IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-251

Filed: 3 December 2019

Mecklenburg County, No. 16 CRS 222461-62, 222465-66, 222469, 222471; 17 CRS 7406

STATE OF NORTH CAROLINA

v.

ROBERT LOUIS QUINN

Appeal by defendant from judgments entered 23 July 2018 by Judge Todd Pomeroy in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 November 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sonya Calloway-Durham, for the State.

Mark Montgomery for defendant-appellant.

TYSON, Judge.

Robert Louis Quinn ("Defendant") appeals from the jury's convictions for statutory rape, three counts of statutory sexual offense, and two counts of taking indecent liberties with a child. We find no prejudicial error.

I. Background

Defendant is the father of "Jane," born in 2002, and "Jill," born in 2007. *See* N.C. R. App. P. 42(b)(3) (pseudonyms used in appeals filed under N.C. Gen. Stat. § 7A-27 involving sexual offenses committed against a minor). Ronetta is the children's mother. Ronetta and Defendant were never married. Ronetta and the children have moved several times. They lived with various relatives, with Defendant, and at one point with Defendant and his girlfriend. In June 2015, Ronetta began a relationship with another man, Claude. She and all the children moved in with Claude in August of that year.

On 20 February 2016, while Ronetta and Claude were at work, Jill told her sister Jane, "Dad raped me." The girls called Ronetta and Claude for them to come home. Ronetta spoke with Jill, and then called 911. While Ronetta was speaking with Jill, Claude asked Jane if Defendant had ever inappropriately touched her. Jane broke down and started crying. Jane told Ronetta Defendant had also sexually violated her.

At trial, the State presented the 911 call, as well as the recordings of forensic interviews with Jill and Jane. Ronetta, Jill, Jane, and Claude all testified for the State. Jane testified Defendant began sexual contacts with her when she was 8 or 9 years old. These incidents included Defendant performing oral sex on her, forcing her to perform oral sex on him, and vaginal penetration.

Jill testified Defendant initiated sexual contacts with her when she was 6 years old and in similar ways as he had Jane. Both Jill and Jane testified they were afraid of Defendant, because he had been violent with their mother. Ronetta testified Defendant had physically abused and assaulted her during their relationship, including while she was pregnant.

Ronetta's father, the children's maternal grandfather, testified and corroborated that Defendant had physically abused Ronetta, and had also threatened him. Claude testified and corroborated that Jane had told him Defendant had inappropriately touched her.

A. Expert Witness Testimony

Defendant's counsel filed a pretrial motion challenging the proposed testimony by the State's expert witness in clinical social work, Kelli Wood, who specialized in child sexual abuse cases. Before Wood testified, the trial court held a *voir dire* to determine the admissibility of her testimony. In the *voir dire*, Wood testified to her education and experience as a forensic interviewer. She testified "disclosure is a process" and explained it is common for children who have suffered sexual abuse to "delay disclosure," sometimes out of fear.

During the *voir dire,* Defendant's counsel argued "it is the State's intention to use Ms. Wood to vouch for these witnesses and to bolster the lack of reporting." The trial court ruled Wood's testimony would be admitted, with an instruction limiting

Wood's testimony and any of her expert opinions for the sole purpose of corroborating the testimony of the alleged victims: "It is not being admitted to prove that a rape or sexual offense, in fact, occurred." Defendant's counsel thanked the court and said, "I was going to request that instruction."

The trial court received Wood's expert qualifications and admitted her testimony, along with recordings of her interviews with both complainants, without objection by Defendant's counsel. Defendant's counsel also cross-examined Wood on her techniques for "extract[ing] memories of episodic events from script memory."

B. Defendant's Niece's Blocked Testimony

Defendant's minor niece was among the witnesses testifying on his behalf. She testified she and Jane "were like sisters, like twins. We did everything together." She "just couldn't believe" Jane's accusations and was "really surprised" by them.

Defendant's counsel tried to ask her, "[i]n the times you have ever been with or around your Uncle Robert, has he ever done anything . . . to you?" The State objected to this question and the trial court sustained the objection. The State also moved to strike, which the court allowed.

C. Defendant's Stepfather's Testimony

Defendant's stepfather, Adam Morrison, also testified on his behalf. Morrison recounted Defendant had called him and told him of the allegations. Defendant "was calm. . . . He was a little mad. Sounded a little mad, but not over-the-top mad." On

cross-examination, Morrison admitted he had called the police after Defendant's call, "just to keep everything calm." The State asked Morrison about notes taken by the police officer, who had responded to his call. According to those notes, Morrison had called law enforcement because Defendant had threatened to kill him. Morrison responded he did not recall making that statement to the officer.

