IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-289

No. COA20-433

Filed 15 June 2021

Surry County, Nos. 18 CRS 531-32

STATE OF NORTH CAROLINA

v.

DAVID CARL SOUTHERN

Appeal by defendant from judgment entered 3 October 2019 by Judge Stanley L. Allen in Surry County Superior Court. Heard in the Court of Appeals 13 April 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Adren L. Harris, for the State.

Michael E. Casterline, P.A., by Michael E. Casterline, for defendant.

ARROWOOD, Judge.

¶ 1 David Carl Southern ("defendant") appeals from his convictions for statutory rape of a person fifteen years or younger, indecent liberties with a child, and sexual activity by a substitute parent. For the following reasons, we find no error in defendant's trial but dismiss defendant's claim of ineffective assistance of counsel

without prejudice to his right to file a motion for appropriate relief in the trial court.

I. Background

¶ 2 In or around 2012, defendant began dating "Amy" who lived with her then-eleven-year-old child, "Erica," in a double-wide trailer in Surry County, North Carolina.[1] Amy and Erica's biological father, "Richard," separated in 2009 and divorced in 2010; they stipulated to a custody arrangement whereby Erica would reside with each parent on alternate weeks. In 2013, defendant moved into the trailer with Amy and Erica. Approximately one year later, defendant and Amy married. At first, the relationship between defendant and his new family was pleasant and healthy. This would drastically change.

¶ 3 When Erica resided with her mother and defendant, she would return from school on the school bus and exit either at her mother's house or her maternal grandmother's home which was nearby. Defendant was often the only person present when Erica would return directly to her mother's residence—Amy did not return from work until much later in the day. On several of these one-on-one occasions, defendant kissed Erica and made her believe that the two were in a romantic relationship. Defendant purchased jewelry for Erica and had flowers delivered to her school. As

[1] Pseudonyms are used throughout the opinion to protect the identity of the juveniles and involved parties and for ease of reading.

time progressed, defendant began touching Erica's breasts, buttocks, and vaginal area, and, eventually, began having sexual intercourse with her on a frequent basis. Erica was thirteen at the time. Erica testified that defendant told her what they were doing was wrong and that she should keep it a secret.

¶ 4 While most of the sexual intercourse took place in Erica's bedroom, according to Erica's testimony, there were at least three occasions when the activity occurred outside her room. On one occasion, defendant had sexual intercourse with Erica after she returned from school in her mother's room. On another, when Amy was using a tanning bed in the residence, defendant had sexual intercourse with Erica in the living room. Amy subsequently entered the room and observed defendant cleaning up a stain on the carpet that he attributed to self-masturbation. Defendant engaged in sexual intercourse with Erica on multiple occasions at this residence.

¶ 5 When Erica was fifteen, the maternal family (including defendant) moved into a single-family home. At this point, Erica was still spending every other week with Richard and his then-girlfriend, "Mary," and Mary's daughter, "Brittany." While alone with Erica at this new residence, defendant continued to have sexual intercourse with Erica. He also purchased "gifts" for Erica, one of which was a "sex toy." Moreover, at one point, defendant and Erica visited a local Sam's Club where defendant brought Erica into the family restroom and had sexual intercourse with her.

¶ 6 In April 2017, Erica told defendant that she did not want to continue sexual relations with him. Erica did not alert Amy of the relationship or her wish to cut it off; however, Erica disclosed to her long-time friend "Jenna" that she and defendant had been engaged in sexual intercourse. Jenna had previously experienced a similar situation involving a neighbor who was ultimately charged with taking indecent liberties with a minor.

¶ 7 Then, in December 2017, Erica confided to Brittany that defendant had been sexually abusing her since she was thirteen years of age, beginning on a family trip to Pigeon Forge, Tennessee.[2] Brittany informed Mary of this disturbing disclosure, and Mary in turn notified Richard. Richard and Mary then took Erica to the Surry County Sheriff's Office, where she was interviewed by Detectives Larry Lowe ("Detective Lowe") and Rita Nichols ("Detective Nichols"). Erica disclosed the sexual relationship with defendant, and her statements were confirmed by law enforcement's subsequent investigation.

