NO. COA12-645
NORTH CAROLINA COURT OF APPEALS

Filed: 21 May 2013

STATE OF NORTH CAROLINA

v.

EVER ALEXANDER RIVAS-BATRES,
Defendant.

Union County
Nos. 09 CRS 4485
09 CRS 4488
09 CRS 4499
09 CRS 4507-08
09 CRS 50957
09 CRS 50960
09 CRS 50962-63
09 CRS 50974
09 CRS 50976

Appeal by defendant from judgments entered 15 November 2011 by Judge Christopher W. Bragg in Union County Superior Court. Heard in the Court of Appeals 28 November 2012.

Attorney General Roy Cooper, by Special Deputy Attorney General Belinda A. Smith, for the State.

Mark Montgomery for defendant-appellant.

GEER, Judge.

Defendant Ever Alexander Rivas-Batres appeals from his conviction of multiple counts of first degree sex offense, first degree rape, and sex offense in a parental role. On appeal, defendant argues that the trial court erred in referring to "the

victim" when instructing the jury. This Court has previously held that the pattern jury instructions' reference to "the victim" does not amount to an improper expression of opinion, and we are bound by that holding. Only the Supreme Court may revisit that issue.

Facts

The State's evidence tended to show the following facts. "Francine" was 10 years old and in sixth grade in 2008 when defendant began sexually assaulting her.[1] During that time, she lived with her mother (Jessica Martinez), her little sister, and an infant brother who was born on 3 February 2008. Defendant lived with Francine's family for approximately two years. Francine considered him to be a father figure because he took care of her when her mother was absent, which was frequently as she worked from 7:00 p.m. to 7:00 a.m.

When Ms. Martinez was not home, defendant made Francine go into the bedroom he shared with Ms. Martinez, laid her down on the bed, and had sexual intercourse with her. The penetration was uncomfortable, and Francine had to clean slippery white liquid from her vagina. She told defendant to stop and pushed him away with her feet. Defendant also licked her genital area

[1]The pseudonym "Francine" will be used throughout the opinion for protection of the minor's privacy and for ease of reading.

with his tongue and inserted his middle finger in her vagina. This occurred two to three times weekly. On about three occasions, defendant put his penis in Francine's mouth. Defendant forced Francine to perform fellatio both in her home and in the back room at his tile business, and, on one occasion, engaged in anal intercourse, causing Francine to bleed.

Defendant began the sexual assaults while Ms. Martinez was pregnant with Francine's little brother. The abuse continued for around one year during which time defendant engaged in mouth to genital contact with Francine about eight times per month, put his fingers in her vagina two to three times per week, engaged in intercourse three or four times per week or about ten times per month, and made Francine perform oral sex on him three times. Defendant threatened Francine not to tell anyone what he was doing, or she would be separated from her mother.

In February 2009, Francine told her friends at school that defendant was sexually assaulting her. She then reported the abuse to Joyce Weddington, a counselor at her school. Ms. Weddington made a report to the Department of Social Services ("DSS"), and DSS started an investigation. Francine's mother received a call from her daughter's school. When her mother called the school back, they put Francine on the phone, and

Francine told her mother that she had something to tell her, but that it would be better if they spoke at home.

Ms. Martinez arrived home to find a social worker waiting for her outside who told her that defendant had been having sexual relations with her daughter. Ms. Martinez then called defendant and asked him to come home. When she confronted defendant, he looked sad and did not respond when asked whether the accusations were true. When Francine came home that afternoon on the bus around 6:00 p.m., she told her mother that defendant had been having sexual relations with her and cried. Her mother went to defendant with Francine, and Francine confronted him asking why he had done those things to her. Defendant did not answer Francine, but after she left the room, defendant told Francine's mother that she should believe her daughter because she was her daughter.

On 10 February 2009, Ms. Martinez took Francine for a physical examination at Idlewild Medical Center. Dr. Spidaro, who worked at the Medical Center, called Detective Shannon Huntley of the Monroe Police Department to report that Francine had been brought in for an examination relating to her allegations of sexual assault. After receiving the report, Detective Huntley went to Francine's home and conducted an interview with her in private.

On 11 February 2009, Francine saw Dr. Robert Helmuth, the medical director at the Union County Health Department and a pediatrician at a child advocacy center. Dr. Helmuth's role in part is to conduct a pediatric clinic and provide forensic evaluation of children who may be physically or sexually abused. In his examination of Francine, Dr. Helmuth found a complete absence of her hymen at the six o'clock position, a condition that only occurs with a penetrating injury.

