IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1025

Filed: 16 July 2019

Mecklenburg County, No. 14 CRS 237227

STATE OF NORTH CAROLINA

v.

DEMORRIS VAN CATHCART, II, Defendant.

Appeal by Defendant from judgment entered 23 February 2018 by Judge Gregory R. Hayes in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 March 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Elizabeth J. Weese, for the State.

Knox, Brotherton, Knox & Godfrey, by Allen C. Brotherton, for defendant-appellant.

MURPHY, Judge.

Defendant, Demorris Van Cathcart, II, was convicted of sexual offense with a child and now argues (1) the trial court committed plain error in allowing certain expert testimony into the record, (2) the trial court erred in denying his motion to dismiss at the conclusion of the evidence, and (3) his trial counsel rendered ineffective assistance. We hold that Defendant failed to prove the trial court committed plain

error because he cannot show the alleged error caused a probable impact on the jury's finding him guilty where Defendant confessed to committing such offense at trial. As to Defendant's second argument, the State met its burden under the *corpus delicti* rule by presenting independent evidence tending to establish the truthfulness of Defendant's extra-judicial confession. The trial court did not err in denying Defendant's motion to dismiss. Nevertheless, we dismiss Defendant's argument regarding ineffective assistance of counsel ("IAC") so that he may bring it in Superior Court as a Motion for Appropriate Relief ("MAR").

BACKGROUND

The victim in this case, Bertha[1], was twelve years old when she met Defendant in the summer of 2014. The two met twice during that summer, both meetings lasting thirty minutes or less. That September, Bertha went missing from her home and spent a night at Defendant's residence. On the evening in question, Defendant and a few friends drove to Bertha's neighborhood and picked her up. Bertha spent the night at Defendant's residence and the two both slept in his bed.

Defendant testified at trial that he and Bertha kissed and he touched her under her underwear "on her clitoris." That same evening, officers from the Charlotte Mecklenburg Police Department ("CMPD") responded to a missing person report filed by Bertha's mother. Bertha's mother provided police with information about her

[1] A pseudonym is used to protect the identity of the minor victim.

daughter, a recent photograph, and Defendant's name as a possible suspect. The following morning, police were able to find an address for Defendant, and went to his residence looking for Bertha. Defendant denied knowing Bertha, who had given him a fake name up to this point.

Later that morning, Bertha's cousin found her walking away from Defendant's residence. After she was returned home, Bertha's mother took her to the hospital to be examined by certified sexual assault nurse examiner Maria Crandall ("Nurse Crandall"). During the examination, Nurse Crandall observed redness and abrasions at the bottom of Bertha's vaginal entrance. At trial, Nurse Crandall—accepted without objection as an expert in sexual assault nursing—testified that these injuries were recent at the time of her examination and consistent with "something entering the vagina, something injuring the vagina, or a near injury of the vagina." Nurse Crandall's examination revealed fluid on Bertha's underwear, which Nurse Crandall collected and placed in an evidence bag. Nurse Crandall also took swabbings of Bertha's genitals and placed those swabs, along with Bertha's underwear, in a sexual assault evidence kit that she gave to police.

A few days later, Defendant spoke with detectives from CMPD and admitted to "fingering" Bertha when she spent the night at his house. When police asked Defendant to explain what he meant by "fingering," Defendant explained that he had digitally penetrated Bertha's vagina. Defendant was arrested and indicted on

charges of indecent liberties with a child, sexual offense with a child, and statutory rape.

At trial the State called CMPD DNA Analyst Mohammed Amer ("Amer"). Amer was the State's final witness at trial and was accepted without objection as an expert in the field of DNA analysis. Amer began his testimony by describing his testing of a buccal standard (or cheek swab) from the Defendant, which provided him a "complete single-source profile" of Defendant's DNA. Amer next described his process for testing DNA samples, testifying that as he goes through the DNA testing process he is careful to document what he is looking at, what he is doing with each sample, and the results of each test.

After describing his process for DNA analysis, Amer testified that his test of the "external genitalia swabs" taken from the victim showed one foreign source of DNA, which was consistent with Defendant's DNA. Next, the State asked Amer: "Did you also look at the interior swabs, the vaginal swabs, from [the victim]?" Amer responded, "Yes, I did[,]" and went on to describe the results of that testing, which detected the presence of male DNA that was not complete enough for Amer to use "for any kind of comparison." Finally, Amer described his testing of swabs taken from both the exterior and interior surfaces of the victim's underwear, both of which revealed a full DNA profile matching that of Defendant. On cross-examination, Amer reaffirmed that he "located the presence of male DNA on the interior genitalia," but

he could not unequivocally "tell this jury that that male DNA [on those swabs] belonged to [Defendant]." Defendant did not object to the admission of the DNA evidence or to any of Amer's testimony.

