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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1061

Filed: 5 November 2019

Mecklenburg County, Nos. 17CRS222943-944, 17CRS25631

STATE OF NORTH CAROLINA

v.

RICHARD PADRE SNEED, JR., Defendant.

Appeal by Defendant from judgments entered 22 March 2018 by Judge Gregory R. Hayes in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 September 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Tracy Nayer, for the State.

Joseph P. Lattimore for Defendant-Appellant.

INMAN, Judge.

Defendant Richard Padre Sneed, Jr., ("Defendant") appeals from judgments entered following a jury trial convicting him of two counts of taking indecent liberties with a child and the entry of a guilty plea to attaining habitual felon status. Defendant argues that the trial court erred in failing to dismiss one of the indecent liberty charges for insufficiency of the evidence, and assigns plain error to the

admission of certain witness testimony and evidence of prior bad acts. After careful review, we hold that Defendant has failed to demonstrate error.

I. FACTUAL AND PROCEDURAL HISTORY

The State's evidence tends to show the following:

In spring of 2017, ten-year old I.J. ("Isabell")[1] lived with her mother and maternal grandmother at her grandmother's home. That June, Isabell's mother moved into an apartment in Charlotte, North Carolina with her then-boyfriend, B.S. ("Benjamin"), and his uncle, Defendant. Isabelle remained with her grandmother.

On 15 June 2017, Isabell spent the night with her mother at Benjamin's apartment. The next day, Isabell's mother left for work around 4:00 p.m. and arranged for Benjamin to watch Isabell when he returned from work around 5:00 p.m. When her mother called the house around 5:00 p.m., Isabell told her that Benjamin was not there but that Defendant was alone with her. Defendant left the apartment shortly thereafter to get groceries and, when he returned, saw that Isabell was playing in Benjamin's room on her phone. Defendant sat down on the couch to watch T.V. and was joined by Isabell a few moments later. When Defendant turned off the T.V., Isabell got up, went to the bathroom, and returned to Benjamin's bedroom.

[1] We refer to minor victims and related persons by pseudonym to protect their privacy and for ease of reading.

Defendant followed Isabell into Benjamin's bedroom and repeatedly asked if she loved him. When Isabell responded by telling him she just wanted to watch a video, Defendant told her to come over to him; once she did, Defendant pulled up her dress, put his hand inside her underwear, pulled her underwear down, and began touching her "private part" with his hand while he put his tongue inside her mouth. Defendant told Isabell to keep the encounter between the two of them. Isabell managed to push Defendant off of her, grab her phone, pull up her underwear, and run out of the apartment. Isabell attempted to call her mother once she was outside and, when her mother didn't answer, she called 9-1-1.

The 9-1-1 operator who received Isabell's call dispatched Officer Edward Levins of the Charlotte-Mecklenburg Police Department. Officer Levins arrived on the scene, found Isabell, and had her sit in his patrol vehicle. Isabell was then able to contact her mother and describe the incident to her. When Isabell's mother arrived, Isabell recounted the abuse again; she also described the incident to Officer Levins once more later that evening.

Isabell met with a forensic interviewer, Kelli Wood, the following day. As part of that interview, Isabell told Ms. Wood what Defendant had done and described where he touched her.

Defendant was indicted on two counts of taking indecent liberties with a child and one count of attaining habitual felon status on 26 June 2017 and 11 September

2017, respectively. Prior to trial, Defendant filed a motion in *limine* to exclude evidence of a prior allegation of indecent liberties that was dismissed in 2013. The case came on for trial on 19 March 2018; in dispensing with pre-trial motions, the trial court reserved any hearing on Defendant's motion in *limine* until the State sought to introduce that evidence during trial.

