IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1291

Filed: 17 September 2019

New Hanover County, Nos. 15CRS055121, 15CRS055186-7

STATE OF NORTH CAROLINA

v.

JOSHUA DUSTIN LUTZ, Defendant.

Appeal by Defendant from judgments entered 29 March 2018 by Judge Jay D. Hockenbury in New Hanover County Superior Court. Heard in the Court of Appeals 7 August 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sharon Patrick-Wilson, for the State.

Mark Montgomery for the Defendant.

DILLON, Judge.

Defendant Joshua Dustin Lutz appeals from judgments finding him guilty of various sex offenses. After careful review, we find no error.

I. Background

Defendant was tried for various sex offenses stemming from alleged sexual encounters he had with his thirteen (13) year-old niece, Kelly[1], in 2015, and with his fifteen (15) year-old niece, Kate, the prior year in 2014. Kelly reported Defendant's abuse of her shortly after it occurred. After hearing her sister's report, Kate reported that she too had been abused by Defendant the previous year.

At trial, the State called various witnesses, including an expert in nursing and a detective who investigated the matter.

Defendant was found guilty of statutory sexual offense, attempted statutory sexual offense, and taking indecent liberties with a child based on his abuse of Kelly. Defendant was found guilty of taking indecent liberties with a child based on his abuse of Kate.

The trial court entered judgment based on the jury verdicts and sentenced Defendant in the presumptive range. The trial court further issued a permanent no contact order with his nieces. Defendant timely appealed to our Court.

II. Analysis

A. Witness Testimony

On appeal, Defendant argues that the trial court committed plain error in allowing certain testimony from witnesses called by the State.

[1] We use pseudonyms to protect the juveniles' privacy.

As Defendant's trial counsel did not object to these testimonies, we review this issue for plain error. *State v. Odom*, 307 N.C. 655, 659-61, 300 S.E.2d 375, 378 (1983). To establish plain error, a defendant must show that the alleged error prejudiced him by having a "probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations omitted).

First, Defendant argues that a witness qualified as an expert in nursing offered inadmissible testimony. This nurse testified that Kelly had reported to her that Defendant had *touched* her private parts with his fingers but that his fingers did not actually *penetrate* her. Indeed, proof of slight penetration of the labia was required to prove Defendant had committed a sexual offense against Kelly. *See State v. Jones*, 249 N.C. 134, 137, 105 S.E.2d 513, 514 (1958) (holding that "the entering of the vulva or labia is sufficient" to constitute penetration). The nurse, however, further opined that mere touching of the labia would *always* result in at least slight penetration of the labia, which is all that is necessary to constitute penetration:

> STATE: Can you explain to the jury how the outer lips, or the labia majora, how do they work? If I put pressure on the outer labia, what happens?
>
> EXPERT: . . . . Any touching or rubbing or pressure would break [the fatty tissue that is the labia majora] and allow entry to the more internal structures.
>
> . . .

> STATE: Just touching it or rubbing it with a finger would penetrate the outer labia of the female anatomy?
>
> EXPERT: Yes, it would.

Defendant contends that the nurse's testimony constituted impermissible witness vouching. *See State v. Stancil*, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002) (holding that "[i]n a sexual offense prosecution involving a child victim, the trial court should not admit an expert opinion that sexual abuse has in fact occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility"). We disagree. This testimony does not express or suggest an opinion that Defendant actually penetrated Kelly. In fact, the nurse testified that Kelly had reported that she had not been penetrated. Rather, the nurse merely provided her opinion that *if* Defendant had touched Kelly, *then* penetration must have happened.

Defendant contends, however, that this expert opinion – that touching inevitably constitutes penetration – was not supported by any reliable science. It is true that our law recognizes a distinction between the mere touching of the outer part of the labia and the slight penetration of the labia. But assuming that the nurse's opinion constituted error, we conclude that such error did not rise to the level of plain error. There was other evidence of actual penetration: namely, Kelly's testimony that Defendant's fingers, in fact, had penetrated past her labia and into her vagina. It may be that the jury convicted Defendant based on the nurse's testimony,

disbelieving Kelly's in-court account. But it may also be that the jury simply believed Kelly. Therefore, we cannot say that it is reasonably probable that a different result would have occurred, but for the nurse's opinion. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

Second, Defendant argues that the State elicited testimony, which also constituted witness vouching, from a detective involved in the underlying investigation. Again, as Defendant failed to object to this testimony we review for plain error. *Odom*, 307 N.C. at 659-61, 300 S.E.2d at 378.

