IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-673

Filed: 1 December 2020

Wake County, Nos. 17 CRS 213316–17

STATE OF NORTH CAROLINA

v.

JOHN ANTON PARULSKI

Appeal by defendant from judgments entered 21 August 2018 by Judge Rebecca W. Holt in Wake County Superior Court. Heard in the Court of Appeals 31 March 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General John F. Oates, Jr., for the State

Dylan J.C. Buffum for defendant-appellant.

BRYANT, Judge.

Where defendant's arguments on appeal failed to show any plain or prejudicial error, we uphold the judgment of the trial court.

On 8 August 2017, defendant John Anton Parulski was indicted in Wake County Superior Court on three counts of statutory sexual offense with a child by adult, statutory rape, and indecent liberties with a child. On 17 July 2018,

superseding indictments were issued on the same charges. On 13 August 2018, defendant was tried before the Honorable Rebecca W. Holt, Judge presiding.

The victim, Amy[1], was eleven years old at the time of trial. The State's evidence revealed that defendant met Shannon, Amy's mother, on a dating website in November 2010, while they were living in New York. The couple eventually moved in together and married in June 2014. Soon thereafter, the family moved to Raleigh.

Amy testified that in 2015 defendant began kissing her on the mouth before she went to bed. Amy was around eight years old at the time. On or after 15 October 2015, when Amy moved into another bedroom, defendant's sexual advances increased. On more than one occasion, defendant placed his mouth on her "private parts." On another occasion, defendant put his finger in her vagina, causing pain. Amy testified that defendant would take her clothes off and insert his "private into [her] private." Defendant, on a few occasions, would turn her over "like she was crawling" to penetrate her "bottom." Defendant would also put Amy in a sitting position and put his penis in her mouth.

On 15 December 2016, Shannon took Amy to the doctor after Amy told Shannon she was having difficulty urinating without pain. Amy was also experiencing pain when wiping, so Shannon asked the doctor to do an examination. Upon examination, the doctor showed Shannon several lesions inside Amy's vagina

[1] A pseudonym is used to protect the identity of the child victim and for ease of reading.

and prescribed medication for Amy. The next day, Shannon noticed she had missed three phone calls from the doctor and two calls from Wake County Human Services. Shannon asked Amy what happened to her and Amy disclosed that she had been sexually abused by defendant, most recently three weeks before. Based on Amy's revelations about when the abuse first started, Shannon estimated it would have started over a year before—at least October 2015. Shannon moved her two daughters out of the home and contacted Child Protective Services ("CPS"). CPS began its investigation and implemented a safety plan to prohibit defendant from contacting Amy. Amy was diagnosed with HPV 1, herpes simplex virus, the cause of the lesions inside Amy's vagina.

In January 2017, at defendant's request, Shannon talked to Amy about the consequences to their family and living situation if she continued to disclose defendant's sexual abuse. Shannon told Amy that defendant could get arrested and go to jail. Amy then said she wanted it all to "go away" and get her family back. Shannon took Amy to defendant's attorney's office and had her sign an affidavit recanting her disclosure of defendant's sexual abuse. Shannon also signed an affidavit stating that she did not believe that defendant committed a crime against Amy. Amy, however, told a classmate that she had been sexually abused by defendant. That classmate testified at trial. In March 2017, Shannon was found to be in violation of the safety plan and CPS removed Amy from the home. Amy was

sent to live with her grandmother. Amy also told her grandmother about defendant's sexual abuse.

During trial, the State introduced Amy's testimony describing her sexual abuse by defendant and her disclosures to a therapist. The recantation affidavits of Amy and Shannon were also introduced as State's exhibits and admitted into evidence. Defendant testified and denied sexually abusing Amy.

On 21 August 2018, defendant was convicted on all charges. Following the jury verdict, defendant was sentenced to an active term of 300 to 420 months imprisonment for statutory rape. The remaining charges were consolidated and defendant was sentenced to a consecutive term of 300 to 420 months imprisonment. Defendant appeals.

Plain Error Review

On appeal, defendant raises five argumentsnone of which were addressed below by the trial court. As a result, all issues defendant brings forth on appeal are subject to plain error review only.

> 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)

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* (citation and quotation marks omitted).