At trial, the State called Isabell, her mother, and Ms. Wood as witnesses, all of whom testified consistent with the above recitation of the facts.[2] Specifically, Isabell testified that Defendant put his hand inside her underwear, touched her "private part" that she "use[d to go to] the rest room[,]" and kissed her with his tongue. Officer Levins testified that Isabell told him that Defendant "put . . . his hand down her pants, but did not put his fingers inside of her[,]" while Isabell's mother testified that Isabell told her Defendant "was touching [Isabell] in [her] private parts."

The State began Ms. Wood's direct examination by having her explain her general process for interviewing child-victims, which included describing the guidelines she asks children to abide by in her interviews. She also testified to the purposes behind forensic interviews generally, followed by testimony specific to her observations and interview of Isabell. The State concluded its direct examination of Ms. Wood by introducing into evidence and playing for the jury a video recording of that interview.

[2] The State also called additional witnesses not pertinent to our analysis.

The State then sought to call A.S. ("Alice") as a witness to testify to the 2013 incident that was the subject of Defendant's motion in *limine*. The trial court held a *voir dire* hearing, during which Alice testified concerning her alleged abuse by Defendant. Following that testimony and argument from the parties, the trial court denied Defendant's motion in *limine* and held that evidence of the 2013 event could be admitted to show intent, *modus operandi*, common scheme or plan, and preparation.

The jury returned to the courtroom following the *voir dire* hearing and the trial court gave a limiting instruction consistent with its ruling under Rule 404(b) of the North Carolina Rules of Evidence. Alice then testified without further objection before the jury. The State then called additional witnesses to corroborate Alice's testimony and rested its case.

Defendant moved to dismiss all counts for insufficiency of the evidence at the close of the State's evidence. The trial court denied the motion and Defendant declined to present evidence. Defendant renewed his motion to dismiss, which was again denied. Following closing arguments, instruction, and deliberation, the jury returned guilty verdicts on both counts of taking indecent liberties with a child. Defendant pled guilty to the charge of attaining habitual felon status and was sentenced to consecutive terms of 96 to 128 months and 77 to 105 months imprisonment. He entered oral notice of appeal in open court.

II. ANALYSIS

Defendant presents three principal arguments on appeal, asserting that the trial court: (1) erred in denying his motion to dismiss one count of indecent liberties with a child because the State did not present sufficient evidence that Defendant fondled Isabell's genital area; (2) committed plain error in allowing Ms. Wood's testimony because it vouched for Isabell's credibility; and (3) committed plain error in allowing Alice to testify about a prior incident involving Defendant. We hold that Defendant has failed to demonstrate error. We address each argument in turn.

A. Motion to Dismiss

A uniform standard of review applies to motions to dismiss for insufficiency of the evidence in criminal trials:

> Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.
>
> If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed.

State v. Scott, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)). Substantial evidence considered under this standard "is relevant evidence that a reasonable person might accept as

adequate, or would consider necessary to support a particular conclusion. In this determination, all evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence." *State v. Hunt*, 365 N.C. 432, 436, 722 S.E.2d 484, 488 (2012) (quoting *State v. Abshire*, 363 N.C. 322, 327-28, 677 S.E.2d 444, 449 (2009)). In looking to the evidence presented, "the trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility," *State v. James*, 248 N.C. App. 751, 755, 789 S.E.2d 543, 547 (2016) (quoting *State v. Robledo*, 193 N.C. App. 521, 524-25, 668 S.E.2d 91, 94 (2008)), and "*[a]ll evidence, competent or incompetent, must be considered*." *State v. Bradshaw*, 366 N.C. 90, 93, 728 S.E.2d 345, 347 (2012) (citation omitted) (emphasis added).

