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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-659

Filed: 21 July 2020

Watauga County, No. 17 CRS 51785

STATE OF NORTH CAROLINA

v.

ELIZABETH ANN SANDERS

Appeal by defendant from judgment entered 31 January 2019 by Judge Marvin P. Pope, Jr., in Watauga County Superior Court. Heard in the Court of Appeals 4 February 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Sarah G. Zambon, for the State.

Anne Bleyman for defendant-appellant.

BRYANT, Judge.

Where a testifying witness's testimony did not differ significantly from the child-victim's testimony, the trial court did not commit plain error in admitting the testimony for corroborative purposes. Where the trial court did not inform defendant of her right to be heard on the issue of attorney's fees, we vacate the civil judgment for attorney's fees and remand for further proceedings.

On 19 March 2018, defendant Elizabeth Ann Sanders was charged with one count of felony statutory sexual offense with a child under 13 years by adult offender. Defendant pled not guilty, and her case was tried before the Honorable Marvin P. Pope, Judge presiding, on 28 January 2019.

A pre-trial hearing was held on defendant's motion to suppress statements she made to law enforcement during a videotaped interview. The trial court heard testimony from defendant and Detective Jason Reid regarding the videotaped interview which led to an admission by defendant to child sexual abuse. After the hearing, the trial court concluded defendant's statements to Detective Reid were voluntary and without coercion. Defendant's motion to suppress was denied.

At trial, the State proffered testimony from several witnesses including: the victim Stella¹, who was ten years old at trial; Detective Reid, who investigated the matter and obtained defendant's confession; Selena Moretz, a forensic interviewer; and Ashley McKinney, Stella's therapist. All the witnesses testified to the events which led to the charges against defendant. From June to August of 2015, defendant was a twenty-year-old who moved into the home of Stella's mother to babysit then-six-year-old Stella, in exchange for rent. Stella testified that during that time, defendant sexually abused her on several occasions. As a result of the abuse, Stella testified that her vagina bled to the extent that blood was on the floor, in her clothes,

¹ A pseudonym is used to protect the juvenile's privacy and for ease of reading.

and in the carpet of multiple bedrooms. Stella testified that one time, Elizabeth scratched down on her breasts which bled badly. She also testified that when she would start crying, defendant would say, “F**k you” and “shut up.” Eventually, Stella told her mother, and defendant moved out the home in August of 2015.

In 2017, Stella started therapy with Ashley McKinney, to whom Stella disclosed that she had been abused by defendant. McKinney made a report to the Department of Social Services (“DSS”). DSS contacted the Boone Police Department, and Detective Jason Reid began an investigation. Detective Reid arranged for Selena Moretz to interview Stella. Moretz recorded the interview with Stella, gathered statements from Stella, and presented a diagram for Stella to use as she described the sexual contact by defendant.

On 1 December 2017, Detective Reid contacted defendant, who initially denied sexually abusing Stella. Defendant later requested a further interview. Defendant was videotaped during an interview on 14 December 2017. The videotape showed that defendant admitted to Detective Reid that she put her finger in Stella’s vagina when she babysat her. Detective Reid also used a drawing to trace defendant’s hand, in which defendant indicated how much of her index finger she had stuck into Stella’s vagina. Defendant’s depiction on the drawing was introduced and admitted into evidence. Defendant’s videotaped admission was played during trial. However, at

trial, defendant testified and denied inserting her fingers into Stella's vagina and butt, and denied touching Stella's breasts.

At the close of the evidence, the jury found defendant guilty as charged. Defendant was sentenced to a term of 300 to 372 months imprisonment. Defendant immediately appealed in open court. Four days later, the court signed and entered an order for the payment of \$6,067.50 in attorney fees.

On appeal, defendant raises issues involving I) the admission of evidence at her trial, and II) the trial court's order granting attorney's fees.