Defendant does not point to any specific statements made by the detective at trial, but rather makes a broad, sweeping claim that the detective was "acting as a thirteenth juror[.]" Our review of the detective's testimony, though, reveals that the detective only expressed an opinion as to Kelly's injuries when prompted on cross-examination. *See* N.C. Gen. Stat. § 15A-1443(c) (2018) ("A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct."). At no time did the detective bolster Kelly's credibility.

Moreover, contrary to the assertions made by Defendant in his brief, the detective was not testifying as an expert. Rather, the detective testified as to his personal experiences in the case, his interactions with the people involved, and his decision-making process. Thus, the detective's testimony did not lack foundation and did not violate Rule 701. *See* N.C. Gen. Stat §8C-1, Rule 701 (2018) ("If the witness

is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.").

In light of the other evidence presented by the State, we cannot say that, absent the detective's testimony, the jury would have reached a different verdict. N.C. Gen. Stat. § 15A-1443(a). Therefore, the detective's testimony did not prejudice Defendant and does not amount to plain error. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

In the alternative, Defendant contends that his trial counsel was ineffective in failing to object to the State's line of questioning. We review this argument for whether Defendant's counsel's performance "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). And, if so, we review to determine whether this "deficient performance prejudiced the defense." *Id.* at 687; *see State v. Miller*, 357 N.C. 583, 597-98, 588 S.E.2d 857, 867 (2003) (explaining the second prong of *Strickland* to require "the defendant [to] show that the deficient performance prejudiced the defense . . . [a] showing that counsel's errors were so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable*") (emphasis in original).

We cannot say that Defendant's counsel's performance "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688; *accord State v. Roache*, 358

N.C. 243, 289, 595 S.E.2d 381, 411 (2004) (noting "the presumption [of] the appropriateness of counsel's actions at trial" and the principle that "[c]ounsel [should be] given wide latitude in matters of strategy"). Moreover, as we concluded above that this testimony did not amount to plain error, the actions, or lack thereof, of Defendant's counsel likewise do not amount to a prejudicial deficiency. *Strickland*, 466 U.S. at 687; *Miller*, 357 N.C. at 597-98, 588 S.E.2d at 867.

B. Motion to Dismiss

Defendant also argues that the trial court erred in denying his motion to dismiss the charge of attempted sexual offense against Kelly. At the close of the State's case, Defendant moved to dismiss the charge of attempted sexual offense, arguing that there was no evidence that Defendant intended, but failed, to penetrate Kelly. The trial court denied such motion. We review this dismissal *de novo*. *See State v. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 550 (2018).

When ruling on a motion to dismiss, the trial court must view the evidence in the light most favorable to the State and determine whether there is any evidence which tends to prove guilt or reasonably leads to the conclusion of guilt as a logical and legitimate deduction. *State v. Jones*, 303 N.C. 500, 504-05, 279 S.E.2d 835, 838 (1981). To prove guilt for attempted sexual offense with someone who is fifteen (15) years of age or younger, the State must prove that the defendant had the specific intent to engage in a sexual act with an alleged victim who is both fifteen (15) years

old or younger and at least six years younger than the defendant. N.C. Gen. Stat. § 14-27.30(a) (2015).

Viewing the evidence *in the light most favorable to the State*, Kelly was thirteen (13) years old and Defendant was forty-one (41) years old, an age difference of more than six years, at the time of the alleged assault. Defendant intended to engage in a sexual act with Kelly – according to Kelly, Defendant touched her and attempted to digitally penetrate her. Defendant suggested sleeping in the same room as Kelly. Defendant's semen was found both in Kelly's shorts and on her bedroom comforter.

The aforementioned evidence sufficiently constitutes substantial evidence that could have reasonably led to the conclusion of Defendant's guilt. N.C. Gen. Stat. § 14-27.30(a); *Jones*, 303 N.C. at 504-05, 279 S.E.2d at 838. As such, it was not error for the trial court to deny Defendant's motion to dismiss the charge of attempted sexual offense and allow the jury to render a verdict on the charge.

III. Conclusion

The trial court did not commit plain error by allowing the testimony of the nurse and the detective. Likewise, Defendant's trial counsel was not defective for failing to object to such testimony. The trial court also did not err in denying Defendant's motion to dismiss. Thus, we find no reversible error in the judgments against Defendant.

NO ERROR.

Judges ZACHARY and BROOK concur.

Report per Rule 30(e).