I

Defendant first argues the trial court erred when it failed to intervene e*x mero motu* during the State's closing argument. Specifically, defendant contends the State's remarks were grossly improper in referring to matters outside the record and inviting the jury to compare the present case with public cases of sexual predators.

Because defendant failed to object to the State's closing arguments at trial, our review is limited to: "(1) whether the argument was improper; and, if so, (2) whether the argument was so grossly improper as to impede the defendant's right to a fair trial." *State v. Huey*, 370 N.C. 174, 179, 804 S.E.2d 464, 469 (2017). "Under this standard, [o]nly an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." *State v. Anthony*, 354 N.C. 372, 427, 555 S.E.2d 557, 592 (2001) (alteration in original) (citation and quotation marks omitted).

"[I]n order to constitute reversible error, the prosecutor's remarks must be both improper and prejudicial." *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107–08 (2002).

"The scope of closing argument is governed by N.C.G.S. § 15A-1230(a) which provides that an attorney may 'argue any position or conclusion with respect to a matter in issue.' " *State v. Whiteside*, 325 N.C. 389, 398, 383 S.E.2d 911, 916 (1989) (quoting N.C.G.S. § 15A-1230). During a closing argument to the jury,

> an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice.

N.C.G.S. § 15A-1230(a). The North Carolina Supreme Court has previously held that "the trial court is not required to intervene *ex mero motu* unless the argument strays so far from the bounds of propriety as to impede defendant's right to a fair trial." *State v. Atkins*, 349 N.C. 62, 84, 505 S.E.2d 97, 111 (1998); *see also State v. Small*, 328 N.C. 175, 400 S.E.2d 413 (1991).

"[P]articular prosecutorial arguments are not viewed in an isolated vacuum. [Instead] [f]air consideration must be given to the context in which the remarks were made and to the overall factual circumstances to which they referred." *State v. Moseley*, 338 N.C. 1, 50, 449 S.E.2d 412, 442 (1994) (citations and quotation marks omitted).

In the instant case, for context, we note the State made the following remarks to the jury during closing argument that defendant does not challenge on appeal:

> I want you to think about [Amy] crawling into her bed with her elephant and hoping that her stepdad was going to tuck her in first, because that meant her mom would come in next and maybe that was one night when she and [her sister] wouldn't have to worry about what the defendant would do, where he would put his penis, and what would happen next.
>
> I want you to think about [Amy], a nine-year-old girl at the time -- eight, nine years old -- who was brave enough to tell her mother what had happened when, you heard from professionals who treat children who have been sexually abused, where one in four girls are abused and most never tell until adulthood.

Also, the State made the following remarks which defendant now challenges on appeal contending they are so improper as to be prejudicial, such that it was an abuse of discretion for the trial court to not intervene *ex mero motu*:

> I want you to think about those thousand children in Pennsylvania who are molested by priests right under their parents' noses. I want you to think about Dr. Nassar, who would molest those children, those gymnasts, right in front of their parents' eyes.
>
> . . .
>
> And, again, I ask you to think of all of the news stories that you heard, Jerry Sandusky, all of those people, Larry Nassar, people people [sic] trusted, and it was happening right in front of them.

We acknowledge that the State, in making an impassioned closing argument which lasted almost an hour, did refer in two instances to matters outside the record.

However, other than those two instances, the State's closing argument was not abusive, did not express personal belief in the truth or falsity of the evidence, or otherwise violate the proper scope of closing argument. N.C.G.S. § 1230(a); *see State v. Wardrett*, 261 N.C. App. 735, 746, 821 S.E.2d 188, 195 (2018) ("The [State] did not urge that society or the community wanted [d]efendant punished, but requested, based on the evidence, the jury make an appropriate decision.").

The State made remarks to remind the jury that child sexual abuse can occur even while children are under the supervision of their parents. *See State v. Bishop*, 346 N.C. 365, 396, 488 S.E.2d 769, 786 (1997) ("[The appellate courts] have repeatedly stated that it is proper to urge the jury to act as the voice and conscience of the community."). The closing statements emphasized the State's evidence at trial that the acts of defendant against Amy could have, and did, occur notwithstanding Shannon's presence in the home. Significantly, the majority of the closing argument by the State was to remind the jury of the evidence and to detail the long-term sexual abuse of Amy by her stepfather.