I

Defendant first argues the trial court erroneously admitted testimony from Selena Moretz. Defendant contends Moretz's testimony regarding Stella's out-of-court statements about sexual abuse contained significant differences from Stella's trial testimony and therefore, was non-corroborative and prejudicial. Having not objected to the disputed testimony at trial, defendant now contends Moretz's testimony constituted plain error. We disagree.

Rule 10 of the North Carolina Rules of Appellate Procedure allows plain error review in criminal cases for issues not preserved by objection at trial. N.C.R. App. P. 10(a)(4). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723

S.E.2d 326, 334 (2012). “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.” *Id.* (citation and quotation marks omitted).

Corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness. In order to be admissible as corroborative evidence, a witness’s prior consistent statements merely must tend to add weight or credibility to the witness’s testimony. Further, *it is well established that such corroborative evidence may contain new or additional facts when it tends to strengthen and add credibility to the testimony which it corroborates.* If the previous statements are generally consistent with the witness[s] testimony, *slight variations will not render the statements inadmissible*, but such variations . . . affect [only] the credibility of the statement. A trial court has wide latitude in deciding when a prior consistent statement can be admitted for corroborative, non[-]hearsay purposes.

State v. Bell, 159 N.C. App. 151, 155, 584 S.E.2d 298, 301 (2003) (emphasis added) (internal citations and quotation marks omitted). “The trial court is [ultimately] in the best position to determine whether the testimony of [one witness as to a prior statement of another witness] corroborate[s] the testimony of [the latter].” *Id.* at 156, 584 S.E.2d at 302 (citing *State v. Williams*, 355 N.C. 501, 566, 565 S.E.2d 609, 647 (2002)). “Only if the prior statement *contradicts* the trial testimony should the prior statement be excluded.” *State v. Tellez*, 200 N.C. App. 517, 527, 684 S.E.2d 733, 740 (2009) (emphasis added).

In the instant case, Stella testified at trial and described, in significant detail, the numerous acts of sexual abuse by defendant: that defendant made her take off her clothes, and touched her “private parts” (her vagina, breasts, and butt); that defendant would stick her hand inside Stella’s vagina and “butt”; that when defendant would touch her vagina, Stella would bleed frequently through her clothes; that “one time when [she and defendant] went to the Kangaroo gas station and [defendant abused her],” there was a “puddle of blood” on the floor and in her clothes.

The State called Selena Moretz to testify as to the forensic interview she had with Stella on or about 27 November 2017. Morteze testified that “[Stella] gave [her] a lot of information in regard to the [sexual] abuse she endured from [defendant]:”

[Stella] talked about how [defendant] had been her babysitter and that she wasn’t a nice person. She says that it happened while her mommy, things happened while her mommy was working. She talked about when mommy was at work that [defendant] would take her into her room and. . . would pull her pants down and start touching her private part. She demonstrated with her hand that [defendant] would kind of rub her vaginal area in a certain way and that [defendant] would put her hand inside of [Stella]’s vagina and that it hurt. That [defendant] would touch her butt and her breasts. [Stella] also talked about how that embarrassed her when these things would happen.

. . . .

[Stella] also disclosed about how one time when they were in town in a bathroom, um, excuse me, to a gas station to get something, and that she had to use the bathroom, and that [defendant] took her into the bathroom and pulled her pants down and forced her hand and her nails as hard as

she could into her vagina and it made her want to scream. When [defendant] took her hand out, that she was bleeding, [Stella] was bleeding. She could hear [defendant] whisper, “Oh, yeah,” to herself. [Stella] disclosed that whenever [defendant] was done. . . there was blood and she didn’t know how to make the blood stop so she wadded toilet paper up and put it inside of her pants. [Stella] disclosed that she’s not safe and that she’s never going to be safe with [defendant] around.

. . . .

[Stella] disclosed that since [defendant] ha[d] shoved her hand inside of her vagina that her vagina would tickle and it would always feel weird. [Stella] said it would make her want to do this, and she demonstrated at that point kind of like squeezing your legs together and wiggling. She also talked about when she was in the living room that she had fallen asleep, she didn’t know what had happened but she woke up and her pants were down and that she was bleeding again. She tried to sit up but it would sting. . . .

