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NO. COA11-722
NORTH CAROLINA COURT OF APPEALS

Filed: 19 June 2012

STATE OF NORTH CAROLINA

v.

Swain County
Nos. 09 CRS 870-72, 10 CRS
647-650

RUDY RODRIGUEZ LOPEZ

Appeal by defendant from judgment entered 28 October 2010 by Judge Mark Powell in Swain County Superior Court. Heard in the Court of Appeals 14 December 2011.

Attorney General Roy Cooper, by Assistant Attorney General Angenette R. Stephenson, for the State.

Mark Montgomery for defendant-appellant.

BRYANT, Judge.

Where the trial court's rulings and instructions to the jury were proper, we find no error in the trial. Where defendant fails to demonstrate that defense counsel's performance was deficient or prejudicial, we find no violation of defendant's Sixth Amendment right to counsel. However, we vacate the trial court's order requiring that defendant submit

to lifetime satellite-based monitoring and remand for additional findings consistent with this opinion.

The evidence presented at trial tended to show the following: defendant is the father of Tina and grandfather to Tina's two children, Mary and Allie.¹ Defendant is the stepfather of Cleto, and step-grandfather to Cleto's two children, Betsy and Kayla. Mary, Allie, Betsy, and Kayla all routinely stayed with defendant and his wife in their trailer.

On 24 May 2009, Tina learned that defendant had sexually assaulted Mary and immediately confronted him about the abuse. Soon thereafter, Cleto learned that defendant had sexually assaulted his daughters, Betsy and Kayla. When confronted by Cleto, defendant said he was sorry for what he had done and that he was going to hang himself. Tina and Cleto reported the abuse to local law enforcement the following day. Law enforcement officers attempted to locate defendant but he was nowhere to be found. Defendant was eventually located in California, where he was arrested and extradited back to North Carolina on 25 November 2009.

Defendant was indicted on three counts of first-degree sexual offense pursuant to N.C. Gen. Stat. § 14-27.4(a)(1), as to Mary and Kayla, and four counts of taking indecent liberties

¹ Pseudonyms have been used to protect the identities of the children.

with a child pursuant to N.C. Gen. Stat. § 14-202.1, as to Mary, Kayla, and Betsy.

At trial in October 2010, Mary, who was eight at that time, testified that defendant touched her in "[m]y private parts" with his hand and his "private part," sticking it in "[m]y behind." Mary further testified that defendant stuck his "private part" in her "behind" numerous times in the washroom and in her grandmother's bathroom. Mary said she knew defendant's private went in her "behind" because she saw it when she turned around and she felt it.

Tina and Allie both testified that Mary told them defendant "put his weenie in her butt." Tina also testified that Mary "gestured with her pelvis several thrusts" when imitating what defendant had done to her.

Cindy McJunkin, a Sexual Assault Nurse Examiner, testified that during an interview with Mary, Mary told her that defendant "stuck his thing up there" while demonstrating on body diagrams her anus and his penis. McJunkin testified that Mary told her the incidents occurred in the washroom and her grandmother's bathroom.

Kayla, who was twelve years old at the time of trial, testified that "[defendant] molested me" when she slept on the couch or in the spare bedroom at her grandmother's house beginning when she was three or four years old and continuing

until she was eleven. When defendant touched her "he would rub on my chest and my thighs and my front parts, my back parts." Kayla also testified that defendant used his hands to touch her inside her vagina.

Nurse McJunkin interviewed Kayla in August 2010 and, at trial, testified to corroborate Kayla's testimony that defendant touched her inside her "girl parts." When discussing exactly where defendant touched her, McJunkin testified that Kayla circled her vagina on the body diagram as well as her chest, anus and thighs. McJunkin also testified that Kayla told her that defendant stopped touching her "a week before he got caught doing it."

Betsy, who was fourteen at the time of trial, testified that defendant "touched me in places I didn't want to be touched." She testified defendant rubbed her upper legs, mostly over her clothes and while she was laying down. This happened many times from the time Betsy was "really young" up until the year before trial.

Defendant and defendant's wife testified in his defense.

