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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-161

Filed: 7 January 2020

Catawba County, Nos. 16 CRS 50126, 50127

THE STATE OF NORTH CAROLINA,

v.

JESSE LEE MIZE, Defendant.

Appeal by Defendant from judgments entered 15 May 2018 by Judge Carla Archie in Catawba County Superior Court. Heard in the Court of Appeals 30 October 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Yvonne B. Ricci, for the State-Appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for Defendant-Appellant.

COLLINS, Judge.

Defendant appeals from judgments entered upon jury verdicts of guilty of one count of statutory rape of a child, one count of statutory sex offense with a child, and three counts of indecent liberties with a child. Defendant argues the trial court reversibly erred in its jury instructions. We discern no error.

I. Procedural History

Defendant Jesse Lee Mize was tried on one count of statutory rape of a child, one count of statutory sex offense with a child, and three counts of indecent liberties with a child. The jury returned verdicts of guilty on all five counts. On 15 May 2018, the trial court entered judgment on the jury's verdicts, sentencing Defendant to 300 to 420 months' active imprisonment for the statutory rape charge. The trial court consolidated the other four charges into a second judgment and sentenced Defendant to 300 to 420 months, to run consecutively to the first sentence. The trial court also imposed satellite-based monitoring for life. Defendant entered oral notice of appeal in open court.

II. Factual Background

Defendant was 67 years old and was a long-distance truck driver. Defendant and Regina James lived together and had been in a relationship for approximately 17 years. Near the end of 2007, after Defendant and Ms. James had been dating for about two years, three of Ms. James' grandchildren, Sarah, Tammy, and Ian,¹ moved into the home Defendant and Ms. James shared. Sarah was born in June of 2003 and Tammy was born in July of 2005. Ms. James eventually adopted Sarah and Tammy.

On 29 December 2015, Sarah and Tammy admitted to Ms. James that Defendant had been sexually molesting and raping them. Sarah told Ms. James that

¹ Pseudonyms have been used to protect the identities of the juveniles. N.C. R. App. P. 42.

Defendant had had sex with her several times, in his truck and in the house. Ms. James reported what Sarah and Tammy had told her to the Catawba County Sheriff's Office.

Tammy, who was 12 years old at the time of the trial, testified that she was sexually assaulted by Defendant and that the first time it happened was when she was eight years old. She was home in the living room, sitting on Defendant's lap. Defendant was rubbing her thigh and then he put his hand in her pants and started rubbing her vagina. Defendant then took her into the bedroom he shared with Ms. James, made her lie on the bed, and pulled her pants down. He pulled his pants down and stuck his penis in her vagina. Defendant told her not to tell anyone. This happened again on numerous occasions in her home and in Defendant's truck.

Tammy testified further that when she turned ten years old, she started going with Defendant on trips while he was driving his truck. The sexual abuse on those trips involved "numerous different sexual activities," including exposing her to pornography, fondling, licking all over her body, and engaging in oral and vaginal sex.

Sarah, who was 14 years old at the time of trial, testified that Defendant sexually assaulted her. She remembered being about 11 years old in the back of Defendant's truck when he put a condom on and had sex with her. Sarah also testified about numerous times that Defendant had assaulted her in her home and

while she travelled with him in his truck, including oral, vaginal, and anal sex. Sarah specifically described a time when Defendant had vaginal sex with her in her home while Ms. James rented a booth at the flea market.

Sarah and Tammy were both interviewed at the Child Advocacy and Protection Center where both disclosed sexual abuse that included details of vaginal, anal, and oral penetration by Defendant over a period of time, both at their home and while travelling in Defendant's truck with him. The State moved into evidence two video-recorded interviews with Sarah at the Child Advocacy and Protection Center as State's Exhibits 6 and 6a. The trial court admitted the videos and, prior to the videos being played in open court for the jury, gave North Carolina Pattern Jury Instruction 105.20, IMPEACHMENT OR CORROBORATION BY PRIOR STATEMENT:

Ladies and gentlemen of the jury, evidence is about to be shown that at an earlier time a witness made a statement, which either may be consistent with or may conflict with the witness's testimony 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. If you believe that such statement was made, and that it is consistent with or conflicts with the testimony of the witness at this trial, then you may consider this together with all facts and circumstances bearing upon the witness's truthfulness in deciding whether you will believe or disbelieve the witness's testimony during this trial.

The State also moved into evidence one video-recorded interview with Tammy at the Child Advocacy and Protection Center as State's Exhibit 7. The trial court

admitted the video and, prior to the videos being played in open court for the jury, again gave North Carolina Pattern Jury Instruction 105.20, IMPEACHMENT OR CORROBORATION BY PRIOR STATEMENT.

Julia Wetmore, PhD, a pediatric nurse practitioner at the Children's Advocacy and Protection Center, testified that she performed child medical examinations on Tammy and Sarah on 12 January 2016. Tammy told Dr. Wetmore that Defendant had been having sex with her. Dr. Wetmore saw two areas within Tammy's vagina in the hymen that indicated some type of blunt force trauma to those tissues. Dr. Wetmore testified that the history she received from Tammy was consistent with Dr. Wetmore's findings. Sarah provided history that Defendant had been having sex with her. Sarah had a similar injury to her hymen, but only in one area. Dr. Wetmore testified that the history provided by Sarah was consistent with Dr. Wetmore's findings.

