IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-385

Filed 6 February 2024

Durham County, Nos. 18 CRS 56417, 21 CRS 795

STATE OF NORTH CAROLINA

v.

FRANCISCO ALVARADO, Defendant.

Appeal by Defendant from judgment entered 28 October 2021 by Judge Orlando Hudson in Durham County Superior Court. Heard in the Court of Appeals 18 October 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tamara M. Van Pala Skrobacki, for the State.

Christopher J. Heaney for Defendant.

GRIFFIN, Judge.

Defendant Francisco Alvarado appeals from the trial court's judgment entered after the denial of a motion *in limine* in which Defendant sought to admit previous sexual assaults. We hold the motion *in limine* was properly denied.

I. Factual and Procedural History

This case arises out of a sexual assault. The evidence at trial tended to show as follows:

M.R.[1], age 9, lived with her mother and Defendant and described their relationship as that of a step-father and step-daughter. On 4 September 2018, her mother left M.R. at home with Defendant while she left to attend a prayer meeting at a neighboring apartment. While her mother was attending the prayer meeting, Defendant forcefully engaged in vaginal intercourse with M.R., which M.R. testified caused her "lots and lots of pain." M.R. later told Defendant that she was suffering from vaginal bleeding. Defendant threatened M.R. and told her not to tell her mother because he could potentially go to prison. M.R. was concerned about telling her mother for fear of being blamed or disciplined. After the assault, Defendant told M.R. "he would take her to Food Lion and buy her candy and juice if she would not tell anybody."

The Food Lion supermarket was approximately a two-to-five-minute walk from the location of the assault. M.R. and Defendant eventually walked to the prayer meeting at the neighboring apartment, where M.R.'s mother noticed her erratic behaviors. M.R. continued to exhibit strange behaviors as they returned home and before bed. When M.R. got out of bed because she "couldn't stand the pain anymore," her mother noticed that she was vaginally bleeding. After discovering M.R.'s physical

[1] Pursuant to N.C. R. App. P. 42(b), initials are used to protect the identities of minors.

injuries, her mother contacted their church pastor. They drove M.R. to the hospital where they met police officers.

Durham police were unable to locate Defendant after knocking on neighboring doors and calling Defendant's phone several times. United States Marshalls apprehended Defendant on 12 September 2018 in Ohio on a fleeing felon warrant. Defendant contacted his mother after being apprehended and asked for forgiveness repeatedly. He did not indicate that anyone other than himself was with M.R. on the night of the assault. Prior to trial, Defendant filed a motion *in limine* to allow evidence of prior sexual assaults on M.R. The trial court found the offered evidence insufficient to overcome Rule 412. A forensic scientist from the North Carolina State Crime Lab testified a DNA sample obtained from M.R.'s underwear was a match for Defendant.

The jury found Defendant guilty on 28 October 2021. Defendant was sentenced to consecutive terms of 300 to 420 months for the statutory rape of a child by an adult and 16 to 29 months for indecent liberties with a child. Defendant timely appeals.

II. Analysis

Defendant asserts the trial court erred under the state and federal constitutions by excluding proffered Rule 412 evidence that another person could have caused M.R.'s injuries. Defendant argues the jurors may have reached a different conclusion had they known M.R. had been previously sexually assaulted. We disagree.

A. Ineffective Assistance and Preservation

Defendant contends that, if we determine that trial counsel failed to preserve the Rule 412 evidentiary issue, then he received ineffective assistance of counsel. To preserve the exclusion of evidence for appellate review, "the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record." *State v. Martin*, 241 N.C. App. 602, 605, 774 S.E2d 330, 332–33 (2015) (citation and internal marks omitted).

"[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. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) (citations omitted). "To make a successful ineffective assistance of counsel claim, a defendant must show that (1) defense counsel's performance was deficient, and (2) the deficient performance prejudiced the defense." *State v. Waring*, 364 N.C. 443, 502, 701 S.E.2d 615, 652 (2010) (citation and internal marks omitted). Deficient performance prejudices a defendant when there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*

Here, the record reflects the significance of the excluded evidence because trial counsel, while arguing the motion *in limine*, stated the way in which the evidence

would bolster the defense. Moreover, trial counsel specifically offered the record he sought to admit. Thus, trial counsel timely preserved the alleged evidentiary error for review. Defendant has failed to show that his counsel's performance was deficient. His claim of ineffective assistance of counsel fails.

B. Rule 412

Defendant argues the trial court erred by excluding Rule 412 evidence. He asserts that "[e]vidence that another person could have caused M.R.'s injuries . . . was relevant and critical to [his] ability to present a full defense."

Rule 412, known as the "Rape Shield Statute," states "the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior: [i]s evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant[.]" N.C. Gen. Stat. § 8C-1, Rule 412(b)(2) (2021). "We review the trial court's rulings as to relevance with great deference . . . . We believe that the same deferential standard of review should apply to the trial court's determination of admissibility under Rule 412." *State v. Davis*, 237 N.C. App. 481, 488, 767 S.E.2d 565, 570 (2014) (citation and internal marks omitted).

"Generally, Rule 412 'stands for the realization that prior sexual conduct by a witness, *absent some factor which ties it to the specific act which is the subject of the trial*, is irrelevant due to its low probative value and high prejudicial effect.'" *State v. Jacobs*, 370 N.C. 661, 665, 811 S.E.2d 579, 582 (2018) (emphasis in original)

(quoting *State v. Younger*, 306 N.C. 692, 698, 295 S.E.2d 453, 456 (1982)). Furthermore, "the proponent of the evidence shall establish the basis of admissibility of such evidence." N.C. Gen. Stat. § 8C-1, Rule 412(d) (2021).

Here, Defendant asserts the jury should have heard evidence tending to show M.R. had been previously assaulted by A.D., her church's piano player. M.R. testified during *voir dire* that A.D. had raped her and assaulted her at least twice. Defendant asserts that this information "would have given the jury an exculpatory explanation for M.R.'s injuries."

Despite Defendant's contention, the trial court did not err by excluding this evidence under Rule 412. After being assaulted by Defendant, M.R. went to the bathroom and discovered she was bleeding. Defendant points to a report written by E. Constantino, a DSS social worker, which gives a six-month time frame during which additional sexual assaults may have occurred. However, Defendant presents no evidence to suggest that A.D. or anyone other than himself was alone with M.R. on the night the assault occurred. Defendant's reference to previous sexual assaults does not have a sufficient temporal connection to M.R.'s 4 September 2018 injuries to be admissible. *See State v. Holden*, 106 N.C. App. 244, 248, 416 S.E.2d 415, 417 (1992) (holding that evidence without a sufficient temporal connection between the events of the offense and evidence pointing to another perpetrator was inadmissible under Rule 412(b)(2)).

Furthermore, multiple witnesses, including M.R.'s mother, their Pastor,

treating physicians, and the sexual assault nurse examiner corroborated M.R.'s account of the assault. Testimony from witnesses, including scientific and medical experts, provided sufficient evidence to find that Defendant was the source and cause of M.R.'s injuries. Defendant has accordingly failed to carry his burden and the trial court properly excluded evidence of previous assaults under Rule 412.[2]

III. Conclusion

For the aforementioned reasons, we hold that Defendant's motion *in limine* was properly denied.

NO ERROR.

Chief Judge DILLON and Judge TYSON concur.

Report per Rule 30(e).

[2] Defendant contends that had the evidence been admitted pursuant to Rule 412, it would have also been considered more probative than prejudicial under Rule 403. However, because the evidence was properly excluded by Rule 412 and because Defendant concedes that M.R. did not make false allegations, it is unnecessary to review the exclusion under 403.