Defendant was found guilty of all charges on 28 October 2010². The trial court entered judgment in accordance with the

² Defendant was found guilty of two counts of first-degree sexual offense as to Mary and one count of first-degree sex offense as to Kayla. Defendant was found guilty of four counts of taking

jury verdict and sentenced defendant to 240-297 months for each of the three counts of first-degree sexual offense and 16-20 months for each of the four counts of taking indecent liberties with a child, all sentences to run consecutively. Defendant appeals.

On appeal, defendant raises the following issues: whether the trial court erred in (I) improperly instructing the jury on first-degree sexual offense; (II) denying defendant's motion to dismiss the charge of first-degree sexual offense as to Mary; (III) instructing the jury on the theory of flight; (IV) referring to the complainants as victims; and (V) ordering lifetime satellite-based monitoring of defendant.

I

Defendant first argues the trial court committed plain error by instructing the jury on theories of first-degree sexual offense not supported by the evidence. Defendant contends that because the evidence does not support a finding that he penetrated Kayla's anus or Mary's genital opening and there is no indication as to which theory the jury used to convict him as to each child, he is entitled to a new trial. We disagree.

indecent liberties with a child: two counts as to Mary and one count each as to Kayla and Betsy.

Here, the trial court instructed the jury on the charge of first-degree sexual offense with a child as follows:

The defendant has been charged with three counts of committing a first-degree sexual offense with a child. For you to find the defendant guilty of these offenses, the State must prove three things beyond a reasonable doubt for each offense:

First, that the defendant engaged in a sexual act with the victim. The sexual act means anal intercourse, which is any penetration, however slight, of an anus of any person by the male sexual organ of another. A sexual act also means any penetration, however slight, by an object into the genital opening of a person's body.

Second, that at the time of the act, the victim was a child under the age of 13 years.

And, third, that at the time of the act, the defendant was at least 18 years of age.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant engaged in a sexual act with the victim, who was a child under the age of 13 years, and that the defendant was at least 18 years of age, it would be your duty to return a verdict of guilty.

Defendant did not object to the jury instruction.

In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(a)(4) (2011).

Our Supreme Court recently reaffirmed its

holding in *Odom* and clarif[ied] how the plain error standard of review applies on appeal to unpreserved instructional or evidentiary error. For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. See [*State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)]. 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." See *id.* (citations and quotation marks omitted); see also [*State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986)] (stating "that absent the error the jury probably would have reached a different verdict" and concluding that although the evidentiary error affected a fundamental right, viewed in light of the entire record, the error was not plain error). Moreover, because plain error is to be "applied cautiously and only in the exceptional case," *Odom*, 307 N.C. at 660, 300 S.E.2d at 378, the error will often be one that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings," *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting [*United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (footnote omitted)]).

State v. Lawrence, ____ N.C. ____, ____, ____ S.E.2d ____, ____, No.100PA11, slip op. at 19 (N.C. filed 13 April 2012).

In North Carolina, "[a] person is guilty of a sexual offense in the first degree if the person engages in a sexual act: (1) [w]ith a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least

four years older than the victim" N.C. Gen. Stat. § 14-27.4(a) (2011). "The term 'sexual act' as used in [N.C.G.S. § 14-27.1(4) Cum. Supp. 1985] means cunnilingus, fellatio, analingus, or anal intercourse. It also means the penetration, however slight, by any object into the genital or anal opening of another person's body." *State v. DeLeonardo*, 315 N.C. 762, 764, 340 S.E.2d 350, 353 (1986); *see also*, N.C.G.S. § 14-27.1(4) (2011). We note that digital penetration is within the definition of sex act. *See State v. Lucas*, 302 N.C. 342, 275 S.E.2d 433 (1981) (holding where evidence showed defendant penetrated victim's genital opening with his fingers, that was sufficient for the jury in a prosecution for second degree sex offense.). Defendant relies on *State v. Hughes*, 114 N.C. App. 742, 443 S.E.2d 76 (1994), to support his contention in this case. Defendant's reliance is misplaced. In *Hughes*, the trial court instructed the jury on first-degree sexual offense based on a sexual act of "fellatio . . . and/or any penetration, however slight, by any object into the genital opening of a person's body." *Id.* at 746, 443 S.E.2d at 79. Our Court reversed holding there was a lack of evidence of penetration. The instant case is quite the opposite.

