IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-819

Filed: 4 June 2019

Gaston County, Nos. 16 CRS 63218; 17 CRS 2071, 2073

STATE OF NORTH CAROLINA

v.

JOSHUA IRAN QUEEN

Appeal by defendant from judgments entered 22 March 2018 by Judge Jeffrey P. Hunt in Gaston County Superior Court. Heard in the Court of Appeals 27 March 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sonya Calloway-Durham, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Katz, for defendant-appellant.

ZACHARY, Judge.

Defendant appeals from the trial court's judgments sentencing him upon his convictions for three counts of taking indecent liberties with a child. Defendant argues that the trial court committed plain error in admitting a portion of the victim's recorded interview in which she recounted statements that Defendant made to her to which she did not testify at trial, and in instructing the jury that it could consider the

recorded interview for its substantive truth. Defendant also argues that the trial court erred in enrolling him in satellite-based monitoring in the absence of evidence that Defendant was statutorily eligible for satellite-based monitoring, and in the absence of evidence that his enrollment would constitute a reasonable search under the Fourth Amendment. We conclude that the trial court did not commit plain error in admitting the challenged portions of the victim's recorded interview and in instructing the jury as to the permissible use of that interview. We reverse the trial court's satellite-based monitoring order.

Background

Defendant lived with his two biological daughters, Karen and Elise,[1] ages 15 and 8, respectively. On 14 November 2016, Defendant was indicted for one count of taking indecent liberties with a child for alleged conduct involving Karen. On 3 April 2017, Defendant was indicted for two additional counts of taking indecent liberties with a child for alleged conduct involving Elise.

The evidence presented at Defendant's trial tended to show that in 2015, Karen began reporting to her peers that Defendant was engaging in a pattern of inappropriate conduct toward her. The parents of one of Karen's friends contacted the authorities, and Karen thereafter participated in an interview at the children's advocacy center in October of 2015. Elise made similar allegations approximately one

[1] Pseudonyms are used to protect the identities of the minor victims.

year later, and also participated in an interview at the children's advocacy center in October of 2016.

Both Karen and Elise testified against Defendant at trial.[2] During her testimony, Karen described incidents of Defendant touching her breasts, reaching into her pants, showing his penis to her, and making inappropriate comments to her. Video recordings of both Karen's and Elise's interviews at the children's advocacy center were also played to the jury. During a portion of Karen's interview, she stated that Defendant would expose his penis while making lewd comments to her, including instructing her to "come play with this." Defendant did not object to the introduction of the recorded interviews, nor did he request that the trial court give a limiting instruction to the jury.

The jury found Defendant guilty of the one count of taking indecent liberties with a child as to Karen, and two counts of taking indecent liberties with a child as to Elise.[3] On 22 March 2018, the trial court sentenced Defendant to three consecutive terms of 16 to 29 months in the custody of the Division of Adult Correction. The trial court also ordered that Defendant enroll in satellite-based monitoring for a period of 30 years upon his release from prison. Defendant gave oral notice of appeal in open court from his judgment of conviction, and also filed written notice of appeal on 23

[2] Defendant's challenges on appeal only relate to his conviction for his conduct involving Karen.

[3] Defendant states that he was also indicted for a third count of taking indecent liberties with a child involving Elise, for which the jury found him not guilty, but those documents are not included in the record.

April 2018 from the trial court's order requiring him to enroll in satellite-based monitoring upon his release from imprisonment.

On appeal, Defendant argues that the trial court committed plain error in admitting portions of Karen's recorded interview that constituted non-corroborative hearsay testimony, and in instructing the jury that it could consider the recorded interview as substantive evidence. Defendant also argues that the trial court erred in enrolling him in satellite-based monitoring in the absence of evidence to support the statutorily required finding that Defendant necessitated the highest level of supervision and monitoring, and in the absence of evidence that his enrollment constituted a reasonable search under the Fourth Amendment.

Discussion

I.

Defendant first argues that the trial court committed plain error when it admitted the portion of Karen's recorded interview in which she stated that Defendant would expose his penis and say "come play with this." Defendant contends that the trial court should have excluded this statement because it was not admissible as substantive evidence and was not otherwise admissible as corroborative evidence, in that Karen did not testify at trial that Defendant made that statement. We disagree that this evidence was inadmissible.

"Our courts have long held that a witness's prior consistent statements may be admissible to corroborate the witness's in-court testimony." *State v. Guice*, 141 N.C. App. 177, 201, 541 S.E.2d 474, 489 (2000). "Corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness." *State v. Rogers*, 299 N.C. 597, 601, 264 S.E.2d 89, 92 (1980). Thus, "[i]n order to be corroborative and therefore properly admissible, the prior statement of the witness need not merely relate to specific facts brought out in the witness's testimony at trial, so long as the prior statement in fact tends to add weight or credibility to such testimony." *State v. Ramey*, 318 N.C. 457, 469, 349 S.E.2d 566, 573 (1986). Prior statements of facts not referred in a witness's trial testimony are only inadmissible to the extent that they contradict the witness's trial testimony or do not otherwise tend "to add weight or credibility to it." *Id.* at 469, 349 S.E.2d at 574 (emphasis omitted). "If the previous statements are generally consistent with the witness'[s] testimony, slight variations will not render the statements inadmissible, but such variations only affect the credibility of the statement," which is for the jury to ultimately decide. *State v. Martin*, 309 N.C. 465, 476, 308 S.E.2d 277, 284 (1983).

