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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-601

Filed 20 February 2024

Forsyth County, Nos. 20 CRS 60488-89

STATE OF NORTH CAROLINA

v.

PRESTON RANDOLPH HOLMES, Defendant.

Appeal by defendant from judgment entered 28 July 2022 by Judge David L. Hall in Forsyth County Superior Court. Heard in the Court of Appeals 10 January 2024.

*Attorney General Joshua H. Stein, by Assistant Attorney General Amber I. Davis, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Brandon Mayes, for the Defendant.*

DILLON, Chief Judge.

Defendant Preston Randolph Holmes appeals from a judgment following a jury's verdict convicting him of statutory rape, statutory sexual offense, and indecent liberties with a child. We conclude that Defendant received a fair trial, free of reversible error. However, we remand to the trial court for re-sentencing.

*Opinion of the Court*

I. Background

On 1 September 2020, Defendant was released from prison after serving time for charges unrelated to this appeal.

For three nights following his release, Defendant stayed at the home that Taylor<sup>1</sup> lived in with her mother, Brandy. Defendant shares three children with Brandy, who are Taylor's half-siblings.

Testimony at trial tended to show the following:

In the early morning hours of 4 September 2020, Defendant entered Taylor's room and lay on the floor beside her bed. Shortly after, he moved from the floor to Taylor's bed and got under the covers with her. Defendant pulled Taylor's shorts and underwear to the side and began touching her. While Taylor tried to move away from Defendant, Defendant touched her vagina with his hands and tongue. Defendant then ejaculated on Taylor's bed.

Unable to sleep, Taylor cried and waited for her mother to come into her room. When Brandy entered Taylor's bedroom later that morning, Taylor told her what Defendant had done.

After learning what Defendant had done, Brandy yelled at Defendant. Defendant fled the home on foot.

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<sup>1</sup> Pseudonyms are used for all relevant persons throughout this opinion to protect the identity of the juvenile and for ease of reading.

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Soon after, Brandy took Taylor to a hospital. While at the hospital, Taylor underwent an exam by a sexual assault nurse examiner (“SANE”) and was interviewed by a police officer. Taylor also participated in a forensic interview with a forensic social worker and expert in the field of forensic and diagnostic interviewing of children at the hospital.

On 8 March 2021, Defendant was indicted with one count of statutory rape of a child by an adult, two counts of statutory sexual offense with a child by an adult, and one count of indecent liberties with a child.

During trial, a forensic biologist with the State Crime Lab and an expert in forensic biology testified regarding her analysis of Defendant’s buccal swab sample and samples taken during Taylor’s SANE exam. Using the sperm-indicating fraction of the vaginal swabs, the forensic biologist developed a DNA profile and determined that the profile matched Defendant’s known DNA profile. She testified that, using statistical analysis, she was able to determine that the chance of the DNA being from an individual other than Defendant was 1 in 6.47 nonillion.

On 25 July 2022, Defendant was found guilty by a jury of statutory rape, statutory sexual offense (cunnilingus), and indecent liberties with a child. The jury found Defendant not guilty of the second count of statutory sexual offense (digital penetration). Defendant gave oral notice of appeal at trial.

II. Analysis

A. Rule 702

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Defendant first argues that the trial court erred by admitting the forensic biologist's testimony because the court did not determine that the testimony was reliable, as required by N.C. R. Evid. 702(a) (2021).

Defendant did not object to the admission of the testimony. Thus, we review for plain error. *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012).

Even assuming (an issue we do not decide) that the trial court erred when it admitted the testimony, we conclude that Defendant has failed to establish plain error for the following reasons.

First, there was enough evidence indicative of Defendant's guilt—other than the challenged testimony—such that Defendant cannot show that the alleged error “tipped the scales” and was “fundamental” such that “justice cannot have been done.” *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

Specifically, during trial, Taylor testified that Defendant sexually assaulted her as described above. Her testimony was consistent with the testimony given by the police officer who interviewed Taylor shortly after the assault and by the forensic social worker who interviewed Taylor at the hospital. And the jury heard testimony from the forensic program coordinator, who testified that the SANE report conducted on Taylor revealed that her vaginal area was red and tender to the touch, which is consistent with a sexual assault.

We also note, and the State argues, that *if* the jury would not have found Defendant guilty, absent the forensic biologist's testimony, then it is unlikely the jury

would have found Defendant guilty of the statutory sexual offense of cunnilingus, which it did. This is because there was no evidence at trial matching Defendant's saliva to Taylor. Thus, the jury's decision to return a guilty verdict indicates that it relied on Taylor's testimony at trial, as well as the other evidence at trial, and *was not* contingent on the DNA evidence. Accordingly, Defendant cannot show that the admission of the challenged testimony, assuming it was erroneous, "had a probable impact on the jury's finding of guilt[.]" *Id.* at 661, 300 S.E.2d at 378-79.

B. Sentencing

Defendant argues, and the State concedes, that the trial court erred when it computed the maximum sentence for Defendant's conviction for indecent liberties with a child. Here, the trial court imposed a minimum sentence of 24 months and a maximum sentence of 98 months. However, where a minimum sentence of 24 months is imposed, a maximum term of 98 months is not prescribed by our General Statutes. N.C. Gen. Stat. § 15A-1340.17(d)(3) (2021). The correct maximum sentence, based on the trial court's imposition of a 24-month minimum, is 38 months. *Id.* Thus, we remand this matter to the trial court for resentencing.

NO ERROR IN PART; REMANDED FOR RESENTENCING.

Judges MURPHY and CARPENTER concur.

Report per Rule 30(e).