The State voluntarily dismissed the statutory rape charge prior to trial and voluntarily dismissed the indecent liberties charge at the conclusion of all the evidence. On 23 February 2018, a jury found Defendant guilty of sexual offense with a child, and Defendant gave oral notice of appeal.

ANALYSIS

A. DNA Analyst Testimony

Defendant's presents two arguments on appeal that the trial court committed plain error in allowing the DNA analyst, Amer, to testify that swabs of the victim's internal genitals showed the presence of male DNA. Defendant's arguments for plain error are that (1) Amer lacked personal knowledge of the sources of the various samples he tested, so the testimony should have been excluded under Rule of Evidence 602 and (2) the testimony of Nurse Crandall was not a proper foundation for Amer's testimony. Defendant's counsel did not object to the admissibility of the DNA evidence or the challenged testimony at trial. Accordingly, we review the trial court's admission of such only for plain error. N.C. R. App. P. 10(a)(4) (2019).

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so

> lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has "resulted in a miscarriage of justice or in the denial to appellant of a fair trial" or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Lawrence, 365 N.C. 506, 516-17, 723 S.E.2d 326, 333 (2012) (*citing State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). Given the evidence in the record and the stringent standard of review, we cannot hold the trial court committed plain error in allowing Amer's testimony.

In resolving Defendant's arguments for plain error, we will assume *arguendo* the trial court erred in allowing Amer's testimony that he tested swabs taken from Bertha's internal genitalia and that the testing revealed the presence of male DNA. Defendant argues that without Amer's testimony a jury could not have concluded he committed a sexual act because there was no other evidence that he penetrated Bertha's vagina. We disagree.

Defendant was convicted of one count of sexual offense with a child under N.C.G.S. § 14-27.4A(a) (2014). Under this statute, a defendant commits the crime of sexual offense with a child where he commits a sexual act with "a child under the age of 13 years." *Id.* The definition of "sexual act" includes "the penetration, however slight, by any object into the genital or anal opening of another person's body . . . ." N.C.G.S. § 14-27.1(4) (2014). Our Supreme Court has held that evidence a defendant

"enter[ed] the vulva or labia is sufficient" to prove the element of penetration, *State v. Johnson*, 317 N.C. 417, 434, 347 S.E.2d 7, 17 (1986), and we have applied this standard in sexual offense cases. *State v. Bellamy*, 172 N.C. App. 649, 658, 617 S.E.2d 81, 88 (2005).

By Defendant's theory, the State could not prove Defendant committed a sexual act without Amer's testimony regarding his DNA analysis of a swab taken from Bertha's internal genitalia. However, this overlooks the fact that Defendant unequivocally testified at trial that he touched Bertha "on her clitoris[,]" which is an unchallenged admission that he entered her labia. Even without Amer's testimony there was sufficient evidence in the record that Defendant penetrated Bertha's vagina and therefore committed a sexual act prohibited by N.C.G.S. § 14-27.4A(a) (2014). In light of our caselaw and Defendant's unchallenged testimony at trial, we cannot conclude Amer's testimony regarding his DNA analysis had a probable impact on the jury's finding that Defendant was guilty of committing a sexual offense with a child. We hold the trial court did not commit plain error.

B. Motion to Dismiss

Defendant's next argument on appeal is that the trial court erred by denying his motion to dismiss "where there was insufficient evidence apart from his inculpatory statement to satisfy the *corpus delicti* rule[.]" In this case, the State met

its burden of presentation, and the trial court did not err in denying Defendant's motion to dismiss.

In general terms, the *corpus delicti* rule provides that "a crime must be proved to have occurred before anyone can be convicted for having committed it." *Corpus delicti*, BLACK'S LAW DICTIONARY (11th ed. 2019). The traditional formulation of the *corpus delicti* rule, which applies in non-capital cases where there is independent proof of the commission of the crime, provides:

> [W]hen the State relies upon the defendant's confession to obtain a conviction, it is no longer necessary that there be independent proof tending to establish the *corpus delicti* of the crime charged if the accused's confession is supported by substantial independent evidence tending to establish its trustworthiness, including facts that tend to show the defendant had the opportunity to commit the crime.