In the instant case, the relevant scope of Karen's testimony at trial included the following:

> [THE STATE:] Can you tell me a little bit about [the times that Defendant would make you feel uncomfortable]?
>
> A. Usually it would be situations where I'm reading or

playing a video game and out of nowhere he would walk up to me and touch my breasts, or say things about wanting to have sex with me.

Q. Okay. Tell me what kind of stuff he would say.

A. He would say things like, come get in the shower with me, or, just try it you'll like it.

. . . .

Q. What would [Defendant] say when he was trying to [touch you inappropriately]?

A. Usually just like that I should let him do it because I would enjoy it, and stuff.

Q. Do you ever remember a time that you had to fight him off . . . ?

. . . .

A. Yeah. There was a time when I was downstairs in the kitchen and he walked up and started saying inappropriate things. And, you know, I thought that was just him being usual, but he tried to reach into my pants. And I kept fighting with him but he wouldn't stop doing it . . . .

. . . .

Q. And what if anything was he saying to you?

A. That I should just let him do it, or be quiet.

Q. Okay. Would your dad ever expose himself to you?

A. Yes, ma'am.

Q. And what parts of his body would he show you?

A. Sometimes his entire body, but usually just his penis.

Q. All right. Well, we'll start out with the, sometimes his entire body. Can you tell us what you mean by that?

A. Sometimes he would walk into my room completely naked and tell me he was going to go get in the shower and that I should come with him.

. . . .

Q. What would you say when he would say something like that?

A. I would tell him that he's disgusting and should leave me alone.

Q. And you said sometimes he would—or, most of the time, I think you said, he would just expose his penis. Would that be with his clothes on or off?

A. On.

Q. And if his clothes were on how was it that he was able to expose his penis?

A. He would like unzip his pants and pull it through that little pocket, I guess.

Q. And what kind of stuff would he do once that was exposed?

A. Sometimes if I was asleep he would just rest it on my face and I would wake up like that. Or sometimes if I was in the shower—because the bathroom door didn't lock so he could walk in. But if I was in the shower he would put it like between the wall and the curtain and wait until I noticed.

Karen's statements in her recorded interview that Defendant would also tell her to "come play with this" as he exposed his penis are "generally consistent" with her above trial testimony. *Guice*, 141 N.C. App. at 202, 541 S.E.2d at 490. Such statements did not contradict her trial testimony, but instead supplemented it with additional details so as to add weight and credibility thereto. Accordingly, we conclude that Karen's prior statements in her recorded interview were admissible as corroborative evidence, and the trial court did not err, let alone commit plain error, in admitting the same. *See Ramey*, 318 N.C. at 470, 349 S.E.2d at 574 ("[The victim's] testimony clearly indicated a course of continuing sexual abuse by the defendant. The victim's prior oral and written statements to [the detective], although including additional facts not referred to in his testimony, tended to strengthen and add credibility to his trial testimony.").

Defendant also argues that the trial court committed plain error when it identified the "audio and visual recordings of [the] interviews of" Karen and Elise, and thereafter instructed the jury that "you may, in this case, consider them as evidence of any fact, or facts, which you may find them to show." Defendant contends that this instruction warrants a new trial because it "allowed the jury to consider Karen's statement that he said 'come play with this' as substantive evidence of his guilt," for which that statement was not admissible.

However, in addition to the trial court's general instruction pertaining to the audio recording's use as substantive evidence, the trial court instructed the jury that if

> evidence has been received tending to show that at an earlier time a witness made a statement which may conflict or be consistent with the testimony of the witness at this trial then you must not consider such earlier statement as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial. If you believe the earlier statement was made, and that it conflicts or is consistent with the testimony of the witness at this trial, however, you may consider this, and all other facts and circumstances bearing upon the witness' truthfulness in deciding whether you will believe or disbelieve the witness' testimony at this trial.

Because the trial court instructed the jury that it was to limit its consideration of the prior statements to corroborative purposes only, and because "[t]his Court presumes that jurors follow the trial court's instructions," we necessarily find no error in the trial court's additional and more general instruction pertaining to the substantive use of the recorded interview. *State v. Norwood*, 344 N.C. 511, 537, 476 S.E.2d 349, 361 (1996), *cert. denied*, 520 U.S. 1158, 137 L. Ed. 2d 500 (1997); *see also State v. Nicholson*, 355 N.C. 1, 60, 558 S.E.2d 109, 148 ("We presume that jurors pay close attention to the particular language of the judge's instructions in a criminal case and that they undertake to understand, comprehend, and follow the instructions as given." (quotation marks omitted)), *cert. denied*, 537 U.S. 845, 154 L. Ed. 2d 71 (2002).