¶ 8 Detectives Lowe and Nichols also interviewed Amy, who stated that she had sensed that something was awry with respect to the relationship between defendant and Erica; Amy sensed that something felt off vis-à-vis the tanning bed incident. Later, after being unofficially summoned, defendant voluntarily met with the

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[2] Mary also testified that in December 2017, Erica informed her that defendant had been "molesting her for three years."

Detectives and denied any wrongdoing; defendant claimed that the only contact between him and Erica involved hugs. Detective Nichols testified that defendant appeared nervous during the interview and was not fully cooperative with the criminal investigation.

¶ 9 In January 2018, the Department of Social Services referred Erica to the Dragonfly House Children's Advocacy Center where she met with a forensic interviewer and expert on child abuse. Following this interview, Erica was taken to Dr. Amy Suttle ("Dr. Suttle") for a physical examination. Dr. Suttle testified that Erica disclosed that defendant began kissing her when she was fourteen years of age and this affection escalated into sexual intercourse shortly thereafter. Moreover, Dr. Suttle testified that her physical examination of Erica revealed penetrating vaginal trauma and a damaged hymen. Dr. Suttle testified that Erica identified defendant as her only sexual partner.

¶ 10 On 19 February 2018, warrants were issued for defendant's arrest. The grand jury returned two separate indictments for the following charges: (1) statutory rape of a person fifteen years or younger; (2) indecent liberties with a child; and (3) sexual activity by a substitute parent. The first indictment covered offenses occurring between 1 December 2015 and 30 April 2017 (No. 18 CRS 531). The second indictment charged defendant with the same offenses but for the period between 1 July 2014 and 30 November 2015 (No. 18 CRS 532). Defendant's trial for the

offenses alleged in both indictments began 30 September 2019. At the close of all evidence, the trial judge granted defendant's motion to dismiss the charge of sexual activity by a substitute parent (Count III) in Case No. 18 CRS 532 but denied the motion as to all other charges. The jury subsequently found defendant guilty of all remaining charges. During sentencing, the trial judge found that mitigating factors outweighed aggravating factors and thus sentenced defendant in the mitigated range to a minimum 144 months' and maximum 233 months' imprisonment. Judgment was entered on 3 October 2019. Defendant gave oral notice of appeal in open court on the same day.

¶ 11 This appeal is properly before this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2019) and N.C. Gen. Stat. § 15A-1444(a) (2019).

II. Discussion

¶ 12 Defendant first argues that the trial court committed plain error by failing to give a curative instruction to the jury directing the jurors to disregard Detective Nichols' improper reference to polygraph testing. The second issue raised on appeal, which is factually intertwined with the first, is whether defendant was denied effective assistance of counsel due to his attorney's failure to object and move to strike his testimony regarding the polygraph testing and request a curative instruction directing the jury to disregard the same.

A. Polygraph Testimony

¶ 13 During trial, Detective Nichols testified on behalf of the State. In the State's case in chief, Detective Nichols testified that defendant had not been fully cooperative during questioning. On cross-examination, trial counsel for the defense asked Detective Nichols to explain how defendant had not been fully cooperative during questioning. Detective Nichols responded, "Well, we asked if he would be willing to take a polygraph and he did not take that." Defense counsel neither objected to this statement nor requested a curative instruction directing the jury to disregard this inadmissible statement, and the trial judge did not exclude this testimony or give a curative instruction *sua sponte*. Defendant argues that the trial court's failure to do so amounts to plain error. We disagree.

¶ 14 Because there was no objection at trial, the challenge is unpreserved. This Court reviews unpreserved challenges to the admission of lay opinion testimony for 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) (citing *State v. Odom,* 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). "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.* (citations and internal quotation marks omitted). Because plain error is to be " 'applied cautiously and only in the exceptional case,' the error will often be one that 'seriously

affect[s] the fairness, integrity or public reputation of judicial proceedings[.]' " *Id.* (quoting *Odom*, 307 N.C. at 660, 300 S.E.2d at 378) (internal citation omitted). Moreover, plain error has been described as "so fundamental as to amount to a miscarriage of justice or which *probably* resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Bagley,* 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987) (citations omitted) (emphasis added).

