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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-955

Filed: 7 May 2019

Onslow County, No. 17 CRS 51429

STATE OF NORTH CAROLINA

v.

RONALD ALAN ZEY

Appeal by defendant from judgments entered 11 May 2018 by Judge Marvin K. Blount III in Onslow County Superior Court. Heard in the Court of Appeals 28 February 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Laura H. McHenry, for the State.

Richard Croutharmel for defendant-appellant.

ZACHARY, Judge.

Defendant Ronald Alan Zey appeals from judgments entered upon jury verdicts finding him guilty of three counts of statutory sex offense with a person who is 15 years of age or younger and two counts of taking indecent liberties with a child. Defendant argues that the trial court committed plain error when it denied his motions to suppress and thereafter admitted into evidence (1) items obtained from

his home pursuant to a search warrant, and (2) statements that he made to police during their execution of the search warrant. Because Defendant cannot establish prejudice, we find no plain error.

Background

On 9 January 2018, Defendant was indicted for six counts of statutory sex offense with a person who is 15 years of age or younger and six counts of taking indecent liberties with a child. The offense dates were listed as 1 January 2017 through 31 January 2017 and 1 February 2017 through 5 March 2017. Defendant was tried before the Honorable Marvin K. Blount in Onslow County Superior Court beginning on 7 May 2018.

I. Evidence Presented at Trial

The evidence at trial tended to show that sometime in January 2017, when the victim was 14 years old, she and her friend were "prank calling" random phone numbers, and Defendant's "happened to be one of them." Defendant answered the phone and asked the victim and her friend what they looked like. The girls took a picture together and sent it to Defendant, and he told the victim that she "was pretty." Defendant and the victim continued to exchange text messages for about a week thereafter, before ultimately meeting in person. Defendant was approximately 50 years old at the time.

When they first met, Defendant picked the victim up in his van and "asked if [she] could go in his garage with him." The victim "thought it was weird," but went with Defendant anyway. She testified that while there, Defendant took her clothes off and "touched [her] . . . [o]n [her] private areas," and that she "put his privates in [her] mouth." The victim additionally testified that Defendant "kissed [her] on [her] private and on [her] mouth . . . [m]ore than one time" and "rubbed [his penis] on [her vagina]." Thereafter, the victim told the jury that she and Defendant continued to meet "again and again, repeatedly," and that they did "the same thing" each time, never having vaginal intercourse. Although the victim initially told Defendant that she was 16 years old, the pair continued to have sexual contact "[m]ore than one time" after the victim told him that she was, in fact, only 14 years old.

Defendant also testified at trial and described to the jury his first time meeting the victim:

> She texted me that she needed a ride to school, because she couldn't—she didn't have a ride, and she was kicked off her bus. And I said, "Okay, I can pick you up at 6:15, and then I can—we can go back—go back over to my house and go back in the garage and get warm and lay down and get comfortable." And that way, when it was time for her to go to school, she could walk right down, because I lived right down the street from the school, and she could walk there without any problem.
>
> . . . .
>
> [DEFENSE COUNSEL:] And where did you pick her up from?

A. The McDonalds . . .

. . . .

Q. And who made the suggestion to go to your garage?

A. I did, sir.

Q. And isn't that kind of weird? How do you make a suggestion to go to a garage?

A. Well, I didn't—I didn't know where else to take her. . . . So I suggested, because of the way things were going, the way things—we were talking, we would just go in the garage and cuddle together and hold each other, and just—

Q. What do you mean, the way things were going, the kind of things you talked—

A. We were talking about sexy stuff, sexual stuff, and she also was texting me about things that were going on at her house, and I felt bad for her. I wanted her to feel safe, because she kept indicating to me that she didn't feel safe in her house. . . . I was not in a proper state of mind because of the stress in my relationship with my wife. . . . we were just kind of coexisting in the same house. . . . Sex life was pretty much no good . . . . and this intrigued me to maybe have—you know, to experience something that I wasn't getting, that I didn't have. . . .

Q. Okay. When you suggested to go to your garage and she agreed, was there any inkling, expectation that something sexual might occur between the two of you?

A. Yes. . . .

. . . .

