IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1393

Filed: 2 October 2018

New Hanover County, Nos. 13 CRS 60326-28; 14 CRS 6398

STATE OF NORTH CAROLINA

v.

ROBERT THOMAS POLE

Appeal by Defendant from judgments entered 19 May 2017 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 22 August 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General John F. Oates, Jr., for the State.

Mark Montgomery for defendant-appellant.

ZACHARY, Judge.

Defendant Robert Thomas Pole appeals from judgments entered upon jury verdicts finding him guilty of one count of statutory sexual offense with a minor, one count of taking indecent liberties with a child, and three counts of first-degree sexual exploitation of a minor. Defendant argues that the trial court erred in denying his motion to suppress, in admitting the lay opinion testimony of two detectives, and in

denying his motion to prohibit the use of the term "victim" to describe the complaining witness. For the reasons set forth below, we find no error.

Background

In August 2014, the New Hanover County Grand Jury indicted Defendant for one count of statutory sexual offense with a minor, one count of taking indecent liberties with a child, and three counts of first-degree sexual exploitation of a minor. The charges against Defendant came on for trial at the 15 May 2017 criminal session of New Hanover County Superior Court, the Honorable Phyllis M. Gorham presiding. The jury returned guilty verdicts on all counts charged. Defendant appeals.

A. Evidence Presented at Trial

At trial, the State presented evidence tending to establish the following facts: In 2013, Holly,[1] a 15-year-old girl, lived with her mother in Brunswick County, North Carolina. In September 2013, Holly met Defendant through Craigslist when she responded to an advertisement placed by Defendant. Defendant solicited someone to provide child care for his three-year-old son and clean the house. Defendant and Holly arranged to meet for the first time at the Fort Fisher Ferry and they went to a zoo with Defendant's three-year-old son for a "trial run." Holly immediately started working for and living with Defendant in his trailer. While Holly initially told

[1] We use pseudonyms for ease of reading and to protect the identity of the complainant.

Defendant she was 17 years old, he found out eventually that she was actually 15 years old.

Holly soon discovered Defendant ran a "topless cleaning service" called "French Maids" or "Fantasy Maids." Defendant would send women to the homes of clients and they would "take their clothes off and clean." The women would sometimes have sex with the clients. Defendant would take thirty percent of the money and pay the remainder to the women in either pills or cash. Holly testified that Defendant sent her on approximately seven or eight of these jobs and on one occasion she had sex with one of Defendant's clients.

Defendant would give Holly alcohol and pills such as Xanax and hydrocodone. Holly testified that she and Defendant had a sexual relationship while she lived with him and that they engaged in oral, vaginal, and anal sex. Defendant took videos and still photographs with his cell phone of Holly performing oral sex on him. These videos and photographs were admitted into evidence over Defendant's objection. During one of these videos, Holly is heard saying, "I didn't even want to do this in the first place, this is the only way I could get my moped and my phone back[.]" Holly testified that she was the woman in the video and that Defendant was the man in the video. Additionally, Detective Sellers and Detective Womble both testified that the voice on the video was Defendant's. While Defendant objected to this testimony from Detective Sellers, he failed to object to the same testimony from Detective Womble.

Brittany Meyer, another young woman who lived with and worked for Defendant, also testified about the Fantasy Maids business, which she stated involved her having sex with clients. She testified that Holly lived with Defendant, Defendant told her about his sexual relationship with Holly, and Defendant knew Holly was 15 years old. She also testified Defendant told her, "[Holly] was okay with a daddy-daughter fantasy," which Defendant "really liked[.]" Brittany further testified that Defendant provided all of the young women or girls living there, including Holly, with alcohol and prescription pills.

On 17 November 2013 or 18 November 2013, Defendant made piña coladas for Holly and her friend, who was about 17 years old. After the girls each drank one piña colada, Defendant gave both of them two of what he said were hydrocodone pills. The girls each took one pill and then Holly blacked out or lost consciousness. When Holly regained consciousness, she was in her room and Defendant was on top of her "having sex with [her]." After telling Defendant to get off of her and pushing him off, Holly went to find her friend, who was passed out on the couch with her shorts on inside out and backwards. At first, Defendant would not let Holly leave, but eventually the girls "snuck out" of Defendant's trailer and Holly's mother picked them up. After getting back to Holly's mother's home, the girls walked to the hospital; however, Holly left after hospital staff informed her there likely was no physical evidence of assault remaining after the passage of a few days. Later that night, law enforcement officers

and employees of the Department of Social Services came to her mother's home to talk with Holly. As a result of interviews with Holly and her friend, detectives from the Brunswick County Sheriff's Office began investigating Defendant.