On 16 February 2009, Alaka Ayers, a child forensic interviewer with a child advocacy center, interviewed Francine. Francine disclosed that defendant had touched, licked, and digitally penetrated her. He also engaged in penile penetration with ejaculation and engaged in oral and anal sex.

It appears that defendant was originally indicted for 33 counts of first degree sex offense, 30 counts of statutory rape of a child, 30 counts of first degree rape of a child, nine counts of attempted first degree sex offense, 91 counts of statutory sex offense with a child, and 33 counts of sexual offense where the defendant is in a parental role. At the start of the trial, the State announced it was proceeding on only 35 of those charges, including multiple counts of first degree rape of a child, first degree sex offense with a child, and sex offense in a parental role.

At trial, defendant testified on his own behalf. He acknowledged that he was sometimes alone with the children, but he denied any wrongdoing. He said he first heard of Francine's allegations on 9 February 2009 when her mother confronted him. Upon hearing the allegations, he encouraged Ms. Martinez to have Francine see a doctor. He did not know why Francine would make these allegations against him, but he claimed Francine said that her friends persuaded her to do it. He did acknowledge that when Ms. Martinez confronted him about Francine's allegations, he told her to believe her daughter.

Defendant also testified about his relationship with Ms. Martinez, stating that they often argued over money and that she was jealous because of his ex-wife. Defendant testified that he had tried to get Ms. Martinez to move out of the house and into an apartment with the children, but she refused to leave and was constantly trying to get money out of him.

The jury convicted defendant of multiple counts of first degree rape, first degree sexual offense, and sex offense in a parental role. It found defendant not guilty of three counts of first degree sexual offense. In orally pronouncing defendant's sentence, the trial court expressed its intent that a separate judgment with a mitigated-range term of 240 to 297 months be entered for each count of each indictment on which defendant was

found guilty with the exception of the counts for the sex offense in a parental role. The court consolidated the sex offense in a parental role counts into a single judgment and imposed a mitigated-range term of 25 to 39 months imprisonment. The court further indicated orally that the sentences for the counts in each indictment should run concurrently to each other, but that the sentences for each indictment except for the sex offense in a parental role judgment would run consecutively. The judgment for the consolidated counts of sex offense in a parental role was supposed to run concurrently with another sentence.

The written judgments included in the record on appeal do not match what the trial court orally pronounced. The record does not contain a judgment for each count on which defendant was found guilty -- for many of the counts of which defendant was convicted, the record contains no judgment and does not otherwise account for those convictions. After carefully reviewing the transcript and the record on appeal, we cannot tell whether the problem is with the record on appeal or whether the trial court failed to enter some of the judgments it pronounced during the sentencing hearing. We note further that the written judgments that do appear in the record vary in some respects from the oral pronouncement of defendant's sentence.

Following the sentencing hearing, the trial court held a hearing to determine whether defendant was subject to satellite-based monitoring ("SBM"). In its order requiring lifetime SBM, the trial court found that defendant had been convicted of a sexually violent offense. Although the court found that defendant had not been classified as a sexually violent predator under N.C. Gen. Stat. § 14-208.20 (2011) and was not a recidivist, the court determined that defendant had been convicted of an aggravated offense and an offense that involved the physical, mental, or sexual abuse of a minor. Defendant gave oral notice of appeal at trial to this Court.

I

Defendant first contends on appeal that the trial court erred in admitting Detective Huntley's testimony that defendant had invoked his constitutional rights to remain silent and to counsel under the Fifth and Fourteenth Amendments to the United States Constitution. Because defendant did not object at trial, he argues that the testimony amounted to plain error. As our Supreme Court has stated:

> 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 the defendant was guilty.

> Moreover, 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[.]

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations and quotation marks omitted).

At trial, Detective Huntley testified that after having obtained a warrant, and located defendant at his place of business, she and a fellow officer returned with defendant to the Monroe Police Department where they read defendant his Miranda rights. Detective Huntley then gave the following testimony:

> Q All right. And did Mr. Rivas-Batres choose to speak to you all?
>
> A Yes.
>
> Q Okay. What, if anything, did he say?
>
> A Well, he did not waive his Miranda rights, but he did make the statement that the only person that could get him out of trouble was a lawyer and that was the only person that he would speak with.
>
> Q So did Mr. Rivas-Batres give you a statement in regard to the allegations in the warrant or the information that you had?
>
> A He did not give a statement.