Defendant cites to *State v. Jones*, arguing that the State "sought to bolster the credibility of [Amy] and the expert witnesses by drawing attention to the similarities between those crimes and the [State's] theory in the case." In *Jones*, our Supreme Court reversed the defendant's conviction and death sentence, and ordered a new trial because the State repeatedly engaged in name-calling and personal insults by

calling the defendant a "quitter," "loser," and "lower than the dirt on a snake's belly." *Id*. at 133–34, 558 S.E.2d at 107–08. The Supreme Court found the State's closing argument grossly improper and held that the trial court deprived the defendant of a fair trial by not intervening, even in the absence of an objection by defense counsel. *Id*. at 134, 558 S.E.2d at 108. The Court reasoned that the argument "improperly [led] the jury to base its decision not on the evidence relating to the issues submitted, but on misleading characterizations, crafted by counsel, that are intended to undermine reason in favor of visceral appeal." *Id*.

Contrary to defendant's assertion, the statements in the instant case did not rise to the grossly improper level of those statements in *Jones*. Here, notwithstanding the brief references to outside matters, the jury heard testimony from Amy, Shannon, Amy's grandmother, Amy's classmate, CPS workers at Wake County Health Services, (including a therapist), and expert witnesses who conducted evaluations of Amy. The testimony from all the witnesses corroborated Amy's disclosure of a long-term pattern of sexual abuse from the time she was about eight years old. The jury also heard the testimony as well as videotaped interviews of Amy, which contained significant detail of the abuse, and Amy's testimony about a journal she kept that included "chapters" detailing defendant's sexual abuse.

On this record, defendant cannot show that the challenged portion of the State's argument was so grossly improper as to be prejudicial such that it was an

abuse of discretion for the trial court to not intervene *ex mero motu*. *See id.* at 133, 558 S.E.2d at 107–08 ("[I]n order to constitute reversible error, the prosecutor's remarks must be both improper and prejudicial."). Defendant's argument is overruled.

II

Defendant argues "the State introduced evidence that a judge had previously 'substantiated' [Amy's] allegations by finding 'sufficient evidence' that she was in danger from [defendant]." Defendant contends it was error for the trial court to allow a foster care social worker to testify about Amy's removal from Shannon's home where such testimony "probably impacted the verdict because the entire case turned on Amy's credibility." Again, because defendant failed to object at trial to the admission of this evidence, we review for plain error only.

Generally, judgment in a civil action is not admissible as evidence in a criminal prosecution. *State v. Dula,* 204 N.C. 535, 536, 168 S.E. 836–37 (1933). The trial court must determine "whether the evidence is relevant for some purpose other than proving the same facts found, admitted, or alleged in the civil proceeding in question." *State v. Young*, 368 N.C. 188, 207, 775 S.E.2d 291, 304 (2015). However, "[p]arties in a trial must take special care against expressing or revealing to the jury legal rulings which have been made by the trial court, as any such disclosures will have the

potential for special influence with the jurors." *State v. Allen*, 353 N.C. 504, 509–10, 546 S.E.2d 372, 375 (2001).

In the instant case, the State's witness Susan Ingel testified about custody proceedings involving abuse and neglect. Ingel stated that Amy had been removed from Shannon's house on 14 March 2017 and that Shannon had participated in a case plan in the interim. She testified that the judge would "make[] a determination of whether or not there [was] sufficient evidence that the children [were] not in a safe situation."

While defendant contends that Ingel's testimony *implied* there was a judicial determination of abuse, neglect, or dependency, Ingel made no specific comments regarding Amy's allegations of sexual abuse. Moreover, we reject defendant's argument that the "sole purpose for offering [Ingel's] testimony was to bolster the credibility of [Amy's] allegations against [defendant]." Ingel testified about Shannon's case plan toward reunification, which was relevant to show Shannon's advancements in regaining custody of Amy, and did not serve to enhance Amy's credibility or substantiate her allegations of abuse. Defendant's argument is overruled.

III

Defendant contends the superseding indictment as to the rape and statutory sex offense charges was fatally defective and the trial court had no jurisdiction to try

defendant because the dates of the alleged crimes fell outside the effective dates of the statutes. Thus, defendant contends the indictment against him for rape and sex offense should be dismissed and the judgments vacated. We disagree.

This Court reviews the sufficiency of an indictment under a *de novo* standard of review. *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted).

