

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-203

Filed 21 November 2023

Davidson County, Nos. 19 CRS 53809 - 53812

STATE OF NORTH CAROLINA

v.

JASON WESLEY KELLER, Defendant.

Appeal by defendant from judgment entered 15 June 2022 by Judge Joseph N. Crosswhite in Davidson County Superior Court. Heard in the Court of Appeals 4 October 2023.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Mary Carla Babb, for the State.*

*Grace, Tisdale & Clifton, P.A., by Christopher R. Clifton, for defendant-appellant.*

DILLON, Judge.

Defendant Jason Keller appeals from judgment entered upon a jury's verdict finding him guilty of multiple counts of sex offenses and indecent liberties with a student. For the reasons stated herein, we conclude Defendant received a fair trial, free of reversible error.

STATE V. KELLER

*Opinion of the Court*

I. Background

The victim was a student at a Lexington high school during the 2008-09 school year. Defendant served as an administrator at the school.

Approximately ten years later, in June 2019, the victim filed a report accusing Defendant of inappropriate sexual conduct during the 2008-09 school year. In December 2019, Defendant was indicted for five counts of sexual offense with a student and two counts of indecent liberties with a student.

In 2019, the SAFE Child Act was passed, which extended the statute of limitations for bringing civil suits based upon sexual abuse convictions. The constitutionality of one of its provisions is still at issue. *See McKinney v. Goins*, \_\_ N.C. App. \_\_, 892 S.E.2d 460 (2023) (on appeal at the Supreme Court). However, the provision relevant to that case is not at issue in this appeal.

The defense's primary strategy at trial was to show that the victim came forward after a decade of silence so she could be awarded civil damages if Defendant were convicted. During trial, defense counsel questioned both the victim and her mother on their knowledge of the SAFE Child Act during cross-examination. However, both testified that they had no knowledge of it or its provision allowing for an extension of time for civil claims. Defense counsel also entered a stipulation about the SAFE Child Act.

During jury deliberations, the jury sent two questions to the trial court. In its second question, the jury asked, "Can she pursue civil damages?" The court held a

STATE V. KELLER

*Opinion of the Court*

bench conference with both parties and then stated the following to the jury:

What I'm going to do is just reread to you the state of the law in North Carolina and then one additional instruction.

The current state of the law in North Carolina, pursuant to the stipulation, Defendant's Exhibit 9 that has been admitted, "On November 7, 2019, North Carolina governor signed into law the Safe Child Act. This has been filed on May 6, 2019. It provided, in part, a revival of the statute of limitations for civil lawsuits for money damages for two years from the effective date of December 1, 2019. This revival allowed victims of sexual abuse to file civil lawsuits from age 21 to 28.

¶ On December 20, 2021, this portion of the Safe Child Act was declared unconstitutional and no longer has any effect as of that date."

Also, I just want to reread to you that you are the sole judges of the weight to be given any evidence. If you decide that certain evidence is believable, you must then determine the importance of that evidence in light of all other believable evidence.

With that understanding, I'm going to let you return. I'm going to include this stipulation with all the other evidence and let you continue your deliberations.

The only information presented was a repeat of (1) the parties' SAFE Child Act stipulation and (2) pattern jury instruction 101.20 (discussing the jury's role to judge the weight of the evidence). On 15 June 2022, following the trial court's answer to the jury question, the jury returned to its deliberations and delivered guilty verdicts later that day. Defendant appeals.

## II. Analysis

### A. Response to Jury Inquiry

STATE V. KELLER

*Opinion of the Court*

First, Defendant argues the trial court erred in its response to the jury's question about civil damages by introducing a civil remedy for the jury's consideration and citing a statute which had been rendered unconstitutional at that time. We disagree.

Here, Defendant asks for plain error review. The State argues that any error was invited by Defendant and, therefore, he has waived any appellate review. *See State v. Roseboro*, 344 N.C. 364, 373, 474 S.E.2d 314, 318 (1996).

It appears here that Defendant invited error. The trial court's response to the jury question included only information to which the defense had already agreed to present to the jury, namely: the stipulation and a pattern jury instruction. Moreover, the defense (rather than the State) raised the issue of the SAFE Child Act and did so multiple times during cross-examinations and when entering the stipulation. Any information about civil remedies was not introduced here for the first time—it was already introduced by Defendant earlier in the trial.

Even assuming Defendant did not invite error, we conclude that any error did not rise to the level of plain error. “For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. 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 defendant was guilty.’” *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (citations omitted). The trial court's response to the jury question did not present the jury with

any new information, and this repetition of previously heard information was not a fundamental error sufficient to establish prejudice.

B. Ineffective Assistance of Counsel

Second, Defendant argues his counsel failed to effectively assist him when he did not object to the trial court's response to the jury's question. We also disagree with this argument.

To demonstrate ineffective assistance of counsel, Defendant must establish that (1) his trial attorney's "performance was deficient" and (2) "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must prove that counsel's performance "fell below an objective standard of reasonableness." *Id.* at 688. Our review of counsel's performance "must be highly deferential" and "indulge a strong presumption" that the performance was reasonable. *Id.* at 698. Defense counsel has "wide latitude in matters of strategy," making the defendant's burden of proof "a heavy one for defendant to bear." *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001).

In this case, the defense purposefully brought up the SAFE Child Act during trial as part of its strategy to show the victim's alleged motive for filing charges after many years (i.e., to collect civil damages if Defendant were found guilty). Counsel had no reason to object to the re-reading of a stipulation entered to further his theory, as this aligned with his strategy.

STATE V. KELLER

*Opinion of the Court*

In any event, we conclude that Defendant has otherwise failed to meet his burden to show prejudice. That is, he has failed to show that, but for his counsel's actions, there was a reasonable probability that the result would have been different.

NO ERROR.

Judges ARROWOOD and STADING concur.

Report per Rule 30(e).