Various text messages sent from Defendant's phone were also admitted into evidence over Defendant's objection. These text messages included messages from Defendant to clients with pictures of Holly in a bikini. One outgoing message from 3 October 2013 stated, "Had to go home and do [Holly], she was begging for me to give her some." One outgoing message from 22 October 2013 stated, "Hey, this is Bob. [Holly] is 15. That's why I tried to tell Mike he's f[***]ing up. Also from what I understand, [Holly's] dad called child services on her mom." Another outgoing message stated, "You guys don't need the trouble or drama. That's why she keeps going for older guys and bad boys her own age to get back at her parents. Typical 15-year-old game."

Photographs of Defendant's body were also admitted into evidence over Defendant's objection. In the images from Defendant's cell phone, the male receiving oral sex from Holly had a mole or "skin abnormality" "[w]here the leg meets the body, in the genital area." The images that law enforcement officers took of Defendant revealed that he has a mole in the same location.

B. Law Enforcement Investigation

Prior to trial, Defendant filed a motion to suppress "any and all evidence seized from the Defendant, Defendant's residence, and Defendant's vehicle pursuant to an illegal detention, search, and seizure of the Defendant and his vehicle, and the execution of an illegal search warrant." After a hearing, the trial court denied Defendant's motion.

The evidence at the pre-trial hearing established the following facts: After conducting interviews with Holly and her friend about the night of the sexual encounter between Holly and Defendant in November 2013, detectives from the Brunswick County Sheriff's Office applied for and were issued a search warrant by Superior Court Judge Ebern Watson on 22 November 2013 at 2:10 p.m. The New Hanover County Sheriff's Office received the warrant at approximately 3:17 p.m. Pursuant to the search warrant, the premises to be searched included Defendant's residence, Defendant's person, a "White Trans Am with Blue Flames, and a Black Mercedes." The items to be seized were a cell phone with a green and white case, an iPad with a blue case, a laptop with other computer equipment or other electronic storage devices, and a silver handgun with a wooden handle.

On 22 November 2013, Detective Lisa Hudson of the New Hanover County Sheriff's Office was conducting surveillance on Defendant and his residence while officers awaited the issuance of the warrant. She observed Defendant leave his residence and drive away in a white Trans Am. Detective Hudson followed him in

her vehicle. After following him for less than five miles, Detective Hudson received instructions to "go ahead and stop the vehicle, the search warrant is in hand." After running the tag on the vehicle and confirming that the vehicle was registered to Defendant, Detective Hudson initiated a traffic stop. Detective Hudson then approached Defendant's vehicle, explained to him that a search warrant was about to be executed at his residence, and asked him whether he would "like to come back to the residence . . . so that the lead detective could explain . . . the search warrant to him." Defendant told her he wanted to go back to his residence; she asked him if he would like to ride back in her car and Defendant said yes. Detective Hudson then drove back to Defendant's residence with Defendant sitting in the front passenger seat. While driving, Detective Hudson observed Defendant using a cell phone with a green and white case. She knew that this cell phone was listed in the search warrant as an item to be seized, so she asked Defendant to "please not go into the cell phone[] because that is part of the search warrant." Defendant put down the cell phone. During and immediately after the initial stop, no search was conducted of Defendant or his vehicle.

After Detective Hudson and Defendant reached Defendant's residence, Detective Amy Womble of the New Hanover County Sheriff's Office read the search warrant to Defendant and provided him with a copy. Additionally, Defendant signed a form consenting to a search of the cell phone.

Discussion

I. Motion to Suppress

Defendant argues that the trial court erred by denying his motion to suppress the evidence obtained from the search of Defendant and the search and seizure of Defendant's cell phone. Specifically, Defendant contends that the search warrant lacked probable cause as to Defendant's person and that the initial stop of Defendant's vehicle was unconstitutional. Defendant claims these errors are a violation of the Fourth Amendment of the United States Constitution and Article I, §§ 19 and 23 of the North Carolina Constitution. This argument is without merit.

On appeal, this Court reviews the denial of a motion to suppress to determine "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011). When the trial court's findings of facts are not challenged on appeal they are deemed conclusive and binding. *Id.* at 168, 712 S.E.2d at 878. We review *de novo* the trial court's conclusions of law. *Id.* "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* (internal quotation marks omitted).

A. Validity of the Search Warrant

First, we address whether the search warrant issued for Defendant's person was supported by probable cause.

