

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-937

Filed: 2 June 2020

Guilford County, No. 16CRS067565

STATE OF NORTH CAROLINA

v.

ERIC LEONARD SPINKS, Defendant.

Appeal by Defendant from judgment entered 23 April 2019 by Judge William A. Wood, II, in Guilford County Superior Court. Heard in the Court of Appeals 28 April 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Anne Brown, for the State.

Mark Montgomery for the Defendant.

BROOK, Judge.

Eric Leonard Spinks (“Defendant”) appeals from judgment entered upon a jury verdict finding him guilty of second-degree sexual offense. We hold that Defendant has failed to demonstrate any error.

I. Factual and Procedural Background

On 18 October 2012, Sergeant William Maynard (“Sergeant Maynard”) was on routine patrol in Greensboro, North Carolina, when he observed Brazilla Earle

Wright motion to him and request his assistance. Ms. Wright is deaf. Sergeant Maynard initially encountered some difficulty communicating with her, but, using a notepad, Sergeant Maynard understood Ms. Wright to indicate she had been sexually assaulted that day. Ms. Wright provided a general physical description of the person who she alleged assaulted her but was unable to identify the person.

Ms. Wright was transported to Moses Cone Hospital where Connie White-Harris, a sexual assault nurse examiner (“SANE”), conducted an examination of her and obtained a DNA sample during the examination. The DNA sample was entered into CODIS, the State’s Combined DNA Index System. However, at the time, no suspected matches were identified in CODIS.

In late 2015, however, a suspected match in CODIS was identified. Personnel at the State Bureau of Investigation (“SBI”) laboratory compared the DNA sample obtained from Ms. Wright in 2012 to a sample obtained from Defendant and determined them to be a match. The State’s expert in forensic biology, who was involved in performing the analysis that determined the sample from Defendant was a match, testified at trial that “[t]he probability of randomly selecting an unrelated individual with a DNA profile that matches the DNA profile obtained from . . . [the sample obtained from Ms. Wright] [was] approximately one in 28.0 thousand trillion in the North Carolina Caucasian population, one in 398 trillion in the North Carolina black population, one in 6.00 thousand trillion in the North Carolina Lumbee Indian

population, and one in 330 thousand trillion in the North Carolina Hispanic population.”

Defendant was indicted on 3 February 2016 for second-degree sexual offense by a Guilford County grand jury. On 18 April 2016, Defendant was indicted for first-degree kidnapping and a superseding indictment for second-degree sexual offense was issued.

The matter came on for trial before the Honorable William A. Wood, II, in Guilford County Superior Court on 15 April 2019. Judge Wood presided over a four-day trial. On 22 April 2019 the jury rendered a verdict of not guilty on the charge of first-degree kidnapping and a verdict of guilty on the charge of second-degree sexual offense. Judge Wood determined Defendant to be a prior record level IV offender and sentenced him to 110 to 192 months in prison. Defendant entered notice of appeal in open court.

II. Analysis

Defendant argues that the trial court committed plain error in allowing various witnesses to refer to Ms. Wright, the complaining witness, as “the victim.” Because Defendant did not object to this testimony at trial, we review whether allowing this testimony constituted plain error. We hold that it did not.

Demonstrating plain error requires meeting a standard that is “more onerous” than that for prejudicial error. *State v. Coleman*, 254 N.C. App. 497, 502, 803 S.E.2d

820, 824 (2017). Whereas “[t]he test for prejudicial error is whether there is a *reasonable possibility* that the evidence complained of contributed to the conviction,” *State v. Milby*, 302 N.C. 137, 142, 273 S.E.2d 716, 720 (1981) (emphasis added), an unpreserved evidentiary error does not rise to the level of plain error unless the defendant “show[s] that, absent the error, the jury *probably* would have returned a different verdict[.]” *State v. Lawrence*, 365 N.C. 506, 519, 723 S.E.2d 326, 335 (2012) (emphasis added).

