IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 19-1100

Filed: 15 September 2020

Johnston County, No. 17 CRS 57623

STATE OF NORTH CAROLINA

v.

CLIFTON WILLIAM BATTS, Defendant.

Appeal by defendant from judgments entered 21 December 2018 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 12 August 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Sherri Horner Lawrence, for the State.*

*Mark Montgomery, for defendant-appellant.*

YOUNG, Judge.

This appeal arises out of convictions for attempted first-degree forcible rape, attempted statutory sexual offense with a child by an adult and taking indecent liberties with a child. The trial court did not commit plain error in allowing the nurse to testify at trial, nor did the trial court err in allowing certain language to be used in witnesses' testimony. Accordingly, we hold that there was no plain error.

## I. Factual and Procedural History

Sarah[1], a minor, was at home with her mother and sisters when Clifton William Batts ("Defendant") knocked on the door around midnight. Sarah's mother was asleep, and her sisters were in other rooms of the house. Although she knew Defendant, Sarah refused to let him inside the house. Defendant pushed himself into the house and went to the bathroom. He then entered Sarah's bedroom where he left his pants halfway down, tried to pull Sarah's pants down and tried to open her legs. Sarah cried, pushed Defendant away and closed her legs. Defendant tried to put his penis inside Sarah while pushing her toward him, but she resisted by pushing and kicking. The struggle continued to two or three minutes, but Defendant was only able to put his penis on top of Sarah's thigh.

Sarah did not tell anyone that Defendant tried to rape her until two months later when she told her cousin, and one year later when her mother found her crying in the bathroom. Sarah's mother contacted the Johnston County Sheriff's Office. Defendant was charged with attempted first-degree forcible rape, attempted statutory sexual offense with a child by an adult and taking indecent liberties with a child. Nurse Practitioner Ann Parsons ("Nurse Parsons"), Licensed Professional Counselor Jasmine Tankard ("Tankard"), and Detective Charlotte Fournier ("Detective Fournier") all testified at trial. A jury convicted Defendant on all counts.

[1] We use a pseudonym to protect the juvenile's identity.

The trial court sentenced Defendant as a prior record level V to consecutive sentences of 96-176 months for attempted second-degree forcible rape and 240-348 months for attempted statutory rape of a child by an adult, and 28-43 months for taking indecent liberties with a child. The trial court ordered Defendant to register as a sexual offender for a period of 30 years and for the Division of Adult Corrections to perform a risk assessment and report the results. Defendant gave oral notice of appeal in open court.

## II. Standard of Review

"In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action 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); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008).

Plain error arises when the error is "'so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]'" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d. 513 (1982)). "Under the plain error rule, 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).

## III. Testimony

Defendant contends that the trial court committed plain error by allowing Nurse Parsons to testify. We disagree.

Our Supreme Court has held that "[i]n a sexual offense prosecution involving a child victim, the trial court should not admit 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 victims credibility." *State v. Stancil*, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002). In *Stancil*, our Supreme Court stated that "an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith." *Id.* at 267, 559 S.E.2d at 789.

Furthermore, "[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) (2020). "[S]tatements elicited by a defendant on cross examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law. *State v. Bice*, 261 N.C. App. 664, 821 S.E.2d 259 (2018). Since Defendant failed to object at trial, he has the burden of establishing that the trial court committed plain error.

Defendant challenges portions of Nurse Parsons' direct examination testimony and portions of Nurse Parsons' responses to his questions on cross examination. Nurse Parsons testified, without objection, that Sarah's diagnosis was consistent with child sexual abuse. Nurse Parsons did not testify that she diagnosed Sarah with child sexual abuse or that Sarah was in fact sexually abused. She did not vouch for Sarah's credibility by rendering an opinion based on Sarah's physical exam, forensic interview and behavioral history and changes.

Defendant contends that Nurse Parsons "assure[d] the jury that her diagnosis was definite of sexual abuse" by pointing out portions of Nurse Parsons' responses to his questions on cross-examination. However, Defendant fails to acknowledge that he invited any alleged error on cross-examination by categorizing Nurse Parsons' opinion as a diagnosis of sexual abuse, rather than what she testified to on direct examination, which was a diagnosis consistent with sexual abuse based on Sarah's physical examination, forensic interview, behavioral changes, mannerisms and fear of the defendant. Nurse Parsons corrected Defendant's statement by testifying that her "diagnosis was consistent with sexual abuse."

In light of Sarah's uncontradicted testimony, behavioral changes, mannerisms, fear of Defendant, as well as the trial court's jury instructions imposing the duty to determine witness credibility upon the jury and to hold the State to its burden of

proof, there is not a reasonable probability that the jury would have reached a different result. Accordingly, Defendant has failed to establish plain error.

## IV. Language used in testimony

Defendant contends that the trial court committed plain error by allowing witnesses to use certain language in their testimonies to vouch for Sarah. We disagree.

Defendant contends that Nurse Parsons' use of the term "disclosure" amounted to plain error because it "assur[ed] the jury that Sarah had revealed a truth that she had been abused, in other words vouching for the complainant." Nurse Parsons' use of the term "disclosure" in her responses on direct and cross-examination did not offer an opinion that Sarah's recount of the incident was truthful. Nurse Parsons did not testify that she believed Sarah's story was credible. In fact, within Nurse Parsons' testimony she also stated, "what *allegedly* happened to [Sarah]," which indicates that Nurse Parsons was not presenting an opinion that the event actually occurred. Nurse Parsons only used the term "disclosure" to refer to Sarah's account of what happened to her, and that does not rise to the level of plain error.

Defendant contends that Tankard's use of the phrases "this incident" and "what has happened" to refer to the event that Sarah stated she experienced and was currently receiving therapy for was plain error. Tankard only testified about the therapy services she provided to Sarah. Tankard's testimony referring to "this

incident" was not an attestation that Sarah was being truthful, but instead was used to refer to Sarah's allegation. Defendant's contention that Tankard testified about "what has happened" is a mischaracterization. In response to a question about whether Sarah has talked to her about the abuse, Tankard replied, "She has not – she's never given me any details, just more so of the name, which she referred to as "Gouley." And more so of the repercussions of what has happened because 'I have said this.'" Tankard testified that Sarah has not provided details to her regarding the sexual abuse but has discussed the repercussions of her reporting it.

Lastly, Defendant contends that Detective Fournier's use of the term "victim" was improper vouching for Sarah and amounted to plain error. Detective Fournier referred to Sarah as the victim when discussing her initial involvement in the case by stating that she had "the victim's name" and then stating on cross-examination that she had not met the father of "the victim." On cross-examination, Defendant asked whether she had met "the father of the alleged victim?" to which she responded that she had not "met the father of the victim." She did not offer her own opinion of the case or whether or not Sarah was actually abused by Defendant, and the line of questioning by Defendant was invited error.

In light of the evidence presented at trial, Defendant cannot show that, absent the error, the jury probably would have reached a different result. Thus, he cannot

meet his burden of establishing that the trial court committed plain error, and we uphold the decision of the trial court.

NO PLAIN ERROR.

Judges MURPHY and HAMPSON concur.

Report per Rule 30(e).