State v. Cox, 367 N.C. 147, 152, 749 S.E.2d 271, 275-76 (2013) (citing *State v. Parker*, 315 N.C. 222, 236, 337 S.E.2d 487, 495 (1985)). "The rule does not require the State to logically exclude every possibility that the defendant did not commit the crime." *Id.* at 152, 749 S.E.2d at 275. Defendant's argument on this issue is premised upon his contention that his case is "strikingly similar" to *State v. Smith*, where the Supreme Court held the State failed to meet its burden under the *corpus delicti* rule. *State v. Smith*, 362 N.C. 583, 596, 669 S.E.2d 299, 308 (2008). This case is not nearly as similar to *Smith* as Defendant contends, and his argument to the contrary is unpersuasive.

In *Smith*, the jury found the defendant not guilty of an offense the victim claimed the defendant committed and guilty only of an offense the victim repeatedly denied ever happened, an offense to which the defendant had confessed. *Id.* at 593-94, 669 S.E.2d at 306. Our Supreme Court held that the State failed to meet its burden under the *corpus delicti* rule in part because the victim denied that the alleged sexual assault had ever occurred, but also—and in large part—because the State's only evidence aside from the defendant's confession was largely vague, contradictory, and non-probative. *Id.* at 594-95, 669 S.E.2d at 306-07.

In contrast to *Smith*, here, the State presented DNA evidence that was unchallenged both at trial and on appeal[2] and is not vague, contradictory, or non-probative. The DNA evidence tends to establish the trustworthiness of Defendant's confession and shows that he had the opportunity to commit the sex offense with which he was charged. Furthermore, Defendant testified at trial that he committed the offense when he stated he touched Bertha "on her clitoris." The State satisfied its burden under the *corpus delicti* rule, and the trial court did not err in denying Defendant's motion to dismiss.

[2] Again, Defendant argues on appeal the testimony regarding swabs of Bertha's internal genitalia were improperly admitted. Since we assumed *arguendo* in Section A of our analysis that the trial court did err in allowing this testimony, we do not consider the challenged DNA evidence in our *corpus delicti* analysis. Instead, we consider only the unchallenged DNA evidence: swabs taken from Bertha's external genitalia that revealed a partial DNA match consistent with that of Defendant, and swabs taken from the interior and exterior of Bertha's underwear that revealed a complete DNA profile matching Defendant.

C. Ineffective Assistance of Counsel

Defendant's remaining argument on appeal is that he received ineffective assistance of counsel ("IAC"), warranting a new trial. We dismiss Defendant's IAC claim without prejudice so that he may raise it in the trial court through a *Motion for Appropriate Relief* ("MAR").

To successfully prove an IAC claim, it is a defendant's burden to show (1) "counsel's representation fell below an objective standard of reasonableness[,]" and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (internal quotation marks omitted). Arguments regarding IAC should generally be considered through an MAR rather than on direct appeal. *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001). "[W]hen it appears to the appellate court further development of the facts would be required before application of the *Strickland* test, the proper course is for the [c]ourt to dismiss the defendant's assignments of error without prejudice." *Allen*, 360 N.C. at 316, 626 S.E.2d at 286. On direct appeals, we reach the merits of IAC claims only when it is apparent on the face of the cold record "that no further investigation is required . . . ." *Id.*; *State v. Thompson*, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004).

Here, Defendant argues his trial counsel was ineffective for numerous reasons and submits an MAR in addition to his brief. In contrast, the State argues we should

deny Defendant's IAC argument based on the cold record alone. Given the record before us, there is not sufficient evidence to decide this issue on appeal. Defendant's argument regarding IAC requires further investigation in order to be properly resolved and the trial court is the proper venue for such investigation. *Stroud*, 147 N.C. App. at 554, 557 S.E.2d at 547 (describing why filing an MAR in Superior Court is preferable to doing so on direct appeal). We dismiss Defendant's IAC argument without prejudice so that he may refile his MAR regarding this issue in the trial court. Likewise, we dismiss his MAR without prejudice in a separate order.

CONCLUSION

The trial court did not commit plain error regarding the challenged expert testimony and did not err in denying Defendant's motion to dismiss under the rule of *corpus delicti*. Defendant's argument regarding IAC is dismissed without prejudice so that he may refile it in Superior Court as an MAR.

NO PLAIN ERROR IN PART; NO ERROR IN PART; DISMISSED IN PART.

Judges STROUD and BERGER concur.

Report per Rule 30(e).