Finally, because we conclude that the trial court did not err by admitting the challenged portion of Karen's interview and by instructing the jury in the manner that it did, Defendant's argument that he received ineffective assistance of counsel due to his attorney's failure to object to the same is also without merit. *See, e.g.*, *State v. Land*, 223 N.C. App. 305, 316, 733 S.E.2d 588, 595 (2012) ("Since the trial court did not commit plain error when failing to give the instructions at issue, defendant cannot establish . . . ineffective assistance of counsel for failure to request the instructions."), *aff'd per curiam*, 366 N.C. 550, 742 S.E.2d 803 (2013).

II.

Lastly, Defendant argues that the trial court erred in ordering that he enroll in satellite-based monitoring for a period of 30 years because he "does not fit the statutory criteria for the imposition" thereof, and is thus "statutorily ineligible" for satellite-based monitoring.

In considering whether to enroll a defendant in lifetime satellite-based monitoring, if the trial court "finds that the [defendant] committed an offense that involved the physical, mental, or sexual abuse of a minor," but "that the offense *is not an aggravated offense or a violation of G.S. 14-27.23 or G.S. 14-27.28*, and the [defendant] *is not a recidivist*," then the trial court shall not enroll the defendant in lifetime satellite-based monitoring, but is instead required to "order that the Division of Adult Correction do a risk assessment of the [defendant]." N.C. Gen. Stat. § 14-

208.40A(d) (2017) (emphases added). Upon receiving the risk assessment, the trial court shall then determine "whether, based on the . . . risk assessment," the defendant nevertheless "requires the highest possible level of supervision and monitoring." *Id.* § 14-208.40A(e). If the court determines, based on the risk assessment or the culmination of additional evidence, that the defendant requires the highest possible level of supervision and monitoring, then "the court shall order the [defendant] to enroll in a satellite-based monitoring program for a period of time to be specified by the court." *Id.*; *see also State v. Morrow*, 200 N.C. App. 123, 131, 683 S.E.2d 754, 760-61 (2009) ("[A]ny proffered and otherwise admissible evidence relevant to the risk posed by a defendant should be heard by the trial court; the trial court is not limited to the DOC's risk assessment."), *aff'd per curiam*, 364 N.C. 424, 700 S.E.2d 224 (2010).

In the instant case, the only discussion regarding satellite-based monitoring at Defendant's sentencing was limited to the following exchange:

> THE COURT: All right. So it's 30 years *registration*?
>
> [THE STATE:] Yes, Your Honor.
>
> [DEFENDANT:] Yes, Your Honor.
>
> THE COURT: And no lifetime satellite monitoring?
>
> [DEFENDANT:] Yes, sir.
>
> THE COURT: All right. I'll find that.

(Emphasis added). Indeed, the trial court made no findings of fact to support a requirement that Defendant be enrolled in satellite-based monitoring.

Nevertheless, the trial court checked the box on the form ordering that Defendant be enrolled in satellite-based monitoring for a period of 30 years upon his release from imprisonment, based upon its conclusion that Defendant "require[d] the highest possible level of supervision and monitoring." As the State concedes, however, the trial court did not order a risk assessment or indicate in its Judicial Findings and Order for Sex Offenders that a risk assessment had been completed. *See id.* at 132, 683 S.E.2d at 761 ("[O]ur review requires us to consider whether evidence was presented which could support findings of fact leading to a conclusion that 'the defendant requires the highest possible level of supervision and monitoring.' " (citation omitted)). Nor did the State otherwise submit any evidence that would have tended to support the trial court's determination that Defendant required "the highest possible level of supervision and monitoring." *See State v. Kilby*, 198 N.C. App. 363, 370, 679 S.E.2d 430, 434 (2009) (reversing the trial court's satellite-based monitoring order because "[t]he State did not present evidence which could support a finding that [the] 'defendant requires the highest possible level of supervision and monitoring' "). Thus, because no evidence was presented which could have supported the trial court's conclusion that Defendant required the highest possible level of supervision and monitoring, the trial court's order enrolling Defendant in satellite-

based monitoring upon his release from imprisonment must be reversed. *Id.* at 370-71, 679 S.E.2d at 434; *accord Morrow*, 200 N.C. App. at 132, 683 S.E.2d at 761.

Because we reverse the trial court's satellite-based monitoring order on statutory grounds, we need not address Defendant's remaining arguments concerning the constitutionality of the same.

Conclusion

We conclude that Defendant received a fair trial, free from plain error. We reverse the trial court's order enrolling Defendant in satellite-based monitoring for a period of thirty years upon his release from imprisonment.

NO ERROR IN PART; REVERSED IN PART.

Judges STROUD and INMAN concur.

Report per Rule 30(e).