Defendant notes that in this case, the trial court instructed the jury that "[f]ondling of the genital area of the child is a lewd or lascivious act," and that the verdict sheet asked jurors about "fondling of the genital area." Defendant contends on appeal that, because due process requires "the sufficiency of the evidence to support a conviction be reviewed with respect to the theory of guilt upon which the jury was instructed[,]" *State v. Wilson*, 345 N.C. 119, 123, 478 S.E.2d 507, 510 (1996) (citation omitted), Isabell's testimony that Defendant touched the "private part" that she "use[d to go to] the rest room[,]" was too ambiguous to reasonably support the conclusion that Defendant touched Isabell's "genital area" as opposed to her anal

area. In support of this ultimate proposition, Defendant relies exclusively on our Supreme Court's holding in *State v. Hicks*, 319 N.C. 84, 352 S.E.2d 424 (1987), that an alleged victim's testimony that the defendant "put the penis in the back of me" was insufficient to support a charge for first degree sexual offense at the motion to dismiss stage on the basis of anal intercourse. 319 N.C. at 89-90, 352 S.E.2d at 427.

Hicks is distinguishable, and the trial court did not err in denying Defendant's motion to dismiss in file number 17CRS222943. In *Hicks*, the sole evidence before the trial court was the ambiguous testimony of the witness, which the Supreme Court held was insufficient only because of the "absen[ce] [of] corroborative evidence (such as physiological or demonstrative evidence)." 319 N.C. at 90, 352 S.E.2d at 427. However, when other corroborative evidence exists that reasonably resolves such ambiguity in the favor of the State, a charge is not subject to dismissal for insufficiency of the evidence. *See State v. Summers*, 92 N.C. App. 453, 456-57, 374 S.E.2d 631, 634 (1988) ("Although the victim's own testimony was perhaps scientifically inaccurate and somewhat ambiguous, it was corroborated by the testimony of numerous other witnesses. Therefore, the victim's arguably imprecise testimony at worst raises a question for the jury as to her meaning and credibility." (citation omitted)).

The following evidence corroborated Isabell's testimony and supports a reasonable inference, resolving any ambiguity in the State's favor, that Defendant

fondled her genital area: (1) Ms. Wood's testimony that Isabell told her Defendant touched her "where she goes pee" and motioned to the area with her hand, which was itself corroborated by the video of the interview showing Isabell doing exactly that; and (2) Isabell's mother's testimony that Isabell told her Defendant touched Isabell's "private parts." From this corroborative evidence, a reasonable juror could resolve any anatomical ambiguity in Isabell's direct testimony in favor of the State and, as a result, the trial court did not err in denying Defendant's motion to dismiss.

Defendant contends that the above evidence, as corroborative evidence, cannot be relied upon as substantial evidence in resolving the motion to dismiss. To the contrary, this Court has relied on corroborative evidence in the form of a minor victim's prior out-of-court statements to draw reasonable inferences from the evidence on review of a motion to dismiss. *See, e.g., State v. Phachoumphone*, ___ N.C. App. ___, ___, 810 S.E.2d 748, 757 (2018) (holding a trial court did not err in denying a motion to dismiss a charge of first-degree sex offense with a child for insufficiency of the evidence showing digital penetration of the victim's genital area in part because "the State presented overwhelming corroborative evidence [in the form of the victim's prior out-of-court statements] from which to reasonably infer that defendant digitally penetrated [the victim]"). Furthermore, no objection or limiting instruction was requested as to Ms. Wood's testimony, and it was therefore "admissible as corroborative and substantive evidence because defendant did not

object to her testimony or request a limiting instruction." *State v. Goforth*, 170 N.C. App. 584, 588, 614 S.E.2d 313, 316 (2005) (citations omitted).[3]

Defendant's trial counsel did not object to or request a limiting instruction regarding Isabell's mother's testimony, although we observe that the trial court: (1) overruled an objection raised by Defendant during Isabell's testimony of what she told her mother on the phone as "subject to this testimony being corroborated" by her mother; and (2) notwithstanding the absence of any request, the trial court instructed jurors that:

> Evidence has been received tending to show that at an earlier time a witness made a statement which may . . . be consistent with . . . the testimony of the witness at this trial. 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.

