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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-824

Filed 7 May 2024

Martin County, No. 19CRS216

STATE OF NORTH CAROLINA

v.

JAMES EARL SHEPARD, JR.

Appeal by defendant from judgment entered 20 April 2022 by Judge Wayland J. Sermons Jr. in Martin County Superior Court. Heard in the Court of Appeals 16 April 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General, Yvonne B. Walker, for the State.

Joseph P. Lattimore, for the defendant-appellant.

TYSON, Judge.

James Earl Shepard, Jr. (“Defendant”) appeals from his conviction of statutory rape of a child by an adult. Our review discerns no plain error.

I. Background

In 2018, JMP accused Defendant, who was married to JMP’s aunt, of raping her two years earlier. *See* N.C. R. App. P. 42(b) (pseudonyms used to protect the

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identity of minors). JMP was fifteen years old when she told her mother about the purported rape. JMP's mother promptly reported the alleged rape to law enforcement authorities.

Following the accusation, investigator Michael Stalls ("Stalls") sent JMP to the TEDI BEAR child advocacy center. TEDI BEAR is located at East Carolina University and facilitates the care of children experiencing maltreatment. Ann Parsons ("Parsons"), a licensed nurse practitioner, who predominately works as a medical evaluator at TEDI BEAR, explained "to get to TEDI BEAR there needs to be an active investigation, so a citizen needs to have made a report to DSS or law enforcement [which] becomes involved and then the investigator refers the child to TEDI BEAR for medical evaluation."

Investigator Stalls testified law enforcement officers did not conduct JMP's interview because the sheriff's and the district attorney's policy states, "if there[is] a juvenile involved TEDI BEAR Advocacy Center does the interview." After TEDI BEAR conducted the interview, Stalls prepared the case file and forwarded it to the district attorney's office. No forensic evidence was collected in 2018, because the alleged abuse had purportedly occurred two years prior to the date the rape was reported.

On 25 July 2019, Defendant was indicted by a Martin County grand jury for one count of statutory rape of a child by an adult with date of offense occurring from between 23 January 2015 to 23 January 2016. On 12 August 2019, a superseding

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indictment was issued on the same charge with date of offense between 1 December 2015 – 23 January 2016.

JMP had previously visited the TEDI BEAR center in 2016. Her school noticed something was apparently wrong with JMP and contacted Integrated Family Services, who referred JMP to TEDI BEAR. During her initial visit in 2016, JMP made four accusations. Relevant to this case, JMP stated she had been molested by Defendant on two prior occasions.

The first incident involving Defendant allegedly occurred when JMP was 12 years old. She was at church, getting ready to perform in a Christmas play. Defendant was married to JMP's aunt at that time, was in attendance at the play along with his wife, and JMP's mother, cousin, and other family members. JMP recalled Defendant came up from behind her, lifted her robe, put his hand inside her panties, and touched her vagina for a few seconds.

The second incident allegedly occurred shortly thereafter at the same church during a second performance of the Christmas play. After her performance had ended, JMP went to the back of the church to help clean up. JMP's younger cousin, who was between five and seven years old and has a hearing impairment, was the only other person with her. As she was bending over and cleaning things off the floor, Defendant allegedly approached her, lifted her robe, put his hand inside her panties, and touched her vagina for a few seconds. JMP testified she did not tell anyone what had happened at those times because she was too scared.

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The 2016 TEDI BEAR report also claims JMP was purportedly sexually assaulted by other individuals, in addition to Defendant's alleged acts. The report states JMP had told TEDI BEAR that she had experienced "digital-vaginal contact by [a man named] 'Floyd' a previous boyfriend of mom [from] years ago." She had also told TEDI BEAR in 2016 "two boys at school have touched her inappropriately; [and] one of the boys has threatened her."

These purported events by JMP's mother's prior boyfriend and the two boys at school were documented in the 2016 TEDI BEAR report, but were deemed to be irrelevant to Defendant's case by the trial court.

When JMP revisited TEDI BEAR in 2018, she asserted in a video recorded interview and by written statement that Defendant had raped her when she was 12 years old. JMP testified at trial and corroborated the contents of the video and statement. She asserted Defendant had raped her at her grandmother's house on a Sunday, while the other adults in the house were present in a different room. JMP and Defendant were allegedly seated in the living room on a couch, at first far apart, and Defendant allegedly began moving closer, eventually laying on top of her. JMP's five-year-old cousin was in the living room at the time of the alleged rape, on a different couch located away from them.