Sergeant Rick Younger of the Catawba County Sheriff's Office was assigned to investigate the case. Younger met Defendant and read him his *Miranda* rights. Defendant waived his *Miranda* rights and over a period of approximately four hours, Defendant was questioned by Younger, Lieutenant Fisher, Investigator Towery, and Investigator Boger of the Catawba County Sheriff's Office, separately and together. Younger testified: "[Defendant] continually repeated that if what the girls said, that's the truth. He would agree with it. He would not talk to me in detail about the

allegations against him, only to say that, if they said it, it's true.” The State moved into evidence Younger’s video-recorded interview with Defendant as State’s Exhibit 5. The video was admitted without objection.

III. Discussion

In his sole argument on appeal, Defendant asserts the trial court reversibly erred by instructing the jury in the final jury instructions that it could treat the recorded interviews with Sarah and Tammy as substantive evidence of guilt. Defendant misapprehends the trial court’s instructions.

A trial court must instruct the jury on the applicable law. *See* N.C. Gen. Stat. § 15A-1231(c) (2018); *Sugg v. Baker*, 258 N.C. 333, 335-36, 128 S.E.2d 595, 597 (1962). The purpose of jury instructions is to “appl[y] the law to the evidence in such manner as to assist the jury in understanding the case and in reaching a correct verdict.” *State v. Williams*, 280 N.C. 132, 136, 184 S.E.2d 875, 877 (1971). Thus, it is error for the trial court to misstate the applicable law when instructing the jury. *See id.* at 137, 184 S.E.2d at 878.

During the State’s presentation of its evidence, the State introduced three video-recorded interviews with Sarah and Tammy. These videos—State’s Exhibits 6, 6a, and 7—were admitted to corroborate their sworn in-court testimony, and the jury was so instructed. The State also introduced Younger’s video-recorded interview with Defendant. This video—State’s Exhibit 5—was admitted with no instruction.

At the charge conference, the trial court informed the parties that it would give “104.50[A], photographs as substantive evidence.” In instructing the jury, the trial court stated, “Other photographs, as well as a video were introduced into evidence in this case. And those photographs and videos may be considered by you as evidence of the facts they illustrate or show.” This language tracks the language of North Carolina Pattern Jury Instruction 104.50A.

It is evident from the transcript that the trial court had instructed the jury on the limited purpose for which the jury could consider the video-recorded interviews with Sarah and Tammy when those videos were admitted into evidence, and that the trial court’s jury instruction on the use of the video as substantive evidence referred to the video of Defendant’s interview.

Defendant made no argument at trial, and makes no argument on appeal, that the video of Defendant’s interview was not properly admitted as substantive evidence of his guilt. As the trial court properly instructed the jury on the applicable law, Defendant’s argument is without merit.

Even if the trial court’s instruction could be construed as erroneous, however, the error did not prejudice Defendant.

“[N]ot all trial errors require reversal. The error must be material and prejudicial. An error is not prejudicial unless ‘there is a reasonable possibility that, had the error in question not been committed, a different result would have been

reached at the trial[.]” *State v. Mason*, 144 N.C. App. 20, 27-28, 550 S.E.2d 10, 16 (2001) (citations omitted). “An error is harmless ‘unless a different result would have been reached at the trial if the error in question had not been committed.’” *State v. Berry*, 143 N.C. App. 187, 206, 546 S.E.2d 145, 158 (2001) (*quoting State v. Hardy*, 104 N.C. App. 226, 238, 409 S.E.2d 96, 102 (1991) (citation omitted)). The burden is on the defendant to show that he was prejudiced by the error in question. *Mason*, 144 N.C. App. at 28, 550 S.E.2d at 16.

Here, Defendant has not shown prejudice. Tammy testified about the extensive sexual abuse she endured from Defendant, including numerous instances of vaginal and oral penetration. Likewise, Sarah testified about the extensive sexual abuse she endured from Defendant, including numerous instances of oral and vaginal penetration and anal intercourse. Dr. Wetmore testified that she found that each girl had areas in their hymens within their vaginas indicating some type of blunt force trauma to those tissues, and that the history Dr. Wetmore received from Tammy and Sarah was consistent with her findings. Defendant himself told Younger “that if what the girls said, that’s the truth. He would agree with it. He would not talk to me in detail about the allegations against him, only to say that, if they said it, it’s true.”

Due to the substantial evidence of Defendant’s guilt, there is no reasonable possibility that, had the challenged instruction not been given, a different result would have been reached at the trial. *Mason*, 144 N.C. App. at 27-28, 550 S.E.2d at

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16 (citations omitted). Therefore, we conclude Defendant's argument is without merit.

NO ERROR.

Judges TYSON and BROOK concur.

Report per Rule 30(e).