We also note, however, that all of the evidence recounting Isabell's descriptions of the event on the night of and the day following the abuse was admissible as substantive evidence under the excited utterances exception to the hearsay rule. N.C. Gen. Stat. § 8C-1, Rule 803(2) (2019); *see also State v. Ford*, 136 N.C. App. 634, 641, 525 S.E.2d 218, 222-23 (2000) (noting that a victim's description of abuse to her mother on the day of the incident could have qualified as substantive evidence of the abuse under that exception); *State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985) (holding a child's

[3] By contrast, the State expressly limited its introduction of the video recording of the forensic interview "as corroborative."

report of abuse to her grandmother between two and three days after the abuse occurred fell within Rule 803(2)'s excited utterance exception to hearsay). Lastly, even if the above evidence did not constitute substantive evidence within an applicable hearsay rule, it was not limited in any way at the time it was presented or when the motion to dismiss was ruled on, and "*[a]ll evidence, competent or incompetent, must be considered*." *Bradshaw*, 366 N.C. at 93, 728 S.E.2d at 347 (emphasis added). As a result, we hold the trial court did not err in denying Defendant's motion to dismiss the charge for insufficient evidence.

B. No Plain Error in Ms. Wood's Testimony

Under the plain error standard, "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." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations and quotation marks omitted). Defendant contends that the trial court committed plain error in permitting Ms. Wood to testify in a manner that impermissibly vouched for Isabell's credibility. Specifically, Defendant points to Ms. Wood's testimony that "authorities are able to utilize [a victim's] statements [in a forensic interview] to either corroborate or refute the allegations" as creating the implication that Ms. Wood and law enforcement believed Isabell's testimony was credible enough to warrant

further investigation and arrest. Defendant also ascribes error to portions of Ms. Wood's testimony in which she describes telling the truth as one of several guidelines she asks alleged victims to abide by in her forensic interviews, followed by later testimony that Isabell appeared to abide by those guidelines.

Although North Carolina law prohibits expert testimony regarding the credibility of a victim, *State v. Crabtree*, 249 N.C. App. 395, 401, 790 S.E.2d 709, 714-15 (2016),[4] and despite the sizeable body of North Carolina appellate decisions on this issue, Defendant concedes that he has been unable to find any that applies to the facts of this case. Instead, Defendant points to two out-of-state decisions, one from South Carolina and one from Minnesota, for support. Both, however, are inapposite.

In *State v. Anderson*, 413 S.C. 212, 776 S.E.2d 76 (2015), the Supreme Court of South Carolina addressed whether a forensic interviewer, tendered as an expert witness in forensic interviewing and child abuse assessment, impermissibly vouched for the credibility of an alleged victim. 413 S.C. at 218-19, 776 S.E.2d at 79. In holding that allowing the witness's testimony was error, the *Anderson* court went further than simply examining whether the expert testified to the child's credibility

[4] Although Ms. Wood was not tendered or qualified as an expert witness, the analysis of whether an expert impermissibly vouched for the credibility of a victim also "applies to a witness who is a DSS worker or child abuse investigator because, even if she is 'not qualified as an expert witness, . . . the jury [will] most likely [give] her opinion more weight than a lay opinion.' " *Id.* at 402, 790 S.E.2d at 714 (quoting *State v. Giddens*, 199 N.C. App. 115, 122, 681 S.E.2d 504, 508 (2009)) (alterations in original). We therefore apply the analysis applicable to expert witnesses to Ms. Wood as a forensic interviewer notwithstanding the fact that she was tendered only as a lay witness.

and instead adopted the defendant's proposed bright line rule that "South Carolina courts do not recognize this type of [forensic interviewing] expertise, and that a forensic interviewer is restricted to testifying to facts." *Id.* at 219, 776 S.E.2d at 80. Thus, that court held, a forensic interviewer who videotaped her interview with the victim cannot testify before the jury beyond laying the foundation for the introduction of the recorded video: "The sole purpose of her jury testimony is to lay the foundation for the introduction of the videotape, and the questioning must be limited to that subject." *Id.* at 220-21, 776 S.E.2d at 80. Because the forensic interviewer exceeded those limitations and "testified . . . to those characteristics which she observed in the minor[,]" South Carolina's Supreme Court reversed the defendant's conviction. *Id.* at 219, 776 S.E.2d at 79. That holding drew a separate opinion from South Carolina's Chief Justice, who "disagree[d] strongly with the majority's suggestion . . . that there is no place for expert testimony by child abuse experts who actually examined the victim in child sex abuse trials." *Id.* at 222, 776 S.E.2d at 81 (Toal, C.J., concurring). The Chief Justice also noted that:

> It is well-established across the country that an expert in child abuse assessment may testify regarding behavioral characteristics . . . . I fear that the majority is creating a dangerous precedent, whereby a forensic interviewer may not be qualified as an expert . . . for the mere fact that the witness is either a practicing forensic interviewer or the person who examined the victim.

Id. at 222 n. 8, 776 S.E.2d at 81 n. 8.

Defendant has not identified any North Carolina appellate decisions prohibiting testimony by forensic interviewers who have interviewed the alleged victim for the same reasons argued by Defendant. To the contrary, this Court has upheld a trial court's decision to admit testimony by a forensic interviewer who interviewed the alleged victim when a videotape of that interview was also received into evidence—including in a decision involving Ms. Wood, the witness whose testimony is challenged in this appeal. *State v. Shore*, 255 N.C. App. 420, 804 S.E.2d 606 (2017) (holding the trial court did not err in qualifying Ms. Wood, who interviewed the alleged victim, as an expert in clinical social work and specializing in child sexual abuse cases when the videotape of the interview was also played for the jury), *disc. rev. allowed and remanded on separate grounds*, 370 N.C. 568 (2018). Nor does North Carolina law prohibit a witness from describing what she observed during an interview with a minor victim. *See, e.g., Crabtree*, 249 N.C. App. at 402, 790 S.E.2d at 715 (holding a child abuse investigator that interviewed the victim did not impermissibly vouch for the victim's credibility when he testified that the victim's description of the abuse during the interview seemed to be " 'more of an experiential statement, in other words something may have actually happened to her as opposed to something [seen] on screen or something having been heard about.' " (alteration in original)). *Anderson*'s categorical holding, therefore, is distinguishable.

The second out-of-state authority cited by Defendant, *State v. Wembley*, 712 N.W.2d 783 (Minn. Ct. App. 2006), bears little resemblance to this case. In *Wembley*, the prosecution tendered the child victim's interviewer "to give expert testimony *as to [the victim's] credibility*[,]" and the expert testified that one of her roles "was to determine [the victim's] credibility" as part of a "credibility assessment." 712 N.W.2d at 790-91 (emphasis added). Minnesota's appellate court understandably ruled, therefore, that the expert's testimony that the victim's "interview was consistent with all factors making up the credibility assessment" constituted an impermissible vouching for the victim's credibility. *Id.* at 792.

Here, neither Ms. Wood nor any other witness testified that her forensic interview was designed to determine Isabell's credibility. Rather, Ms. Wood testified that a forensic interview "provide[s] a process for the child to be able to describe . . . events that he or she *possibly may* have experienced, witnessed, or been exposed to." (emphasis added). She further explained that "what I'm looking for is the *allegations*. What are the *allegations* and then what may have led to the *allegations* or the disclosure." (emphasis added). When asked directly by the prosecutor if it was "fair to say that you don't go into interviews believing that it's your job to prove that something happened or something didn't happen[,]" Ms. Wood replied, "[t]hat is correct." Ms. Wood further testified that law enforcement may use statements made in forensic interviews "to either corroborate *or refute* the

allegations" (emphasis added), and never expressed whether or how law enforcement used her interview of Isabell in this case.