> Q. Once you got inside, what happened?
>
> A. I put a blanket down, . . . and we just laid down and just started to— . . . one thing led to another. You know, we started kissing each other and holding onto each other, and we started to have—play with each other, with our clothes on, and it led to taking her clothes off and me taking my clothes off, and having oral sexual contact.
>
> Q. Okay. Let's be specific. The first time you ended up in your garage with [the victim], did anything sexual occur, the first time?
>
> A. The very first time?
>
> Q. Right?
>
> A. Yes, sir.
>
> Q. It did or it didn't?
>
> A. It did.
>
> . . . .
>
> Q. At some point, did she tell you she was 14?
>
> A. Yes. A little later on, yes.
>
> Q. And was that after you had already had some sexual encounters with her, already?
>
> A. Yes, yes. That was—I'm not exactly sure how long it was. Probably a couple of weeks that she told me that. And by then, I was so—I was in—she had got me in so deep, I couldn't—there was no way I could get back out of it. . . .

On 5 March 2017, after looking through the victim's phone, the victim's mother discovered her daughter's relationship with Defendant and called the police. Officer

Ryan Bosquet of the Jacksonville Police Department traveled to their home for an initial report. During the visit, Officer Bosquet collected the victim's cell phone.

At trial, the State introduced into evidence approximately 1,725 text messages that the victim and Defendant exchanged between 25 February and 5 March 2017. Officer Bosquet also testified and summarized his conversation with the victim and her mother for the jury:

> [The victim's mother] told me that her daughter and the subject she identified as [Defendant] that was saved as "Daddy" [in the victim's phone,] . . . had touched her on her bare breasts and had put his penis in her mouth, as well as his mouth on her vagina, and that he had repeatedly asked to have vaginal intercourse and she had not yet said, yes.

In addition, Officer Bosquet testified that the victim indicated that Defendant had "asked [her] for a pair of dirty panties so he could have those, and she had given him the same," and that "[s]he believed he kept them in his . . . garage."

II. Search Warrant and Motions to Suppress

Detectives filed a search warrant application for Defendant's home and garage on 6 March 2017. The application and attached affidavit stated that the victim had given Defendant a pair of underwear "described as multi-colored with a flower pattern on them" as well as a pair of socks "described as black in color . . . that have pink trim" that "were being kept inside the top right dresser drawer of a dresser that is located in [Defendant's] detached garage." While the application did not identify the ages of the victim or Defendant, it alleged that the articles of clothing, along with

Defendant's cell phone, "constitute[d] evidence of . . . Statutory Sexual Offense G.S. 14-27.7A(a), Indecent Liberties G.S. 14-202.1(b)." The magistrate issued the search warrant and detectives executed the search that same day.

Both Defendant and his wife were present during the search of their home. Upon arrival, Detective Julia Parrish asked Defendant if he knew why they were there, and Defendant indicated that he did. Detectives asked Defendant "if he would like to speak with [them] and advised him that he didn't have to, and [Defendant] advised that he was willing to talk." Detective Parrish and her partner proceeded to speak with Defendant in his living room while the other detectives searched the home. The detectives recorded their conversation with Defendant, and he also provided them with a written statement.

Neither of the detectives read Defendant his *Miranda* rights at any point during the conversation; however, Defendant was not under arrest when he gave his statements to detectives, nor was he handcuffed or otherwise physically restrained. Instead, Detective Parrish testified that "we let [Defendant] know that he was speaking with us at his own free will, and he advised that he was okay to talk with us."

Defendant's statements to detectives largely corroborated the victim's account of events. During their search, detectives also located and seized the victim's underwear and socks, as well as Defendant's cell phone.

Defendant filed pretrial motions to suppress both his written and oral statements to detectives, as well as the items recovered from the search of his home. Defendant argued that his statements required suppression because they were made while he was in custody, and the detectives had not read him his *Miranda* warnings. Defendant further argued that the items seized from his home required suppression because "the search warrant, when taken as a whole, [did] not provide a substantial basis to support the magistrate's finding of probable cause for the issuance of the search warrant." The trial court denied both of Defendant's motions to suppress, and Defendant failed to object when the State introduced the challenged evidence at trial.

The jury found Defendant guilty of three counts of statutory sex offense with a person who is 15 years of age or younger and two counts of taking indecent liberties with a child.[1] The trial court sentenced Defendant to three consecutive terms of 192 to 291 months in the custody of the North Carolina Division of Adult Correction. Defendant gave oral notice of appeal in open court.

Discussion

On appeal, Defendant argues that the trial court erred in denying his pretrial motions to suppress evidence of (1) the items seized as a result of the search of his

[1] The State voluntarily dismissed three counts each of statutory sex offense with a person who is 15 years of age or younger and taking indecent liberties with a child. The jury found Defendant not guilty of one of the remaining three counts of taking indecent liberties with a child.

home, and (2) the statements that he made to detectives during the execution of the search warrant.