Even assuming, without deciding, that the trial court should have excluded the testimony, the defendant has not shown

that in the absence of this evidence, the jury probably would have reached a different verdict. The State presented physical evidence: Francine had a complete absence of the hymen at the six o'clock position. The State's expert witness explained that this type of tear of the hymen "can only occur with a penetrating injury. This is [sic] never been reported to occur as a birth defect or for any other reason. We know that that only occurs if there is some sort of penetrating trauma to that hymen." The expert repeated that the absence of the hymen at that particular location was "definite evidence of penetration," and he testified it was consistent with penetration by a penis.

In addition, Francine gave very detailed testimony that demonstrated a specific knowledge of different types of sexual acts and positions, the characteristics of semen, and sensations resulting from the acts that the jury would likely conclude that a 10- or 11-year old child would not typically know. Francine's testimony at trial was consistent with a prior video of her disclosing abuse in a forensic examination and with statements she made to others. Moreover, when confronted regarding allegations of sexual abuse against Francine, defendant acknowledged telling Ms. Martinez to believe her daughter.

Defendant has not shown that the State, at trial, emphasized the testimony challenged on appeal. We cannot

conclude given the State's evidence at trial and, after reviewing defendant's testimony at trial, that the jury probably would have found defendant not guilty if the detective had not testified regarding defendant's reference to an attorney and his failure to provide a statement.

Therefore, defendant has failed to show plain error. His inability to show sufficient prejudice for plain error also establishes that he has not demonstrated ineffective assistance of counsel. *See State v. Land*, ___ N.C. App. ___, ___, 733 S.E.2d 588, 595 (2012) ("Alternatively, defendant argues that he received ineffective assistance of counsel because of his trial counsel's failure to request these jury instructions. Since the trial court did not commit plain error when failing to give the instructions at issue, defendant cannot establish the necessary prejudice required to show ineffective assistance of counsel for failure to request the instructions.").

II

Defendant next contends that the trial court erred in admitting the testimony of Francine's mother that a social worker, a police officer, and a doctor all told her that Francine had been abused. At trial, Ms. Martinez testified that a social worker asked her if she knew "that [Francine] [was] having sexual relations with her stepdad[?]" Ms. Martinez also

testified that Detective Huntley and Dr. Helmuth both told her that there had been sexual abuse of her daughter.

Defendant contends that this testimony violated defendant's constitutional right to confrontation, was inadmissible hearsay, and amounted to improper vouching by experts for her daughter's credibility. Because defendant did not object at trial to this testimony, he again argues plain error.

We need not address whether admission of the testimony was error. Given Dr. Helmuth's, Detective Huntley's, and Ms. Ayers' detailed in-court testimony regarding the physical evidence and Francine's prior consistent statements, we cannot conclude that Ms. Martinez' brief testimony regarding what she was told during the investigation (as she was making decisions regarding what to do) "'had a probable impact on the jury's finding that the defendant was guilty.'" *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). Defendant has, therefore, failed to meet his burden of showing sufficient prejudice from this testimony to establish plain error or ineffective assistance of counsel. *Land*, ___ N.C. App. at ___, 733 S.E.2d at 595.

III

Defendant next contends that the trial court committed plain error by referring to "the victim" in its instructions to

the jury. Defendant did not object when the trial court instructed the jury on each charged offense according to the North Carolina Pattern Jury Instructions. The pattern jury instructions use the word "victim."

Defendant contends referring to Francine as "the victim" constituted an improper expression of opinion by the trial court and points to numerous decisions across the country reaching that conclusion. We are, however, bound by the prior decisions of this Court. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Our courts have held that the pattern jury instructions' use of the word victim does not amount to the expression of an improper judicial opinion on the guilt of the defendant. *See State v. Jackson*, 202 N.C. App. 564, 568-69, 688 S.E.2d 766, 769 (2010) (holding use of word "victim" in pattern jury instructions was not improper expression of judicial opinion in prosecution for taking indecent liberties with child and statutory rape), *disc. review dismissed*, 365 N.C. 331, 717 S.E.2d 564, 569, *and appeal dismissed*, 365 N.C. 331, 717 S.E.2d 568, 570 (2011); *State v. Richardson*, 112 N.C. App. 58, 67, 434 S.E.2d 657, 663 (1993) ("We have reviewed the record and find no plain error. The word 'victim' is included in the pattern jury instructions promulgated by the North Carolina Conference of Superior Court Judges and is used regularly to instruct on the

charges of first-degree rape and first-degree sexual offense."). The trial court, therefore, did not err.