Defendant's appeal also focuses on Ms. Wood's discussion of the guidelines employed in her interview. She testified that she asks a child to follow three guidelines in her forensic interviews: (1) correct her when she misstates something; (2) say a question is confusing instead of trying to guess and answer it; and (3) "only talk to [her] about things that are true." While Ms. Wood did answer the State's question of whether Isabell "demonstrate[d] an ability to follow the guidelines" in the affirmative, Ms. Wood and the State immediately clarified that answer:

> [THE STATE]: And, again, the guidelines are correct me if I say something wrong and let me know if you don't understand a question?
>
> [MS. WOOD]: Yes.
>
> [THE STATE]: She demonstrated that she could do that?
>
> [MS. WOOD]: Yes. She demonstrated that multiple times. I utilized someone's name incorrectly. . . . [S]he was able to correct me.
>
> There were also several times that I asked her questions and she didn't provide me an answer. . . . I asked her if she understood my question and she said no. . . . So those were several of her demonstrations of utilizing those roles.

Given Defendant's admission that no North Carolina case law supports his assertion that Ms. Wood's testimony constituted impermissible vouching for the victim's credibility—and our analysis that the decisions from other jurisdictions that he relies

on are distinguishable—we hold that Defendant has not demonstrated plain error in the testimony he identifies, particularly when Ms. Wood's testimony is read in context with those portions disclaiming any attempts to discern Isabell's credibility.

C. No Plain Error In Admission of 404(b) Evidence

Defendant also argues the trial court committed plain error in admitting testimony recounting Defendant's alleged abuse of Alice in a prior incident, asserting that the incident was too remote to show a common plan or scheme and that the issue of *modus operandi* was not relevant to any issue at the trial. The trial court, however, admitted the evidence under Rule 404(b) of our Rules of Evidence for additional permissible purposes, including to show intent and preparation. Because the evidence was admitted for other purposes that are not challenged on appeal, any error in admitting it for an improper purpose was not prejudicial. *See, e.g., State v. Morgan*, 359 N.C. 131, 158-59, 604 S.E.2d 886, 903 (2004) ("[W]here at least one of the [other] purposes for which the prior act evidence was admitted was [proper,] there is no prejudicial error." (alteration in original) (citation and quotation marks omitted)). Defendant's argument is overruled.[5]

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[5] Defendant, citing *State v. Ellison*, 253 N.C. App. 658, 799 S.E.2d 286, No. COA 16-879, 2017 WL2118708, 2017 N.C. App. LEXIS 383 (May 16, 2017) (unpublished), contends in his reply brief that prejudice is demonstrated if the "prevailing purpose" for which the evidence was admitted was in error, regardless of whether it was properly admitted for any other purpose. *Ellison*, however, merely held that a defendant failed to demonstrate prejudice when the evidence was properly admitted for at least one purpose, as set forth in *Morgan*. *Id.* at *5. Further, *Ellison*, as an unpublished decision, is not binding on this Court, and no opinion from this Court can limit the Supreme Court's plain statement that no prejudice exists "where at least one of the [other] purposes for which the prior act evidence

III. CONCLUSION

For the foregoing reasons, we hold that Defendant has failed to demonstrate error warranting vacatur and a new trial.

NO ERROR; NO PLAIN ERROR.

Judge BERGER concurs in the result only as to Part II.A. and concurs fully as to Parts II.B. and II.C.

Judge MURPHY concurs in the result only by separate opinion.

Report per Rule 30(e).

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was admitted was [proper.]" *Morgan*, 359 N.C. at 158-59, 604 S.E.2d at 903 (alteration in original) (citation and quotation marks omitted).

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MURPHY, Judge, concurring in result only.

I concur with the Majority's result and the bulk of its analysis. However, I do not join the Majority in its discussion of cases from other jurisdictions, *supra* at 12-16, as I do not find those cases to be persuasive or relevant to our analysis and do not give any consideration as to whether or not those cases are distinguishable from the case before us today. Further, I do not join the Majority in its discussion of one of our unpublished decisions in footnote 5, *supra* at 18.

I agree that there was no error and no plain error at trial and respectfully concur in result only.