We have held that trial court, prosecutor, or State witness use of the word “victim” to refer to the complaining witness is not per se improper. *State v. Jackson*, 202 N.C. App. 564, 568-69, 688 S.E.2d 766, 769 (2010). While it is “a valid point that the use of a more neutral term such as ‘alleged victim’ or ‘complainant’ would remove any possibility that the jury would confuse [references to the complaining witness as the victim] . . . for the comments on the evidence,” a defendant must show he was prejudiced in order to establish that he is entitled to a new trial because of its use, or overuse. *State v. Henderson*, 155 N.C. App. 719, 722-23, 574 S.E.2d 700, 703-04 (2003); *see also State v. Walston*, 367 N.C. 721, 731-32, 766 S.E.2d 312, 319 (2014) (finding no error in trial court use of “victim” while noting “best practice would be” to instead employ “the phrase ‘alleged victim’ or ‘prosecuting witness’”).

Defendant complains of several instances during the State’s case in chief in which law enforcement and the SANE referred or allegedly referred to Ms. Wright as

“the victim,” rather than by her surname, or as the complaining witness.¹ We review the portions of testimony of which Defendant complains in turn.

Sergeant Maynard was the State’s second witness and testified on the first day of trial. Sergeant Maynard referred to Ms. Wright by her surname exclusively throughout his testimony.

Officer Fisher was the State’s third witness and also testified on the first day of trial. Like Sergeant Maynard, Officer Fisher referred to Ms. Wright by her surname throughout his testimony. Although Officer Fisher referred to Ms. Wright by her surname the overwhelming majority of the time, there were two instances in which he referred to her as “the victim,” and two instances in which he described handwriting on a document received into evidence as exhibit 8 as “the victim’s writing.”

Connie White-Harris was the State’s fourth witness; she also testified on the first day of trial. Ms. White-Harris described her interaction with Ms. Wright as the forensic nurse who collected a DNA sample from Ms. Wright at Moses Cone Hospital and her professional background and experience as a nurse qualified to serve as a SANE. In her testimony, Ms. White-Harris exclusively referred to Ms. Wright by her

¹ Defendant suggests that the phrasing of certain questions by the prosecutor amounted to improper prosecutorial comment on the evidence because through this phrasing the prosecutor “inject[ed] his own knowledge, beliefs and personal opinions not supported by the evidence.” *State v. Jones*, 358 N.C. 330, 350, 595 S.E.2d 124, 137 (2004). Defendant fails to specifically identify any questions by the prosecutor amounting to improper prosecutorial comment on the evidence, however. Our review of the record does not reveal any improper comment on the evidence by the prosecutor.

surname. However, in response to questions posed by the prosecutor in order to lay a foundation for Ms. White-Harris's acceptance by the court as an expert, Ms. White-Harris made a reference to *victims* as a group, when describing her qualifications and the responsibilities of a SANE.

Stefanie Young was the State's fifth witness and also testified on the first day of trial. Ms. Young described her duties as a crime scene investigator with the Guilford County Sheriff's Office and identified exhibit 12 to the State's case as "the victim's clothing[.]" rather than identifying the exhibit using Ms. Wright's surname.

Viewed in context, and in light of the other evidence of Defendant's guilt, we are not persuaded that these references created a reasonable possibility that the jury's verdict would have differed, had they not been made. Were all of the witnesses to have referred to Ms. Wright exclusively by her surname or as the complaining witness, as Sergeant Maynard and Ms. White-Harris did, we do not believe on this record that there is a reasonable possibility the jury's verdict would have differed. Because these stray references to the complainant as "the victim" did not prejudice Defendant, we hold that it was not error, much less plain error, for the trial court to allow the testimony of which Defendant complains.²

² We likewise reject Defendant's claim that his trial counsel's failure to object to these references constituted ineffective assistance of counsel. Although "the plain error standard and ineffective assistance of counsel test are not so similar that a finding of no plain error *always* precludes a finding of ineffective assistance of counsel[.]" *State v. Lane*, ___ N.C. App. ___, ___, ___, S.E.2d ___, ___, 2020 WL 2123651, *3 (2020) (emphasis added), in this case the absence of prejudice from the

III. Conclusion

Defendant has failed to demonstrate any error.

NO ERROR.

Judges BRYANT and YOUNG concur.

Report per Rule 30(e).

references to Ms. Wright as “the victim” *does* preclude the success of Defendant’s ineffective assistance of counsel claim. These references were not error, much less plain error. Defendant therefore cannot make the required showing of prejudice to succeed on his ineffective assistance of counsel claim.