¶ 15 Here, the trial court's failure to give a limiting or curative instruction following Detective Nichols' testimony was not a fundamental error. In other words, defendant has failed to demonstrate that the alleged error had a probable impact on the jury's finding that defendant was guilty. As discussed above, the evidence against defendant was overwhelming. Even if the trial judge had taken the actions noted above, *sua sponte*, we cannot say the outcome of defendant's trial would have "probably" resulted in the jury reaching a different verdict. *Id.* Indeed, "the mere mention of polygraph testing does not necessitate appellate relief." *State v. Mitchell*, 328 N.C. 705, 711, 403 S.E.2d 287, 291 (1991) (citation omitted). In short, defendant has failed to demonstrate that a fundamental error occurred at trial. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

B. Ineffective Assistance of Counsel

¶ 16 Defendant lastly claims that he received ineffective assistance of counsel because his trial attorney elicited an inadmissible reference to defendant's refusal to

take a polygraph from Detective Nichols and because counsel failed to request a curative instruction directing the jury to disregard the testimony. Defendant contends that counsel's deficient performance prejudiced him by diminishing his credibility in the eyes of the jury.

¶ 17 "On appeal, this Court reviews whether a defendant was denied effective assistance of counsel de novo." *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014) (citing *State v. Martin*, 64 N.C. App. 180, 181, 306 S.E.2d 851, 852 (1983)).

¶ 18 In order to establish that counsel was ineffective, defendant must satisfy a two-part test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). "Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a 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." *State*

v. Givens, 246 N.C. App. 121, 124, 783 S.E.2d 42, 45 (2016) (quoting *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006)).

¶ 19 Importantly, however, "claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001) (citing *State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E.2d 719, 721 (1985)). A motion for appropriate relief is the preferable mechanism to raise such a claim because "[t]o defend against ineffective assistance of counsel allegations, the State must rely on information provided by defendant to trial counsel, as well as defendant's thoughts, concerns, and demeanor." *State v. Buckner*, 351 N.C. 401, 412, 527 S.E.2d 307, 314 (2000) (citation omitted). "[S]hould the reviewing court determine that [the ineffective assistance of counsel] claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent MAR proceeding." *State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 525 (2001) (citing *State v. Kinch*, 314 N.C. 99, 106, 331 S.E.2d 665, 669 (1985)).

¶ 20 In this case, we cannot properly determine this issue on direct appeal because an evidentiary hearing on this issue has not been held and the "cold record" is not dispositive. *State v. Kinch*, 314 N.C. 99, 106, 331 S.E.2d 665, 669 (1985) (concluding same); *Fair*, 354 N.C. at 166, 557 S.E.2d at 524 (noting that ineffective assistance of counsel "claims brought on direct review will be decided on the merits when the cold

record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing."); *State v. House*, 340 N.C. 187, 196, 456 S.E.2d 292, 297 (1995) (declining to adjudicate ineffective assistance of counsel claim where record was silent as to whether defendant consented to his counsel's argument regarding his guilt and determining that said issue was appropriately deferred for consideration via a motion for appropriate relief). Therefore, we dismiss defendant's claim for ineffective assistance of counsel without prejudice to his right to file a motion for appropriate relief in the trial court.

¶ 21 Should this issue be raised below upon appropriate motion, the trial court "should take evidence, make findings of fact and conclusions of law, and order review of all files and oral thought patterns of trial counsel and client that are determined to be relevant to defendant's allegations of ineffective assistance of counsel." *Buckner*, 351 N.C. at 412, 527 S.E.2d at 314.

III. Conclusion

¶ 22 For the foregoing reasons, we find no error in defendant's trial. We dismiss defendant's claim of ineffective assistance of counsel without prejudice to his right to file a motion for appropriate relief in the trial court.

NO ERROR IN PART; DISMISSED IN PART.

Chief Judge STROUD and Judge JACKSON concur.

Report per Rule 30(e).