Additionally, Moretz testified to a specific incident of physical abuse, which defendant challenges on appeal, that was also disclosed by Stella during the interview:

She disclosed [] that she was told by [defendant] when her mom would ask her how her day was that she needed to say that it was a good day. She said that she did tell her mom that it was a bad day one day, and the next day that [defendant] decided to pull her pants down and take a butter knife and hurt her vagina with it. The knife, she would slightly cut a piece of her vagina off. She didn’t know how to describe what that body part was but she said that there was something that sticks out in your vagina and that it hurt really bad and it bled and bled [sic], and [defendant] told her, “You’ll learn your lesson not to tell.”

In reviewing the testimony of both witnesses, we agree that testimony from Moretz describing a specific incident of physical abuse with a weapon did not directly

corroborate Stella's testimony of incidents of sexual abuse by defendant, but neither did it contradict Stella's testimony.

We consider the reasoning in *State v. Bell* where this Court addressed the admission of corroborating evidence from a testifying witness, who testified as to statements conveyed by a child-victim. 159 N.C. App at 155–56, 584 S.E.2d at 301–02. In *Bell*, the child-victim testified to being raped by the defendant; stating that the defendant attempted to penetrate her but “it didn’t never [sic] go in.” *Id.* at 155, 584 S.E.2d at 301. A law enforcement officer, who interviewed the child-victim, testified that the child-victim told him the defendant “did get inside some before she pushed him off.” *Id.* This Court held the evidence was properly admitted for corroborative purposes because testimony from the law enforcement officer, along with testimony from other supporting witnesses, did not contradict that the act itself could have occurred even if there was no indication of *complete* penetration from the defendant. *Id.* at 156, 584 S.E.2d at 302. Further, this Court reiterated that “[t]he trial court [was] in the best position to determine whether the testimony [from the law enforcement officer] corroborated the testimony of [the child-victim].” *Id.*

Here, as in *Bell*, “corroborative evidence may contain new or additional facts when it tends to strengthen and add credibility to the testimony it corroborates.” *Id.* at 155, 584 S.E.2d at 301 (citation omitted). Moretz’s testimony strongly corroborated Stella’s testimony because it was consistent regarding the extent and frequent acts

of defendant's sexual abuse. Not only did Moretz's testimony provide context to the significant harm endured by Stella, but it also added credibility and weight to Stella's testimony.

Even if we were to assume it was erroneous to admit the challenged testimony regarding defendant's use of a weapon during an act of abuse against Stella, it is not likely the admission had a probable impact on the jury verdict. As previously noted, to prevail on plain error review, "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." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

In addition to Moretz's testimony, Ashley McKinney, Stella's therapist, testified to providing "trauma-focused cognitive behavioral therapy" for Stella following defendant's sexual abuse. McKinney testified to a conversation she had with Stella during therapy in which Stella disclosed that defendant would abuse her every time defendant babysat for Stella's mother. Specifically, McKinney stated that Stella told her that defendant often "pulled [her] pants down and touched her vagina and butt, and stuck her hand in her vagina and it really hurt a lot, and also put her hand in her butt and touched her breasts[.]" McKinney also testified that Stella had symptoms of post-traumatic stress disorder, and that therapy was necessary to assess the symptoms Stella had experienced and enable her to learn coping skills while dealing with her trauma.

Detective Reid testified to the interview he had with defendant in which she admitted to sexually abusing Stella by sticking her finger in Stella's vagina. Defendant's admission was videotaped and played for the jury during trial. Additionally, Detective Reid testified about the drawing of defendant's hand, and defendant's indication of how much of her index finger was inserted into Stella's vagina.

Considering all the evidence presented, there is no reasonable probability the jury would have reached a different result had the disputed evidence been excluded from the record. Therefore, as defendant has failed to demonstrate that the challenged testimony of Moretz had a probable impact on the jury verdict, we overrule defendant's argument.