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. "Probable cause for a search is present where facts are stated which establish reasonable grounds to believe a search of the premises will reveal the items sought and that the items will aid in the apprehension or conviction of the offender." *State v. Fernandez*, 346 N.C. 1, 13, 484 S.E.2d 350, 358 (1997). Whether a search warrant is supported by probable cause is a question to be determined by the "totality of the circumstances." *Illinois v. Gates*, 462 U.S. 213, 238, 76 L. Ed. 2d 527, 548 (1983); *State v. Arrington*, 311 N.C. 633, 641, 319 S.E.2d 254, 259 (1984). The issuing judicial official must make a practical, common sense decision whether, given all the information provided to the issuing official, there is a fair probability that evidence of a crime will be found in a particular place. *See Gates*, 462 U.S. at 238, 76 L. Ed. 2d at 548. A reviewing court employing the totality of the circumstances test must ensure the issuing official had a substantial basis for concluding that probable cause existed. *Id.*; *see also State v. Pickard*, 178 N.C. App. 330, 334, 631 S.E.2d 203, 207, *disc. rev. denied*, 361 N.C. 177, 640 S.E.2d 59 (2006).

In North Carolina, applications for a search warrant must contain the following:

> (1) The name and title of the applicant; and
>
> (2) A statement that there is probable cause to believe that items subject to seizure under [N.C. Gen. Stat. §] 15A-242 may be found in or upon a designated or described place, vehicle, or person; and
>
> (3) Allegations of fact supporting the statement. The statements must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched; and
>
> (4) A request that the court issue a search warrant directing a search for and the seizure of the items in question.

N.C. Gen. Stat. § 15A-244 (2017).

In the present case, the affidavit in support of the search warrant was based on interviews the officers conducted with Holly and her friend concerning the night of 17 November 2013. It alleged the following facts: On 17 November 2013, Holly and her 17-year-old friend had alcoholic drinks with Defendant and then fell asleep in Holly's bedroom. At some point during the night, Holly woke up to find Defendant on top of her while he "vaginally penetrat[ed] her with his penis and fingers." Holly told Defendant to get off of her and "after a minute[,]" he complied. After Defendant left the room, Holly went to the living room and found her friend asleep on the couch with her pants on backwards. The girls went back into her bedroom and they stayed there for the rest of the night. On 19 November 2013, the girls attempted to leave

Defendant's residence, but he "stood in front of the door, refusing to let both [girls] leave his residence." Holly's friend told the police that later that night Defendant "used a silver handgun with a wooden handle to force [the girls] to take the pictures with each other," and that he also took pictures with his cell phone. The girls described Defendant's cell phone as a "large, open face style phone with a green and white case." Holly's friend also stated that Defendant "forced her to perform oral sex on him as he took photos of her performing the sexual act." Defendant told the girls that he would use the photos of them to advertise his "topless maids" business on Craigslist, which Defendant conducted using his iPad and laptop.

The extensive investigation and interviews conducted by the officers produced information establishing more than reasonable grounds to believe a search of Defendant's person would produce the items listed in the warrant. The affidavit submitted to obtain the search warrant was three pages long and "provide[d] a substantial basis for concluding that probable cause exists." *Pickard*, 178 N.C. App. at 334, 631 S.E.2d at 207. As the State noted in its brief, the cell phone was alleged to contain incriminating photos, the cell phone was listed as one of the items to be seized, and common sense dictates that Defendant's cell phone would most likely be located on his person. Accordingly, the search warrant was based on probable cause.

B. Validity of the Traffic Stop

Defendant also contends that the initial stop of Defendant's vehicle was unconstitutional. We disagree.

Under North Carolina law, police officers may stop a motor vehicle for a variety of reasons. Law enforcement officers are authorized to stop a person in a vehicle in order to serve various kinds of legal process such as criminal summonses, N.C. Gen. Stat. § 15A-303 (2013), citations, *id.* § 15A-302, nontestimonial identification orders, *id.* § 15A-277, subpoenas, *id.* §§ 15A-801, -802; 1A-1, Rule 45(e), and any other kind of legal process that does not permit officers to take a person into custody. Robert L. Farb, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA 51 (5th ed. 2016).