During her closing argument, the prosecutor told the jury:

> Morrison, he just lied on that stand. Blatantly lied. How can you believe anything that these people say? He got up on the stand and said that the Defendant called him calmly. He was mad, kind of mad, but it was calm. He was calm. And then finally, when I crossed him, he admitted he called the police because the Defendant threatened to kill him, and he believed that it was gonna [sic] happen. Of course, he doesn't remember saying that. He doesn't remember saying that. The officer a decade ago must have got it wrong. I can understand a stepfather not wanting his stepson to go to prison for 25 years. I can. But you can't lie under oath.

Defendant objected. The court overruled the objection, citing: "Closing argument."

The jury returned guilty verdicts for one count of statutory rape, three counts of statutory sexual offense with a child, and two counts of taking indecent liberties with a child. The trial court determined Defendant's prior record level to be V. The court sentenced Defendant to two consecutive sentences of 400 to 540 months in prison. Defendant was ordered to register as a sex offender and to enroll in satellite-

based monitoring for the remainder of his natural life upon his release from imprisonment. Defendant entered notice of appeal in open court.

II. Jurisdiction

An appeal as of right lies with this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2017).

III. Issues

Defendant argues the trial court committed plain error by allowing a State's expert witness to improperly vouch for the complainants' credibility. Defendant also argues the trial court erred in excluding testimony of his niece. Lastly, Defendant argues the trial court erred by overruling his objection to the prosecutor calling a defense witness a "liar" during closing argument.

In the alternative, Defendant argues he was denied effective assistance of counsel by his counsel's failure to object to the improper testimony.

IV. Improper Vouching

Defendant argues the trial court committed plain error by allowing Wood to improperly vouch for the State's witnesses' credibility by referring to the children's allegations as "disclosures." Alternatively, Defendant argues that he was denied effective assistance of counsel by his counsel's failure to object to the improper testimony.

A. Standard of Review

Defendant concedes on appeal that his trial counsel did not object to the challenged opinion testimony when presented. This issue is reviewed for plain error. "Under the plain error rule, [a] defendant must convince this Court not only that there was error, but that absent the 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).

B. Analysis

1. Invited Error

"A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." N.C. Gen. Stat. § 15A-1443(c) (2017). "[U]nder the doctrine of invited error, a party cannot complain of a charge given at his request, or which is in substance the same as one asked by him." *Sumner v. Sumner*, 227 N.C. 610, 613, 44 S.E.2d 40, 41 (1947) (citations omitted).

Defendant's counsel moved pre-trial for an evidentiary hearing to challenge the admissibility of Wood's testimony and argued this issue before the trial court during the *voir dire*. When the trial court ruled the testimony, including Wood's repeated use of "disclosure," would be admitted with a limiting instruction for corroboration, Defendant's counsel thanked the court and said, "I was going to request that instruction."

The limiting instruction given by the trial court is in substance the same as the one Defendant's counsel was going to request. Defendant invited any alleged error on this issue and cannot show prejudice by its admission under plain error. *Id.* Defendant's arguments on this issue are overruled.

2. Ineffective Assistance of Counsel

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient, and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). To establish prejudice, "[t]he 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 80 L. Ed. 2d at 698.

"[I]f a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 249 (1985).

Recently, this Court held, "repeated use of the word 'disclose' or its variants does not constitute impermissible vouching for a declarant's credibility." *State v. Worley*, __ N.C. App. __, __, __ S.E.2d __, __, 2019 WL 5704097 at *4 (2019); *see also*

State v. Betts, __ N.C. App. __, __, 833 S.E.2d 41, 47 (2019). Until overturned by a higher court, we are bound by our recent precedents on this issue. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

Counsel's failure to object to Wood's use of "disclose" or its variants, as limited to corroboration only by the trial court, would not have led to a different result, if preserved. Defendant's counsel's performance was not "actually deficient." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 249. Defendant's ineffective assistance of counsel claim is denied.

V. Exclusion of Testimony

Defendant argues the trial court erred by excluding the testimony of Defendant's niece.

A. Standard of Review

Whether to exclude evidence of prior acts "is left to the sound discretion of the trial court. A trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Aldridge*, 139 N.C. App. 706, 714, 534 S.E.2d 629, 635 (2000) (citations and internal quotation marks omitted).

B. Analysis

Defendant argues the trial court erred by excluding Defendant's niece's testimony about his prior actions towards her. Defendant asserts it is fundamentally

unfair to impose a higher burden on a defendant's attempt to establish his good character than it would have been for the State to present evidence of a defendant's bad character.

The evidence Defendant sought to introduce was an absence of his prior bad acts towards his niece. Defendant does not assert this testimony was admissible character or habit evidence under the North Carolina Rules of Evidence. He does not so argue, because he cannot.