Defendant asserts that the evidence recovered from the search of his home required suppression because the search warrant application and supporting affidavit "failed to allege a crime and therefore lacked probable cause," in that they "failed to allege [the victim's] age or [Defendant's] age and therefore alleged nothing more than consensual sex between a man and a woman." In addition, Defendant argues that his statements to detectives required suppression because they "were the product of a custodial interrogation without the benefit of *Miranda* warnings."

However, because Defendant failed to object at the time this evidence was introduced at trial, his challenges thereto have not been preserved for appellate review. *State v. Williams*, 248 N.C. App. 112, 117, 786 S.E.2d 419, 424 (2016) ("A pretrial motion to suppress is not sufficient to preserve for appeal the question of admissibility of evidence where the defendant does not object at the time the evidence is offered at trial." (quotation marks omitted)). Nevertheless, Defendant argues that the trial court's denial of his motions to suppress, and subsequent admission of the challenged evidence, amounted to plain error.

Rule 10 of the North Carolina Rules of Appellate Procedure provides:

> 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). Our courts conduct plain error review "in cases in which the defendant assert[s] on appeal that the introduction of evidence and testimony violated [the defendant's] constitutional rights, despite the lack of an objection at trial." *State v. Stroud*, ___ N.C. App. ___, ___, 797 S.E.2d 34, 43 (2017) (citing *State v. Moore*, 366 N.C. 100, 105-06, 726 S.E.2d 168, 172 (2012) and *State v. Raines*, 362 N.C. 1, 16-17, 653 S.E.2d 126, 136 (2007)).

In order to establish plain error, the defendant "must establish prejudice—that, after examination of the entire record, the [alleged] error had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (quotation marks omitted). "The necessary examination is whether there was a '*probable* impact' on the verdict, not a *possible* one. In other words, the inquiry is whether the defendant has shown that, absent the [alleged] error, the jury probably would have returned a different verdict." *State v. Carter*, 366 N.C. 496, 500, 739 S.E.2d 548, 551 (2013) (internal citation and quotation marks omitted).

In the instant case, even assuming, *arguendo*, that it was error for the trial court to deny Defendant's motions to suppress, we conclude that any such error did not amount to plain error. Ample evidence of Defendant's guilt was presented at trial beyond that which Defendant challenges on appeal. The record therefore reveals that

the admission of the challenged evidence did not have a probable impact on the jury's finding that Defendant was guilty. *See Lawrence*, 365 N.C. at 519, 723 S.E.2d at 335 ("In light of the overwhelming and uncontroverted evidence, defendant cannot show that, absent the error, the jury probably would have returned a different verdict.").

The victim provided detailed testimony regarding her sexual encounters with Defendant. According to the victim, these encounters occurred "again and again, repeatedly," and they did "the same thing" each time. The victim also testified that the incidents took place both before and "[m]ore than one time" after she informed Defendant of her real age. The victim's initial statement to Officer Bosquet corroborated her account of the events at trial. The victim's testimony was also corroborated by Defendant's own testimony, in which he recounted the "very first time" that he engaged in sexual relations with the victim. After admitting that he had already "had some sexual encounters" with the victim before learning that she was 14 years old, Defendant explained that "by then, I was so—I was in—she had got me in so deep, I couldn't—there was no way I could get back out of it."

The victim's testimony was further corroborated by the voluminous number of text messages that she exchanged with Defendant during the period in question, including one in which Defendant stated, "I'll teach you more with sex, but you seem pretty good with that for being so young. LOL." In another exchange of text messages, the victim asked Defendant about the prospect of him buying her a new phone, to

which Defendant responded, "We go before I drop you off. You got to earn it. LOL." Thereafter, Defendant purchased the victim a phone. On 26 February 2017, Defendant texted the victim: "Wife's schedule change tomorrow. She working early morning till 11:30 a.m. Can you miss morning at school? I'll pick you up, like before." The victim answered in the affirmative, and Defendant responded, "Mmm. Okay. I can't wait. I want you in sexy panties so I can eat you with—with them on you." This encounter was corroborated by surveillance footage that showed Defendant dropping the victim back off at school around 11:00 a.m. on 27 February 2017.

In light of this "overwhelming and uncontroverted evidence," Defendant cannot establish that the jury probably would have returned different verdicts had his statements to detectives and the victim's underwear and socks been excluded from evidence. *Lawrence*, 365 N.C. at 519, 723 S.E.2d at 335. Accordingly, even if this Court were to assume that the trial court erred in denying Defendant's motions to suppress, Defendant cannot meet his burden of establishing plain error.

Conclusion

We conclude that Defendant received a fair trial, free from plain error.

NO ERROR.

Judges BERGER and HAMPSON concur.

Report per Rule 30(e).