In the trial court's order denying Defendant's motion to suppress, the trial court found as follows:

> Based upon the evidence presented at the hearing and arguments of counsel, this [c]ourt finds that [Detective] Hudson had knowledge that a judicial official had executed a lawful search warrant that included the search of the [D]efendant . . . and his residence, to search and seize a cell phone in a green and white case. Law enforcement officers are authorized to stop a person to serve various legal process, including but not limited to criminal summonses, orders and warrants for arrest, citations, subpoenas, [and] nontestimonial identification orders. [Defendant] voluntarily returned to his residence, less than five minutes away, to be served the search warrant. In addition, the [D]efendant also voluntarily gave permission for the Sheriff's Office to seize and search the cell phone in question.[2]

[2] The trial court's order denying Defendant's motion to suppress did not differentiate between findings of fact and conclusions of law. Further, this statement of the trial court is arguably a

Defendant did not challenge the trial court's findings of fact and thus they are deemed conclusive and binding. The evidence at the hearing revealed that Detective Hudson, who stopped Defendant's car after the search warrant was signed, had knowledge that there was a search warrant for Defendant, Defendant's residence, and Defendant's cell phone. Defendant voluntarily returned to his residence, and no search or seizure took place until he was back at his residence and had been served with the search warrant by Detective Womble.

Nevertheless, Defendant asserts that his Fourth Amendment rights were violated, as found in *Bailey v. United States*, 568 U.S. 186, 185 L. Ed. 2d 19 (2013). In *Bailey*, law enforcement officers were preparing to execute a search warrant to search a basement apartment for a handgun after "[a] confidential informant . . . told police he observed the gun when he was at the apartment to purchase drugs from 'a heavy set black male with short hair' known as 'Polo.' " *Id.* at 190, 185 L. Ed. 2d at 26-27. While awaiting the execution of the search warrant, two detectives surveilling the residence observed two men matching the confidential informant's description of "Polo" "leave the gated area above the basement apartment and enter a car parked in the driveway." *Id*. The detectives informed the search team that they planned to follow and detain the two men and then followed the car for approximately a mile

---

combined finding of fact and conclusion of law. "Regardless of how they may be labeled, we treat findings of fact as findings of fact and conclusions of law as conclusions of law for purposes of our review." *Barnette v. Lowe's Home Centers, Inc.*, 247 N.C. App. 1, 6, 785 S.E.2d 161, 165 (2016).

before pulling it over. *Id*. As they did this, "the search team executed the search warrant at the apartment." *Id*. The detectives then ordered the men to exit the vehicle and conducted a pat down search. *Id*. During the pat down search, detectives found and seized a key to the apartment being searched. *Id*. In addition, defendant's passenger told the detectives that "[defendant] was giving him a ride home and confirmed they were coming from [defendant's] residence at 103 Lake Drive[,]" the address for the basement apartment. *Id*. at 191, 185 L. Ed. 2d at 27.

At trial, the evidence was admitted over defendant's objection. On appeal, the Supreme Court held that the detention, or seizure, of these individuals violated the Fourth Amendment because none of "the special law enforcement interests"[3] that made "[d]etentions incident to the execution of a search warrant" reasonable were at stake where the "individual[s] ha[d] left the immediate vicinity of [the] premises to be searched." *Id*. at 202, 185 L. Ed. 2d at 34.

Bailey is clearly distinguishable from the present case. In *Bailey*, there was no search warrant issued for the persons searched and seized. Here, by contrast, a valid search warrant had been issued to search Defendant's person. As already determined, the search warrant was issued based upon probable cause. We can easily conclude that the traffic stop was not a violation of the Fourth Amendment because the stop was initiated to effectuate service of the search warrant. Moreover, in *Bailey*

[3] "Special law enforcement interests" include officer safety, facilitating the completion of the search, and preventing flight. *Bailey*, 568 U.S. at 194, 185 L. Ed. 2d at 29.

the men were ordered to exit their vehicle, patted down, handcuffed, and arrested. In the present case, Defendant was merely asked if he wanted to return to his residence because of the search warrant, and then voluntarily rode back to his residence with the detective in the front passenger seat of her vehicle. He was also not subjected to any search during the stop or the drive back to his residence. Accordingly, the traffic stop did not violate the Fourth Amendment of the United States Constitution or Article I, §§ 19 and 23 of the North Carolina Constitution.

II. Lay Witness Testimony

Defendant next contends that the trial court erred by admitting certain lay opinion testimony from Detectives Sellers and Womble identifying Defendant's voice in videos admitted into evidence. We disagree.

When properly preserved, objections to the admission of lay opinion testimony are reviewed for an abuse of discretion. *State v. Collins*, 216 N.C. App. 249, 254, 716 S.E.2d 255, 259 (2011). A trial court abuses its discretion when "the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Ward*, 364 N.C. 133, 139, 694 S.E.2d 738, 742 (2010). However, where a party does not object at trial, plain error is the proper standard of review. *State v. Odom*, 307 N.C. 655, 656, 300 S.E.2d 375, 376 (1983). Regarding plain error review, our Supreme Court has explained:

> 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 affects the fairness, integrity or public reputation of judicial proceedings[.]