JMP recounted the event happened on a Sunday because she was wearing a dress. JMP alleged as Defendant laid on top of her, he pulled up her dress, pulled down her panties, unzipped his pants, pulled out his penis, and inserted his penis

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inside of her vagina. Defendant allegedly continued to move his penis in and out of her vagina for one minute before stopping and putting his pants back on after JMP's grandmother had called for her from the other room. JMP testified she whimpered because the penetration hurt, but she had stayed quiet because Defendant was on top of her. JMP did not tell anyone at that time what had allegedly happened, because she thought her family would not love her the same after knowing Defendant had raped her.

Months later, JMP told her grandmother about the two prior incidents of molestation and the alleged rape by Defendant. JMP's grandmother failed to take any action in response to these accusations. JMP testified she frequently tried to take her own life during this time by taking her grandmother's bronchitis pills. She also explained she felt dirty, could never get clean, and felt guilty, as if she had done something wrong.

JMP was later suspended from school after being caught with her grandmother's pills. Her mother could tell something was wrong with her and questioned JMP. About a year after telling her grandmother about the prior incidents, JMP told her mother Defendant had raped her. JMP's mother took immediate action, talking to police investigators and taking JMP to TEDI BEAR where she would have her 2018 interview video recorded and a statement written detailing the alleged rape.

Nurse Parsons was qualified as an expert witness and testified at trial.

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Parsons had performed the physical evaluation of JMP in 2016, including the physical examination of her anogenital area. She also had reviewed the 2018 report. Nurse Parsons testified and downplayed the lack of bodily injuries shown in the physical exam findings during JMP's exam in 2016, by stating "not everything that medically is concerning would be expected to leave a mark or an injury."

Parsons also testified about victim's delayed reporting and why a juvenile might not immediately complain of sexual abuse or maltreatment. Parsons testified about factors which could have led to JMP's delayed accusations of abuse by Defendant. She opined Defendant being her uncle could have played a role because it is "very hard to believe that your family member would ever do anything to you that – shouldn't be done, that your family member would ever hurt you" She also opined why JMP's grandmother's response might have delayed her report to her mother: "What happens when a child tells an adult they trust and nothing happens?"

She further opined:

Well, they're very unlikely to say if anything else happened. They start questioning whether they were right to have told. They start question (sic) – they must start to question whether what happened really was as awful as they thought it was or as bad as what they may have thought it was.

The jury found Defendant guilty of statutory rape of a child by an adult on 20 April 2022. The trial court found and concluded Defendant had amassed a prior record level of VI and sentenced him in the presumptive range to an active term of

480 minimum to 636 maximum months of imprisonment. Further, the trial court ordered lifetime registration as a sex offender and a Satellite Based Monitoring hearing to be conducted upon his release from prison. Defendant gave oral notice of appeal in open court.

II. Jurisdiction

Jurisdiction lies with this court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2023).

III. Issues

Defendant argues the trial court: (1) erroneously excluded JMP's prior statements made to TEDI BEAR agency staff in 2016 pursuant to Rule 403, because the trial court misunderstood the significance of the evidence; and, (2) committed plain error by allowing victim impact testimony by JMP and her mother during the guilt-innocence phase of the trial, and asserting it was highly emotional and irrelevant and prejudicial.

IV. Standard of Review

Defendant failed to object to the trial court's exclusion of evidence regarding her 2016 visit to TEDI BEAR pursuant to Rule 403 and also failed to object to the admission of the victim impact evidence. This court reviews unobjected-to evidentiary errors for plain error. *State v. Lawrence*, 365 N.C. 506, 512-16, 723 S.E.2d 326, 330-33 (2012) (explaining "[u]npreserved error in criminal cases, on the other hand, is reviewed only for plain error" and "plain error review in North Carolina is

normally limited to instructional and evidentiary error” (citations omitted)).

Plain error is defined as:

a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial[,] or where the error is such as to seriously affect the fairness, integrity[,] or public reputation of judicial proceedings[,] or where it can be fairly said the instructional mistake had a probable impact on the jury’s finding that the defendant was guilty.

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citations, quotation marks, and alterations omitted). “To show that an error was fundamental, a defendant must establish prejudice.” *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

“Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result[.]” *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted).

V. Excluded Evidence

Defendant argues the trial court had erroneously excluded evidence related to the 2016 TEDI BEAR report. The evidence excluded at trial was elicited and objected to in the following order:

On direct examination, JMP clarified her visit to TEDI BEAR in 2018 was not the first time she had visited the child advocacy center. JMP asserted she had first

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been referred to TEDI BEAR in 2016 because she “was molested.” The State’s attorney asked her, “How many different incidents did you talk about at TEDI BEAR?”, to which JMP responded, “Two.”

On cross-examination, Defendant asked JMP several questions about the other allegations during her 2016 visit to TEDI BEAR. Defendant asked JMP if she had told TEDI BEAR: “about some other things,” “about something that happened with some boys at school,” and “about another incident that took place with [JMP’s] mother’s boyfriend.” In response to each of those questions, JMP stated she was “not sure,” or provided, “I don’t recall.” The State blanketly objected to some of Defendant’s questions, which the trial court promptly overruled without argument.