IV

Finally, defendant challenges the trial court's order requiring lifetime SBM. We first note that defendant failed to file a written notice of appeal regarding his enrollment in SBM as required under this Court's decision in *State v. Brooks*, 204 N.C. App. 193, 693 S.E.2d 204 (2010). For that reason, defendant has filed a petition for writ of certiorari seeking review of the SBM order. Since it is apparent that defendant lost his appeal through no fault of his own, we grant defendant's petition.

The trial court entered a single order regarding SBM, using the form AOC-CR-615, Rev. 4/11 entitled "Judicial Findings and Order for Sex Offenders -- Active Punishment." The trial court checked the box finding that defendant had been convicted of a sexually violent offense as defined by N.C. Gen. Stat. § 14-208.6(5) (2011). The court then found that defendant had not been classified as a sexually violent predator pursuant to N.C. Gen. Stat. § 14-208.20 and was not a recidivist. The court, however, further found that the offenses of conviction were aggravated offenses and that the offenses involved the physical, mental, or sexual abuse of a minor. Based on the finding of an

aggravated offense, the trial court ordered that defendant enroll in SBM for his natural life.

Defendant contends that the trial court erred in ordering life-time SBM for first degree sexual offense. The State concedes, based on *State v. Treadway*, 208 N.C. App. 286, 303, 702 S.E.2d 335, 348 (2010) (holding that first degree sexual offense, N.C. Gen. Stat. § 14-27.4(a)(1) (2009), does not qualify as an aggravated offense), *disc. review denied*, 365 N.C. 195, 710 S.E.2d 35 (2011), that the trial court erred in ordering lifetime SBM for defendant's five first degree sexual offense convictions. The State further argues, however, that any error was harmless because defendant's convictions for first degree rape require lifetime SBM.

We first note that on the order's line for listing "File No.," the trial court listed the numbers 09 CRS 4507, 50960, 50963, 50976, 50974, 4488, 4499, 4508, 50957, 4485, and 50962. Only the judgments in 09 CRS 4488, 4508, and 50957 involve the convictions for first degree rape. The order for lifetime SBM is, therefore, valid for the judgments entered in file numbers 09 CRS 4488, 4508, and 50957. *See State v. Clark*, 211 N.C. App. 60, 72-73, 714 S.E.2d 754, 762 (2011) ("In comparing the statutory definition of an aggravated offense, as set out in N.C. Gen. Stat. § 14.208.6(1a), with the elements required to be

proven to obtain a conviction under N.C. Gen. Stat. § 14.27.2(a)(1) for first degree rape, it is clear that first degree rape fit[s] within the definition of aggravated offense as required by *Davison* and its progeny." (internal quotation marks omitted)), *disc. review denied*, 365 N.C. 556, 722 S.E.2d 595 (2012). We remand for correction of the order so that it is entered only as to those judgments involving aggravated offenses as defined by the appellate courts.

In reviewing the record for this issue, we discovered a discrepancy between the jury's verdicts, the trial court's oral rendition of defendant's sentencing, and the judgments included in the record. The trial court's oral rendition appropriately sentenced defendant for each of the offenses of which the jury found defendant guilty. Orally, the trial court consolidated only the seven counts of sexual offense in a parental role into a single judgment. The court entered a sentence for each separate count of each of the other indictments. Based on our review of the verdict and the oral sentencing, there should be 20 judgments. The record on appeal, however, includes only nine judgments.

We cannot tell whether judgments exist that were mistakenly omitted from the record on appeal or whether the court erroneously failed to enter judgments for some of the counts or

whether both occurred. The judgment in file no. 09 CRS 50962-52 states that it is to run concurrently with file no. 09 CRS 50962-51, but the record on appeal includes no judgment for file no. 09 CRS 50962-51. Likewise, the judgment for file no. 09 CRS 4488-52 states that it runs concurrent with file no. 09 CRS 4488-51, while the judgment for file no. 09 CRS 4499-51 states that it runs consecutive to file no. 09 CRS 4488-51. The record on appeal includes no judgment for file no. 09 CRS 4488-51. The record on appeal appears to include only one judgment relating to each indictment, even though there should have been a separate judgment for each count of each indictment (with the exception of the consolidated judgment and the three counts on which defendant was found not guilty). In addition, the written judgments are not necessarily consistent with the oral rending as to whether the judgment is concurrent or consecutive to another judgment.

Because we cannot tell whether this is a problem with the compilation of the record on appeal or an error below, the issue must be addressed at the trial level in the first instance. On remand, the trial court, in addition to correcting the SBM order, should review the judgments to ensure that a judgment has been entered with respect to each offense of which defendant was convicted.

Remanded.

Judges BRYANT and CALABRIA concur.

Report per Rule 30(e).