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

Defendant concedes that, while he objected at trial to the admission of Detective Sellers' testimony identifying Defendant's voice in the videos, he failed to object to this same testimony from Detective Womble. We therefore review the admission of Detective Womble's testimony for plain error and the admission of Detective Sellers' testimony for abuse of discretion.

Lay witness "testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2017). Generally, lay opinion testimony identifying the defendant from audio or video recordings is allowed "where such testimony is based on the perceptions and knowledge of the witness, the testimony would be helpful to the jury in the jury's fact-finding function rather than invasive of that function, and the helpfulness outweighs the possible prejudice to the

defendant from admission of the testimony." *State v. Buie*, 194 N.C. App. 725, 730, 671 S.E.2d 351, 354-55, *disc. rev. denied*, 363 N.C. 375, 679 S.E.2d 135 (2009).

In support of his argument, Defendant cites this Court's opinion in *State v. Belk,* 201 N.C. App. 412, 689 S.E.2d 439 (2009), *disc. rev. denied*, 364 N.C. 129, 695 S.E.2d 761 (2010). In *Belk*, the trial court admitted a police officer's lay opinion testimony identifying the defendant as the person depicted in video surveillance footage. *Id.* at 414, 689 S.E.2d at 441. On appeal, this Court held the trial court erred because "there was no basis for the trial court to conclude that the officer was more likely than the jury correctly to identify Defendant as the individual in the surveillance footage." *Id.* at 418, 689 S.E.2d at 443.

The testimony of Detectives Sellers and Womble identifying Defendant's voice on a video was admissible lay opinion testimony and it was not error or plain error for the trial court to admit this evidence. Detectives Sellers and Womble both had ample prior opportunities, through interviews and other interactions, to speak with Defendant before identifying Defendant's voice on the video admitted into evidence. Thus, their testimony identifying Defendant's voice was based on their past perceptions and first-hand knowledge of the Defendant's voice and would have been helpful to the jury. *Buie*, 194 N.C. App. at 730, 671 S.E.2d at 354-55. Accordingly, we hold that the admission of this testimony was not error.

III. Motion to Prohibit Use of the Term "Victim"

Defendant finally asserts that the trial court erred by denying his motion to prohibit the use of the term "victim" to refer to Holly, the complaining witness. This argument is without merit.

Before the trial, Defendant's counsel requested that the trial court not use the term "victim" in reference to Holly. The trial court denied this request. In the trial court's instructions to the jury on the statutory sex offense charge, the trial court used the term "victim" when referring to Holly. As our Supreme Court has declared several times, the "use of the word 'victim' in the jury charge [is] not improper[]" and "[b]y using the term 'victim,' the trial court [is] not intimating that the defendant committed the crime." *State v. Hill*, 331 N.C. 387, 412, 417 S.E.2d 765, 777 (1992) (citation omitted); *see also State v. Walston*, 367 N.C. 721, 731-32, 766 S.E.2d 312, 319 (2014); *State v. Gaines*, 345 N.C. 647, 675, 483 S.E.2d 396, 413 (1997). In *Walston*, our Supreme Court declared in *dicta* that "when the State offers no physical evidence of injury to the complaining [witness] and no corroborating eyewitness testimony, the best practice would be for the trial court to modify the pattern jury instructions at defendant's request to use the phrase 'alleged victim' or 'prosecuting witness' instead of 'victim.' " *Walston*, 367 N.C. at 732, 766 S.E.2d at 319. Here, however, the State presented ample physical evidence of injury to the victim at trial, including the video of Holly performing oral sex on Defendant while she was a minor. "Accordingly, we

hold that the trial court did not err in using the word 'victim' in the pattern jury instructions to describe the complaining witness." *Id*.

IV. Ineffective Assistance of Counsel

Regarding all claimed errors, Defendant argues in the alternative that "if [this] Court determines that [Defendant's] trial counsel failed to preserve this issue for appellate review, [then] this Court should review the record *de novo* to determine whether trial counsel was constitutionally ineffective." In that we hold that the trial court committed no error below, we do not address this issue.

Conclusion

For the reasons stated herein, we conclude that Defendant received a fair trial, free from error.

NO ERROR.

Judges STROUD and MURPHY concur.

Report per Rule 30(e).