Defendant also asked JMP several times if her recollection would be refreshed by reading the 2016 TEDI BEAR report, but JMP declined the opportunity to review the report each time Defendant proffered. The State’s attorney objected as asked and answered, which the trial court overruled. The State’s attorney and Defendant’s attorney both asked to approach the bench. The trial court excused the jury.

The State objected under Rule 412, arguing “a proper procedure [exists] for the defendant to go through if [his attorney is] going to introduce sexual activity or allege sexual activity between the victim and anyone else other than the defendant unless it’s one – for one of the four purposes that are delineated under Rule 412[.]”

Defendant argued the State had “opened the door” to questions about the 2016 TEDI BEAR report by questioning JMP about the two purported incidents of

molestation by Defendant in the 2016 report, of which Defendant was not charged or being prosecuted for. Defendant further argued:

[W]hat we have is testimony that was directly elicited by the State [] that there were only two disclosures during this TEDI BEAR interview which is false and which goes directly to this witness's credibility[,] and I should be allowed to cross-examine her as to the same.

Now I have no intention of trying to portray her as covering up for another assailant. I just want to be able to delve into her credibility as we should be entitled to do on cross-examination, and a falsification from the witness stand should be within the scope of that cross.

(emphasis supplied).

In its ruling, the trial court reasoned:

It's not a prior inconsistent statement. I don't recall her saying, "I didn't say anything about any other people," so I'm going to – I'm going to sustain the objection, and you'll not ask anything about the prior report as being the vaginal contact by Floyd.

Note the defendant's exception.

Bring the jury back.

The trial court also assured Defendant's attorney he "clearly [was entitled to] cross-examine [JMP] about inconsistent statements regarding [Defendant]." Notably, Defendant never objected to the trial court's ruling under Rules 404(b) or 403. N.C. Gen. Stat. §§ 8C-1, Rules 403, 404(b) (2023)

Defendant refrained from asking JMP any questions related to her allegations against Floyd or the two boys from her school in the 2016 TEDI BEAR report.

However, Defendant impeached JMP's credibility on several occasions regarding her allegations against Defendant from the 2016 TEDI BEAR report. Defendant asked JMP if she had told TEDI BEAR staff that Defendant had touched her underneath her clothes in 2016, to which JMP said she had. Defendant's attorney began an impeachment line of questioning:

Q: So it's your statement that that's what you told them.

A. I said yes.

Q. You didn't tell them that he didn't touch you underneath your clothes.

A. I said he touched me underneath my panties.

Q. So your testimony is that you told them the exact same thing.

A. Yes.

Q. And would your reflection – recollection be refreshed by looking at the TEDI BEAR report where it talks about your disclosures there?

...

A: Sure.

...

Q. Did this refresh your recollection as to what you told them?

A. I'm sticking with what I said.

Q. I'm sorry. What did you say?

A. I'm sticking with what I said in court.

In other words, JMP admitted on cross-examination a discrepancy existed between what she had told TEDI BEAR in the 2016 report and her testimony at trial.

On appeal, Defendant argues the trial court abused its discretion under Rule 403 by prohibiting him from questioning JMP about her allegations against Floyd and the two boys at school. *See* N.C. Gen. Stat. § 8C-1, Rule 403 (2023) (providing relevant “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence”).

On appeal, “[p]reserved legal error is reviewed under the harmless error standard of review. Unpreserved error in criminal cases, on the other hand, is reviewed only for plain error.” *Lawrence*, 365 N.C. at 512, 723 S.E.2d at 330 (citations omitted).

A defendant must “specifically and distinctly contend[]” the contested action amounted to plain error. N.C. R. App. P. 10(a)(4). Additionally, plain error review is limited to instructional and evidentiary errors. *Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333 (“Furthermore, plain error review in North Carolina is normally limited to instructional and evidentiary error.” (citation omitted)).

While Defendant’s “exception” or objection to the trial court’s ruling on the State’s Rule 412 objection was preserved and “noted,” Defendant never objected under

Rules 404(b) or 403 during the course of the trial. Instead, Defendant raises his Rule 403 objection for the *first time* on appeal and only argues the trial court “abused its discretion.”

Defendant has failed to “specifically and distinctly” allege the trial court committed *plain error* by excluding JMP’s other sexual assault accusations in the 2016 TEDI BEAR report was in violation of Rule 403, which was otherwise not preserved for appellate review. N.C. R. App. P. 10(a)(4). *See State v. Woodley*, 286 N.C. App. 450, 464, 880 S.E.2d 740, 750 (2023); *State v. Smith*, 269 N.C. App. 100, 105, 837 S.E.2d 166, 169 (2019). Defendant’s arguments concerning the exclusion of the other allegations of sexual assault by others from the 2016 TEDI BEAR report during cross-examination under Rule 403 are unpreserved and waived. *Id.*

VI. Victim Impact Evidence

Defendant failed to object to and argues the trial court committed plain error by not excluding victim impact evidence and asserts it was highly emotional, irrelevant, and prejudicial.