Defendant in his brief on appeal acknowledges there is evidence in the record that he "put something into [Kayla's] genital opening" and that, as to Mary, he "put his hand in 'bad

places' meaning her 'behind,' and that he put his penis 'in back' of her." We further note that Mary, who was eight at the time of trial, testified that defendant put his "private part" in her "behind." She saw it and felt it. Nurse McJunkin, as well as Tina and Allie, testified to Mary's prior statements indicating defendant inserted his penis into Mary's anus. Kayla, who was twelve at the time of trial, testified that defendant touched the inside of her vagina with his hands.

Therefore, the record contains sufficient evidence to support the trial court's jury instruction. Further, the evidence is sufficient to support a jury verdict of guilty on the charge of first-degree sexual offense as to Mary based on anal penetration and as to Kayla based on digital penetration of her vagina. Accordingly, we overrule defendant's argument.

II

Defendant next argues the trial court erred by denying his motion to dismiss the two counts of first-degree sexual offense involving Mary for insufficiency of the evidence. We disagree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). When presented with a motion to dismiss for insufficient evidence,

the trial court must consider the evidence
in the light most favorable to the State and
the State is entitled to every reasonable

inference to be drawn from that evidence. If there is substantial evidence of each essential element of the charged offenses, and of defendant being the perpetrator of the offense, the motion is properly denied.

State v. Saunders, 317 N.C. 308, 312, 345 S.E.2d 212, 215 (1986) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991) (citation and internal quotation marks omitted).

Defendant argues the State offered insufficient evidence to show that Mary's anus was penetrated, thereby failing to prove an essential element of first-degree sexual offense. However, considering the evidence in the light most favorable to the State, it was sufficient for the jury to determine that defendant penetrated Mary's anus.

Mary testified in response to the following questions:

Q. And where is [defendant's] private?

A. On him.

Q. Is it on the front of him or the back of him?

A. On him, on the front.

Mary gave further testimony regarding defendant's conduct when he engaged Mary in sexual acts.

Q. And when you tried to turn around, what happened?

A. He turned me back around.

Q. How would he turn you back around?

A. He'd push my shoulder.

Q. And when you turned around, what, if anything, did you see?

A. His private.

Q. [Mary], how do you know his private went inside yours?

A. Because I felt it.

Q. When you say your private, do you mean the front of you or the back of you?

A. Back of me.

Mary testified that defendant stuck his "private part" in her "behind" several times. Allie, who was ten at the time of trial, testified for purposes of corroboration that one day on the way to the grocery store Mary confided in her, "She said, 'Grandpa put his weenie in my butt.'" Tina, Mary's mother, testified that after hearing from Allie, she confronted Mary about defendant's actions. "[Mary] said that [defendant] put his -- he had put his weenie in her butt."

Because the evidence is sufficient for the jury to determine that defendant penetrated Mary's anus, the trial court did not err in denying defendant's motion to dismiss. Defendant's argument is overruled.

Next, defendant argues the trial court committed plain error by expressing its opinion while giving instructions to the jury in two regards: on the issue of "flight"; and in referring to the complainants as "victims." We disagree.

As previously stated under plain error review, the defendant has the burden of convincing this Court: "(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997) (citations omitted).

"Section 15A-1222 of the North Carolina General Statutes provides that [t]he judge may not express during any stage of the trial[] any opinion in the presence of the jury on any question of fact to be decided by the jury." *State v. Henderson*, 155 N.C. App. 719, 722, 574 S.E.2d 700, 703 (2003) (citation and internal quotation marks omitted). According to North Carolina General Statutes, section 15A-1232, "[i]n instructing the jury, the judge shall not express an opinion as to whether or not a *fact* has been proved" N.C. Gen. Stat. § 15A-1232 (2009) (emphasis added). "There must be no indication of the judge's opinion upon the facts, to the hurt of either party, either directly or indirectly, by words or

conduct." *State v. Benton*, 226 N.C. 745, 749, 40 S.E.2d 617, 619 (1946) (citation and quotation marks omitted).

Defendant contends that the trial court expressed its opinion while giving the jury an instruction regarding flight and in doing so emphasized the State's theory that defendant acknowledged guilt by fleeing to California. The trial court instructed the jury as follows:

[t]he State contends that the defendant fled. Evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show a consciousness of guilt. However, proof of this circumstance is not sufficient in itself to establish the defendant's guilt.

(Emphasis added).