II

Defendant next argues the trial court violated her right to due process by entering an order for attorney's fees without first giving her notice or an opportunity to be heard. We agree.

As a threshold matter, we address the State's motion to dismiss for lack of appellate jurisdiction to review defendant's appeal from the civil judgment ordering defendant to pay attorney's fees. The State argues, and defendant concedes, that the appeal is not preserved because defendant's oral notice of appeal from the civil judgment was insufficient to meet the notice requirements under the appellate rules.

See N.C.R. App. P. 3 (stating that a party appealing from a civil judgment must file *written* notice of appeal within thirty days of the entry to preserve the appeal (emphasis added)); see also *State v. Smith*, 188 N.C. App. 842, 846, 656 S.E.2d 695, 697 (2008) (stating that failure to give written notice of appeal from civil judgments imposing attorney’s fees is a jurisdictional defect in criminal appeal that warrants dismissal of the civil portion of the appeal). Defendant failed to give timely and proper notice of appeal pursuant to Rule 3, and therefore, we are required to dismiss the appeal as this Court is without jurisdiction.

Alternatively, in recognition of her improper notice of appeal, defendant has filed a petition for writ of certiorari asking this Court to review her appeal. See N.C.R. App. P. 21 (2019) (“The writ of certiorari may be issued in appropriate circumstances by [this Court] to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]”). In our discretion, we allow defendant’s petition and review the merits of defendant’s due process argument.

Pursuant to N.C. Gen. Stat. § 7A-455, trial courts may order attorney’s fees against a convicted indigent defendant for expenses incurred by their court-appointed counsel. This Court has stated that

before entering money judgments against indigent defendants for fees imposed by their court-appointed counsel under N.C. Gen. Stat. § 7A-455, trial courts should ask defendants—*personally, not through counsel*—whether

they wish to be heard on the issue. Absent a colloquy directly with the defendant on this issue, the requirements of notice and opportunity to be heard will be satisfied only if there is other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard.

State v. Friend, 257 N.C. App. 516, 523, 809 S.E.2d 902, 907 (2018) (emphasis added).

In the instant case, the record reveals that defense counsel submitted his fee application four days after the criminal judgment was entered, and the trial court subsequently entered an order for payment of attorney's fees against defense. At sentencing, the following occurred:

[THE COURT]: [T]he Court would sentence you to 300 months in the Division of Adult Correction. I recommend any type of psychological programs that are available to you in the Division of Adult Correction, vocational training, and any other programs you can take advantage of. Court costs, attorney fees — you'll submit an affidavit, [defense counsel]?

[DEFENSE COUNSEL]: Yes, sir.

[THE COURT]: Court fees and attorney fees — how many days credit does she have in pretrial confinement?

[THE CLERK]: 408.

[THE COURT]: 408 days in pretrial confinement? She is to receive credit for 408 days in pretrial confinement. Anything else, [defense counsel]?

[DEFENSE COUNSEL]: Yes, Your Honor, may we approach?

[THE COURT]: Yes.

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Opinion of the Court

At no point during the colloquy between the trial court and defense counsel does the record reflect that defendant was directly notified or given an opportunity to be heard on the issue of attorney's fees—a point that the State concedes in its brief to this Court. Moreover, nothing in the record indicates that defendant understood she had that right. *See id.* at 522–23, 809 S.E.2d at 907. (“[A]ttributing counsel’s silence to the defendant could lead to injustice. When the court is contemplating a money judgment against the defendant for attorneys’ fees incurred by appointed counsel[,] . . . the interests of the defendant and trial counsel are not necessarily aligned.”).

Accordingly, we vacate the civil judgment for attorney’s fees under N.C.G.S. § 7A-455 and remand to the trial court for further proceedings on this issue.

NO PLAIN ERROR IN PART; VACATED AND REMANDED IN PART.

Judges DILLON and INMAN concur.

Report per Rule 30(e).