"The purposes of an indictment are: (1) to identify the crime with which defendant is charged, (2) to protect defendant against being charged twice for the same offense, (3) to provide defendant with a basis on which to prepare a defense, and (4) to guide the court in sentencing." *State v. Holanek*, 242 N.C. App. 633, 644–45, 776 S.E.2d 225, 234 (2015) (citation and quotation marks omitted). "A variance occurs where the allegations in an indictment, although they may be sufficiently specific on their face, do not conform to the evidence actually established at trial." *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002).

In the instant case, the indictment in 17 CRS 213316 charged defendant with three counts of statutory sex offense by an adult with a child, and one count of statutory rape. The indictment alleged that defendant had engaged in unlawful acts "between June of 2015 and December of 2016" in violation of N.C. Gen. Stat. §§ 14-

27.23 and 14-27.28. At trial, the State produced evidence to support that Amy's abuse by defendant took place over more than a year, including before and after December 2015.

The General Assembly revised section 14-27.23 ("Statutory rape of a child by an adult") to its current version, formerly codified as section 14-27.2A, and section 14-27.28 ("Statutory sexual offense with a child by an adult"), formerly codified as section 14-27.4A, which applied to all actions effective on or after 1 December 2015. Defendant argues that the indictments were fatally defective because the recodification of statutes criminalizing defendant's conduct were not in effect at the time the acts occurred. However, the language of the statutes did not change. The same conduct was criminalized.

Here, defendant engaged in conduct that occurred before *and after* the effective date of sections 14-27.23 and 14-27.28. In fact, defendant engaged in a continuous course of conduct that lasted approximately one year after the statutes in question went into effect. The language adapted by sections 14-27.23 and 14-27.28 did not in any way change the legal consequences or increase defendant's liability for the alleged crimes. Defendant, himself, concedes in his brief to this Court that the statutes are "substantially similar" to the former statutes regarding statutory rape

and statutory sex offense by an adult with a child.[2] *Begley v. Employment Sec. Comm'n of N. Carolina*, 50 N.C. App. 432, 436, 274 S.E.2d 370, 373–74 (1981) ("[W]hen a statute is amended, all portions of the original act which are not in conflict with the provisions of the amendment remain in force with the same meaning and effect that they had before the amendment." (citing N.C.G.S. § 12-4 ("Construction of amended statute"))).

Sections 14-27.23 and 14-27.28 clearly mirrored the preceding statutes outlining the provisions of the statutory offenses. This was sufficient to provide proper notice to defendant. Significantly, defendant does not argue at any point in his brief that he lacked sufficient notice of the charges against him, or that his ability to prepare a proper defense was impaired by the amendments. Further, as the indictment contained the necessary facts to support the offenses, we find the indictment was not fatally defective. Defendant's argument is overruled.

IV

Defendant argues the trial court erred by denying his motion to dismiss the charge of statutory rape because the State did not present sufficient evidence of vaginal intercourse to support a conviction of statutory rape. Defendant concedes

[2] Our legislature changed the name of the offense in section 14-27.2A ("Rape of a child; adult offender") to "Statutory rape of a child by an adult" in section 14-27.23. *See* N.C. Sess. Law 2015-181, § 5.(b) (Aug. 5, 2015). Section 14-27.28 was also amended to change the original name of the sexual offense statute ("Sexual offense with a child; adult offender") to ("Statutory sexual offense with a child by an adult"). *See* N.C. Sess. Law 2015-181, § 10.(b) (Aug. 5, 2015).

that he did not preserve this issue for appellate review due to his failure to renew his motion to dismiss at the close of all evidence. *See* N.C.R. App. P. 10(a)(3) ("[I]f a defendant fails to move to dismiss the action, . . . at the close of all the evidence, defendant may not challenge on appeal the sufficiency of the evidence to prove the crime charged.").