We conclude that this jury instruction is not an opinion as defined by N.C.G.S. § 15A-1232 nor does it demonstrate a lack of impartiality by the trial court. Instead, the trial court merely stated that flight is a matter for the jury to consider. See *State v. Canipe*, 240 N.C. 60, 65, 81 S.E.2d 173, 177 (1954) ("Whether the conduct or the language of the judge amounts to an expression of his opinion on the facts is to be determined by its probable meaning to the jury, and not by the motive of the judge." (citations omitted)). Further, our Supreme Court has stated that "[s]o long as there is some evidence in the record reasonably supporting the theory that defendant fled after

commission of the crime charged, the instruction is properly given." *State v. Green*, 321 N.C. 594, 607, 365 S.E.2d 587, 595 (1988) (quoting *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977)).

Here, there is ample evidence in the record to show that defendant went to California shortly after the allegations against him were made. Although defendant offered evidence that he went to California for multiple reasons, "[t]he fact that there may be other reasonable explanations for defendant's conduct does not render the instruction improper." *Id.* (quoting *Irick*, 291 N.C. at 494, 231 S.E.2d at 842). Therefore, defendant's argument regarding the flight instruction is overruled.

Defendant also contends the trial court expressed its opinion by using the term "victim" while instructing the jury on first-degree sexual offense. The trial court stated:

The defendant has been charged with three counts of committing a first-degree sexual offense with a child. For you to find the defendant guilty of these offenses, the State must prove three things beyond a reasonable doubt for each offense:

First, that the defendant engaged in a sexual act with the *victim*. The sexual act means anal intercourse, which is any penetration, however slight, of an anus of any person by the male sexual organ of another. A sexual act also means any penetration, however slight, by an object into the genital opening of a person's body.

Second, that at the time of the act, the *victim* was a child under the age of 13 years.

And, third, that at the time of the act, the defendant was at least 18 years of age. If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant engaged in a sexual act with the *victim*, who was a child under the age of 13 years, and that the defendant was at least 18 years of age, it would be your duty to return a verdict of guilty.

(Emphasis added).

Defendant demands a new trial, asserting that the use of the term "victim" by the trial court was error. However, defendant cites to no authority where our Courts have held the trial court's use of the term "victim" to be reversible error. While defendant cites to a number of cases where our courts have found reversible error when the trial court improperly expressed an opinion on the evidence, *see, e.g., State v. McEachern*, 283 N.C. 57, 194 S.E.2d 787 (1973) (ordering a new trial where the trial court asked complainant in a rape case "you were in the car when you were raped?"), and *State v. Bray*, 37 N.C App. 43, 245 S.E.2d 190 (1978) (finding prejudicial error and ordering a new trial where the trial court, in instructing the jury, erroneously stated the defendants confessed to the crime charged), these cases are all inapposite since none address the trial court's use of the term "victim."

While defendant argues that the use of the word "victim" amounted to an opinion by the trial court, "[t]he 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." *Henderson*, 155 N.C. App. at 723, 574 S.E.2d at 703-04 (quoting *State v. Richardson*, 112 N.C. App. 58, 67, 434 S.E.2d 657, 663 (1993)); see also *State v. Allen*, 92 N.C. App. 168, 171, 374 S.E.2d 119, 121 (1988) ("By his use of the term "victim," the trial judge was not intimating that defendant had committed any crime."). Accordingly, the trial court did not err by using the term "victim" in its jury instruction and defendant's argument is therefore overruled.

Defendant also alleges that he has been denied the effective assistance of counsel based on trial counsel's failure to object to these jury instructions. We disagree.

Ineffective assistance of counsel claims are measured by the two-prong test in *Strickland v. Washington*. 466 U.S. 668, 80 L. Ed. 2d 674 (1984). The test developed in *Strickland* requires defendant to demonstrate first "that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687, 80 L. Ed. 2d at 693. If defendant illustrates that

counsel's performance was "deficient" under the *Strickland* test, then defendant "must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* To establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 80 L. Ed. 2d at 698.

Because defendant can establish neither deficient performance by counsel nor prejudice defendant is unable to sustain a valid ineffective assistance of counsel claim. See *id.* at 687, 80 L. Ed. 2d at 693. Thus, defendant's arguments are overruled.

V

Defendant's last argument is that the trial court erred in ordering lifetime satellite-based monitoring. We agree.