Generally, victim impact evidence is admissible at sentencing, but not during the guilt-innocence phase of trial. N.C. Gen. Stat. § 15A-833(a) (2023). At times, victim impact evidence can be relevant and admissible during the guilt-innocence phase of the trial. *See State v. Graham*, 186 N.C. App. 182, 191, 650 S.E.2d 639, 646 (2007) (“[V]ictim impact evidence which tends to show the context or circumstances of the crime itself, even if it also shows the effect of the crime on the victim and his

family, is an exception to the general rule, and such evidence is relevant and therefore admissible at the guilt-innocence phase[.]”); *see also Payne v. Tenn.*, 501 U.S. 808, 823, 115 L.Ed.2d 720, 734 (1991) (“In many cases the evidence relating to the victim is . . . relevan[t] at the guilt phase of the trial.”).

The challenged testimony concerned the effects and impact of the alleged molestations and rape had on JMP. During direct examination of JMP and without objection, the State asked how the alleged incidents had affected her:

Q. Did the rape make you feel differently about yourself than you felt before the rape?

A. Before the rape I was – I always felt protected. I always felt loved. I mean, I had my virginity before the rape. Then when that happened, I had no choice. I felt guilty. I felt like I was wrong. I felt disgusted. Like, no matter how often I took a shower I always felt dirty. I felt like every time I scrubbed, I didn’t feel clean. I felt like when you take a shower – I didn’t look at life the same any more [sic]. I didn’t want to get up. I didn’t want to eat most of the time, took pills to try to take my life many times.

Q. When you say you took pills what pills were you taking?

A. My grandmother’s pills for her bronchitis.

The State then asked JMP, again without objection, if therapy had helped her cope with the incident:

Q. And so after all this has happened to you I think we heard in the video that you had gone to therapy, correct?

A. Correct.

Q. And so how are you feeling now about this?

A. Well, it's like reliving it again. I had gotten to a point where I had, you know, gotten better with it. I stopped taking pills. I stopped running away from home. I stopped doing things. I stopped keeping a knife under my pillow, so then court kind of interrupted my life, and I'm doing better, kind of just makes me hurt, but I know I'm going to be okay.

JMP's mother was also questioned by the State, without objection, about the changes she had noticed in JMP:

Q. Can you tell the Court what those changes were that you noticed?

A. So my child [had] been very vivacious, energetic, head on her shoulders, goal oriented at a young age, just had this attitude I don't want to do nothing any more [sic]. She became socially withdrawn. She didn't want to go to school. She didn't want to be around large crowds or people. She even had a hard time with her younger brother who she loves so much. She didn't even want him to touch her, not even on her shoulder.

Her school grades where she was principal list, honor roll, she started failing in her classes, and she started failing, and, like I said, she didn't want to go to school, be around crowds of people, and things that she used to love to do, band and so forth, dancing at church, you know, doing the rhetorical dancing people call it, praise, you know, dancing, singing that she loves, she didn't want to do that any more [sic].

The State argues this evidence was relevant and had a tendency to make the existence of the abuse by the Defendant more probable. In addition to this impact evidence, there was other evidence was admitted for the jury to rely on to convict the Defendant. Evidence included testimony from Nurse Parsons about delayed

reporting of abuse and JMP's 2016 physical examination at TEDI BEAR. JMP also testified to and corroborated details surrounding the molestations and rape in her TEDI BEAR interviews and during trial. This evidence was sufficient to support the jury's finding and verdict Defendant had raped JMP. Because of this, Defendant cannot meet his plain error burden to show the verdict would have been different if the evidence not been admitted. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 344.

VII. Conclusion

Defendant failed to object or argue plain error by the trial court excluding further cross-examination of JMP under Rule 403, regarding her 2016 statements of prior abuse made to staff at the TEDI BEAR center. In the absence of any objection, and without addressing the propriety thereof, the trial court did not commit plain error by failing *sua sponte* to exclude victim impact evidence during the guilt-innocence phase of trial. *Id.*

Defendant received a fair trial, free from prejudicial and plain errors he argued. We discern no plain error in the jury's verdicts or in the judgment entered thereon. Our decision is without prejudice to Defendant's right to file an ineffective assistance of counsel claim in the trial court. *It is so ordered.*

NO PLAIN ERROR.

Chief Judge Dillon concurs, and Judge Griffin concurs in the result.

Report per rule 30(e).