[t]he consistency of her statements over time, the fact that she could give sensory details of the event . . . [a]nd her knowledge of the sexual act that is beyond her developmental level." *Id.* at 684, 747 S.E.2d at 166. The expert relied solely upon the child's allegations against the defendant to conclude her disclosure was "consistent with sexual abuse." *Id.* The Court explained:

It is well settled that expert opinion testimony is not admissible to establish the credibility of the victim as a witness. However, 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.* With respect to expert testimony in child sexual 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. at 685, 747 S.E.2d at 167 (emphasis supplied) (quotation marks and citations omitted).

Our Supreme Court has also rejected Defendant's argument. In *State v. Aquallo*, 322 N.C. 818, 822, 370 S.E.2d 676 (1988), the defendant argued the pediatrician's testimony that "results of the physical examination were consistent with the victim's pre-examination statement was a comment on the victim's truthfulness or the guilt or innocence of defendant." The pediatrician testified the "lacerational cut" she noted on the victim's hymen was consistent with what the child had told her. *Id.* Our Supreme Court explained:

Essentially, the doctor testified that the *physical* trauma revealed by her examination of the child was consistent with the abuse the child alleged had been inflicted upon her. We find this vastly different from an expert stating on examination that the victim is "believable or "is not lying." The latter scenario suggests that the complete account which allegedly occurred is true, that is, that this defendant vaginally penetrated this child. The actual statement of the doctor merely suggested that the physical examination was consistent with some type of penetration having occurred. The important difference in the two statements is that the latter implicates the accused as the perpetrator of the crime by affirming the victim's account of the facts. The former does not.

Id. (emphasis added).

Here, like in *Aquallo*, the "the statement of the doctor only revealed the consistency of her findings with the presence of vaginal trauma" and she "did not comment on the truthfulness of the victim or the guilt or innocence of defendant." *Id.*

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at 823, 370 S.E.2d at 678. The trial court properly admitted and limited Nurse McAlear's expert testimony that opined an observed physical injury, discovered through examination, was consistent with what Sandy had told her mother. Defendant has failed to show any error in the admission of Nurse McAlear's expert testimony. This argument is overruled.

V. Jury Instructions

Defendant argues the trial court committed plain error by using the word "victim" in its instructions to the jury. Due to Defendant's failure to object at trial, the issue is also reviewed for plain error, N.C. R. App. P. 10(a)(4).

The trial court instructed the jury on the charges as follows:

[T]he State must prove three things beyond a reasonable doubt: First, that the Defendant engaged in a sexual act with *the victim*. A sexual act means cunnilingus, which is any touching, however slight, by the lips or tongue of one person to any part of the female sex organ of another, and/or penetration, however slight, by any object into the genital opening of a person's body; second, that at the time of the acts, *the victim* was a child under the age of 13 years; and third, that at the time of the act, the Defendant was at least 18 years of age. (emphasis supplied).

Our appellate courts have repeatedly rejected the argument that the trial court's use of the word "victim" in the jury instruction constitutes reversible error. *See, e.g., State v. Hill*, 331 N.C. 387, 411, 417 S.E.2d 765, 777 (1992), *cert. denied*, 507 U.S. 924, 122 L. Ed. 2d 684 (1993) ("By using the term 'victim,' [in the jury charge] the trial court was not intimating that the defendant committed the crime."); *State v.*

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Walston, 367 N.C. 721, 732, 766 S.E.2d 312, 319 (2014); *State v. Gaines*, 345 N.C. 647, 675, 483 S.E.2d 396, 413, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997); *State v. Henderson*, 155 N.C. App. 719, 722-23, 574 S.E.2d 700, 703, *disc. review denied*, 357 N.C. 64, 579 S.E.2d 569 (2003). Defendant has failed to show any error in the trial court's use of the word "victim" in its instructions to the jury. This argument is without merit and is overruled.

VI. Ineffective Assistance of Counsel

Defendant argues he received ineffective assistance of trial counsel due to counsel's failure to object at trial. In light of our holdings that the trial court's expert witness rulings and jury instructions contained no error, Defendant's argument is without merit and is overruled. *State v. Lee*, 348 N.C. 474, 493, 501 S.E.2d 334, 346 (1998) (concluding when testimony and evidence are found to be admissible, it cannot be error for the defense attorney to remain silent and defendant has no grounds for an ineffective assistance of counsel claim).

VII. Conclusion

Defendant failed to show the trial court committed any error in admitting Nurse McAlear's expert testimony or in its use of the word "victim" in its instruction to the jury. Defendant makes no showing he received ineffective assistance of counsel.

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Defendant received a fair trial, free from errors he preserved and assertions of plain error he argues. We find no error in the jury's convictions or the judgments entered thereon. *It is so ordered.*

NO ERROR.

Judges MCCULLOUGH and DILLON concur.

Report per Rule 30(e).