Defendant's eligibility for satellite-based monitoring is controlled by North Carolina General Statutes, section 14-208.40A, which provides, in pertinent part:

(a) When an offender is convicted of a reportable conviction as defined by G.S. 14-208.6(4), during the sentencing phase, the district attorney shall present to the court any evidence that (i) the offender has been

classified as a sexually violent predator pursuant to G.S. 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, (iv) the conviction offense was a violation of G.S. 14-27.2A or G.S. 14-27.4A, or (v) the offense involved the physical, mental, or sexual abuse of a minor. The district attorney shall have no discretion to withhold any evidence required to be submitted to the court pursuant to this subsection.

The offender shall be allowed to present to the court any evidence that the district attorney's evidence is not correct.

(b) After receipt of the evidence from the parties, the court shall determine whether the offender's conviction places the offender in one of the categories described in G.S. 14-208.40(a), and if so, shall make a finding of fact of that determination, specifying whether (i) the offender has been classified as a sexually violent predator pursuant to G.S. 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, (iv) the conviction offense was a violation of G.S. 14-27.2A or G.S. 14-27.4A, or (v) the offense involved the physical, mental, or sexual abuse of a minor.

(c) If the court finds that the offender has been classified as a sexually violent predator, is a recidivist, *has committed an aggravated offense*, or was convicted of G.S. 14-27.2A or G.S. 14-27.4A, the court shall order the offender to enroll in a satellite-based monitoring program for life.

N.C. Gen. Stat. § 14-208.40A (2011) (emphasis added).

Here, the trial court ordered lifetime satellite-based monitoring in accordance with its findings that defendant was

convicted of a sexually violent offense as defined in N.C.G.S. § 14-208.6(5) and also that the offense was an aggravated offense as defined in N.C.G.S. § 14-208.6(1a). A sexually violent offense, as defined in section 14-208.6(5) includes a violation of N.C.G.S. § 14-27.4, which states that "[a] person is guilty of a sexual offense in the first degree if the person engages in a sexual act: (1) [w]ith a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim" N.C.G.S. § 14-27.4(a)(1) (2011). General Statutes, section 14-208.6(1a) defines an "aggravated offense" as any criminal offense that includes either of the following: "(i) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim of any age through the use of force or the threat of serious violence; or (ii) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim *who is less than 12 years old.*" N.C.G.S. § 14-208.6(1a) (2011) (emphasis added).

However, and as the State recognizes in its brief, we have held in numerous cases recently that a conviction of first-degree sexual offense under N.C.G.S. § 14-27.4(a)(1) is not an aggravated offense within the meaning of N.C.G.S. § 14-208.6(1a) because "a child under the age of 13 is not necessarily also a child less than 12 years old" *State v. Santos*, ___ N.C. App. ___, ___, 708 S.E.2d 208, 212 (2011) (citation omitted);

see also *State v. Treadway*, ___ N.C. App. ___, 702 S.E.2d 335 (2010). Further, we have also held that

in determining whether a defendant's conviction offense qualifies as an aggravated offense for purposes of N.C. Gen. Stat. § 14-208.40A, the trial court is only permitted to consider the elements of the offense for which the defendant has been convicted and is not to consider the underlying factual scenario giving rise to the conviction. As a result, in order for a trial court to conclude that a conviction offense is an aggravated offense under [N.C. Gen. Stat. § 14-208.40A,] . . . the elements of the conviction offense must fit within the statutory definition of aggravated offense.

State v. Clark, ___ N.C. App. ___, ___, 714 S.E.2d 754, 762 (2011) (original brackets) (citation and quotations omitted).

Accordingly, the trial court's order finding defendant's conviction for first-degree sexual offense pursuant to N.C.G.S. § 14-27.4(a)(1) to be an aggravated offense and requiring defendant to register as a sex offender for life, as well as, submit to a satellite-based monitoring program for life is vacated. Based on our decision, we also remand so that the trial court may determine whether the conviction involved the physical, mental, or sexual abuse of a minor. See N.C.G.S. § 14-208.40A(d). If so, the trial court must order a risk assessment of defendant by the Department of Corrections. *Id.*

No error in part; Vacated in part; and Remanded in part.

Judges CALABRIA and STROUD concur.

Report per Rule 30(e).