"Evidence of other . . . acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2017). Rule 404(b) contains a representative list of permissible exceptions. *Id.* Testimony concerning "absence of bad acts or character" is not among them. *Id.*

"A criminal defendant is entitled to introduce evidence of his good character, thereby placing his character at issue." *State v. Roseboro*, 351 N.C. 536, 553, 528 S.E.2d 1, 12, *cert. denied*, 531 U.S. 1019, 148 L. Ed. 2d 498 (2000). However, where character evidence is admissible on direct examination, proof may only be made by testimony concerning reputation or in the form of an opinion, not specific instances of conduct. N.C. Gen. Stat. § 8C-1, Rule 405(a) (2017).

Defendant improperly sought to introduce evidence on direct examination of his good character by specific instance testimony from his niece of no bad acts towards her, rather than for her to testify to his reputation or opinion of his character. This

testimony is not allowed under Rules 404(b) or 405(a). *Id.* Defendant failed to show the trial court abused its discretion in denying admission of the niece's testimony. Defendant's argument is overruled.

VI. Improper Closing Argument

A. Standard of Review

"The standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection." *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002) (citations omitted).

Our Supreme Court "has articulated a two-part analysis for determining whether the trial court abused its discretion in such cases. This Court first determines if the remarks were improper . . . . Next, we determine if the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court." *State v. Peterson*, 361 N.C. 587, 606-07, 652 S.E.2d 216, 229 (2007) (citations, alteration, and internal quotation marks omitted).

B. Analysis

Our Supreme Court has stated: "It is improper for a lawyer to assert his opinion that a witness is lying. He can argue to the jury that they should not believe a witness, but he should not call him a liar." *State v. Golphin*, 352 N.C. 364, 455, 533

S.E.2d 168, 227 (2000) (citations and internal quotation marks omitted), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001).

Defendant contends the prosecutor improperly argued to the jury that Morrison had "lied on that stand. Blatantly lied. . . . [Y]ou can't lie under oath." Defendant is correct in maintaining these repeated assertions that Morrison lied go well beyond arguing to the jury they should not believe Morrison. These assertions were improper and unprofessional. *See id.* Over Defendant's objection, the trial court erred in allowing the prosecutor to make them, citing "Closing argument."

We again admonish and strongly caution counsel to avoid this accusation and this tactic in closing arguments. *See State v. Degraffenried*, __ N.C. App. __, __, 821 S.E.2d 887, 889 (2018), *disc. rev. denied*, __ N.C. __, 830 S.E.2d 835 (2019). As a result of this error, we must determine if their inclusion before the jury so prejudiced Defendant to award a new trial.

Defendant argues he was prejudiced because the closing argument implied he had suborned perjury by Morrison on his behalf. After a review of the entire record, transcript, and Defendant's argument, we cannot conclude this error so prejudiced Defendant to warrant a new trial.

The State's cross-examination of Morrison provided the jury with ample fodder to conclude his initial testimony on direct examination was false. Morrison first testified he had called police "just to keep everything calm." On cross-examination

the State confronted him with evidence from the responding police officer's notes suggesting he called to report Defendant's threat on his life.

Further, Morrison's testimony that Defendant was "a little mad, but not over-the-top mad" was contrasted by multiple witnesses' testimony of Defendant's history of violence and intimidation.

The prosecution is admonished for using this tactic in its closing argument, and the trial court erred in allowing this "Closing argument," and more particularly after Defendant's objection. Even so, Defendant has failed to show this error is of such a magnitude of prejudice to undermine the validity of the jury's verdict and to warrant a new trial. *See State v. Sexton*, 336 N.C. 321, 363, 444 S.E.2d 879, 903 (1994).

VII. Conclusion

Defendant invited any error and cannot show prejudice in the admission of Wood's expert testimony on the children's "disclosures." Defendant cannot show the excluded testimony of his niece, that he had never abused her, was admissible. The trial court did not abuse its discretion in excluding that testimony.

After Defendant's objection, the trial court's decision to allow the State to repeatedly argue that Defendant's witness Morrison was a "liar" or "lied" was error. Defendant has failed to show prejudice from the prosecution's improper remarks. The record and evidence support both the inference that Morrison's testimony was

inconsistent with his prior statements, and that Defendant had previously intimidated witnesses.

Because Defendant failed to show a different result was probable without the improper closing argument, we conclude no prejudicial error is shown to set aside the jury's verdicts or the judgments entered thereon. *It is so ordered*.

NO PREJUDICIAL ERROR.

Judges COLLINS and YOUNG concur.

Report per Rule 30(e).