Acknowledging his failure to preserve this issue, defendant asks this Court to invoke Rule 2 of the North Carolina Rules of Appellate Procedure to consider the merits of his argument. *See* N.C.R. App. P. 2 (2019) (Rule 2 provides, in pertinent part, that "[t]o prevent manifest injustice to a party, . . . either court of the appellate division may . . . suspend or vary the requirements or provisions of any of these rules in a case pending before it[.]"). However, this Court will invoke Rule 2 only in exceptional circumstances or to prevent manifest injustice, and defendant has not demonstrated such an exceptional circumstance exists to warrant invocation of the rule. Thus, we decline to exercise our discretion to invoke Rule 2 to address this portion of defendant's argument regarding the statutory rape charge.[3]

V

[3] As an alternative argument, defendant contends his trial counsel provided ineffective assistance of counsel (IAC) by failing to renew the motion to dismiss at the close of all of the evidence and preserve the statutory rape claim. While defendant's issue does not rise to the level that would require us to suspend the rules, as a practical matter, we analyze the statutory rape charge in our plain error review of his argument in Issue V regarding jury instructions. Moreover, we see no prejudice from trial counsel's actions and dismiss defendant's IAC argument.

Defendant finally argues the trial court erred in its jury instructions by failing to instruct the jury on the lesser-included offense of attempted rape. Specifically, defendant argues the jury should have been instructed on attempted rape because defendant suggests there was evidence that the act of vaginal penetration by the penis was not completed. Again, we review this argument for plain error only. *See* N.C.R. App. P. 10(a)(4); *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

When the trial court is instructing the jury on a lesser-included offense, the instruction "must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002). The trial court, making the decision to give instructions on lesser-included offenses, "must focus on the sufficiency of the evidence, not the credibility of the evidence[,]" and must consider the evidence in the light most favorable to the defendant. *State v. Reynolds*, 160 N.C. App. 579, 581, 586 S.E.2d 798, 800 (2003). "When the State's evidence is positive as to each element of the crime charged and there is no conflicting evidence relating to any element, submission of a lesser[-]included offense is not required." *State v. Maness*, 321 N.C. 454, 461, 364 S.E.2d 349, 353 (1988). "Mere possibility of the jury's piecemeal acceptance of the State's evidence will not support the submission of a lesser[-]included offense." *Id.*

To sustain a conviction under N.C. Gen. Stat. § 14-27.23, "[a] person is guilty of statutory rape of a child by an adult if the person is at least 18 years of age and engages in vaginal intercourse with a victim who is a child under the age of 13 years." N.C.G.S. § 14-27.23(a). Pursuant to N.C. Gen. Stat. § 15-170, "[u]pon the trial of any indictment[,] [a defendant] may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime." N.C. Gen. Stat. § 15-170 (2019). "In order to prove an attempt of any crime, the State must show: (1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense." *State v. Sines*, 158 N.C. App. 79, 85, 579 S.E.2d 895, 899 (2003) (citation and quotations omitted).

In the instant case, the evidence at trial included testimony from Amy that defendant had penetrated her vagina with his fingers. Amy testified, when asked if defendant put anything else in her private parts, that defendant "tried to put his private into [her] private." Amy indicated defendant's penetration of her vagina with his fingers hurt more than the penetration with his penis. The State also presented evidence of Amy's diagnosis with herpes simplex virus 1 (HSV 1) in December 2016, which caused lesions inside her vagina, which in turn caused Amy's pain upon urination and pain upon wiping.

A State's witness, Dr. Elizabeth Wittman, was admitted as an expert in child abuse pediatrics and testified as to ways in which a person could contract the virus––the transmission included mucus membranes or secretions from penile and vaginal areas. This evidence was sufficient to prove the element of vaginal penetration in regard to the statutory rape charge, and therefore, sufficient to override a motion to dismiss and allow the charge to go to the jury.

Because defendant did not request a lesser-included instruction, and because the evidence did not fall short of the completed offense, the trial court was not required to submit jury instructions for attempt as a lesser-included offense. *See State v. Nelson*, 341 N.C. 695, 697, 462 S.E.2d 225, 226 (1995). (A "lesser offense should not be submitted to the jury if the evidence is sufficient to support a finding of all the elements of the greater offense, and there is no evidence to support a finding of the lesser offense."). While defendant testified at trial denying that he sexually assaulted Amy, "[a] denial by the defendant that he committed the crime is not sufficient to submit a lesser[-]included offense." *See id*. Therefore, the trial court committed no plain or prejudicial error.

Accordingly, for the reasons stated herein, we find no error in the trial or judgment in this case.

NO ERROR.

Judges DIETZ and ARROWOOD concur.

Report per Rule 30(e).