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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-170

No. COA20-73

Filed 20 April 2021

Dare County, Nos. 13 CRS 51315, 973

STATE OF NORTH CAROLINA

v.

JESSE LEE JAMES

Appeal by defendant from judgments entered 15 May 2019 by Judge Jerry R. Tillett in Dare County Superior Court. Heard in the Court of Appeals 26 January 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kimberly D. Potter, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Emily Holmes Davis, for defendant-appellant.

ZACHARY, Judge.

¶ 1 Defendant Jesse Lee James appeals from judgments entered upon a jury's verdicts finding him guilty of child abuse inflicting serious physical injury and child abuse inflicting serious bodily injury. After careful review, we conclude that Defendant received a fair trial, free from error.

Background

¶ 2 In August 2013, Jessica Atkins and her one-year-old son, “Adam,”¹ were living in Kill Devil Hills with a roommate, James Jessup. Atkins was in a relationship with Defendant, who regularly spent the night. Defendant was not Adam’s father, but he often cared for Adam while Atkins was working.

¶ 3 On 8 August 2013, Atkins went to work, leaving Adam in Defendant’s care. At some point, Adam sustained an injury to his head. Defendant texted Atkins and told her that Adam “fell down and got a goose egg on his head.” When Jessup returned home, he saw Adam “on his side hardly moving, hardly breathing. Really lethargic.” Jessup decided to take Adam to Outer Banks Hospital. Upon examination, doctors noted that Adam had bruises on his cheeks, ear, forehead, leg, back, and wrist. Adam was transported by ambulance to the Children’s Hospital of the King’s Daughters in Norfolk, Virginia (“Children’s Hospital”) for further evaluation.

¶ 4 While Adam was being treated, Atkins, Defendant, and Jessup met with Detective Rochelle Brinkley from the Kill Devil Hills Police Department. They also met with Shannon Foltz, a social worker with the Dare County Department of Health and Human Services (“DHHS”). Foltz completed a safety assessment with Atkins and Defendant. Then, because “the bruising on [Adam]’s forehead . . . did not seem to match the explanation” that Defendant provided for how Adam was injured, Foltz,

¹ To protect the identity of the juvenile, and consistent with the parties’ briefs, a pseudonym is used.

Atkins, and Defendant entered into a safety plan providing, *inter alia*, that Adam would not be left in the unsupervised care of Defendant.

¶ 5

On 13 August 2013, Atkins left Adam in the care of Defendant and Jessup so that she could give a friend a ride to work and smoke a blunt. Before Atkins returned, Jessup left the house, and Defendant was alone with Adam. As Atkins was driving home, Defendant called and told her that “there was something wrong” with Adam. Upon her return, Atkins saw Defendant standing in the doorway holding Adam, who was “pale and not breathing right.” Atkins and Defendant took Adam to the emergency department of Outer Banks Hospital.

¶ 6

Adam was airlifted from Outer Banks Hospital to Children’s Hospital, where a neurosurgeon performed an emergency craniotomy. The DHHS child protective services supervisor accompanied Adam to Children’s Hospital, and Atkins and Defendant were directed to meet Detective Brinkley. Atkins and Defendant told Detective Brinkley that Atkins and Adam were in the bedroom, while Defendant was in the kitchen, when Adam began showing symptoms. However, Atkins later told law enforcement, and testified at trial, that Adam had been in the sole care of Defendant when he was injured on 13 August.

¶ 7

According to Foltz, on the evening of 13 August, “it was decided that [DHHS] would file a [juvenile] petition and nonsecure order and that [Adam] would be in the custody of [DHHS].” When Adam was discharged from Children’s Hospital months

later, he was released into the custody of Atkins' great-aunt and great-uncle.

¶ 8

On 28 October 2013, a Dare County grand jury returned true bills of indictment charging Defendant with two counts of child abuse inflicting serious bodily injury. On 13 May 2019, Defendant's case came on for trial in Dare County Superior Court before the Honorable Jerry R. Tillett. At the close of all evidence, the trial court dismissed the charge of child abuse inflicting serious bodily injury in 13 CRS 973, relating to the 8 August incident, but allowed the lesser-included charge of child abuse inflicting serious physical injury to be submitted to the jury. The trial court denied Defendant's motion to dismiss the remaining charge in 13 CRS 51315, relating to the 13 August incident.

¶ 9

On 15 May 2019, the jury returned its verdicts, finding Defendant guilty of both charges. The trial court sentenced Defendant to consecutive sentences in the custody of the North Carolina Division of Adult Correction: 95 to 126 months' imprisonment for child abuse inflicting serious bodily injury, and 30 to 48 months' imprisonment for child abuse inflicting serious physical injury. Defendant gave oral notice of appeal in open court.

Discussion

¶ 10

On appeal, Defendant argues that the trial court committed plain error by admitting irrelevant testimony. We disagree.

A. Standard of Review

¶ 11 “In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved . . . nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.” N.C.R. App. P. 10(a)(4). Defendant acknowledges that his counsel did not object to the testimony that he now “specifically and distinctly” contends was plain error.

For error to constitute plain error, 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. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations and internal quotation marks omitted).

B. Analysis

¶ 12 At trial, the prosecutor asked Foltz if there “was any decision made” after she observed Adam in the hospital on 13 August. Foltz replied: “Yes. At that point it was decided that [DHHS] would file a petition and nonsecure order and that [Adam] would be in the custody [DHHS].” Defendant argues that the trial court committed plain error by admitting this testimony because it was irrelevant.

¶ 13 Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” N.C. Gen. Stat. § 8C-1, Rule 401 (2019). Evidence that “is not relevant is not admissible.” *Id.* § 8C-1, Rule 402.

¶ 14 “Assuming, without deciding, that the trial court did err by admitting [this testimony], [D]efendant has nonetheless failed to establish under the plain error doctrine that [its] admission tilted the scales so as to cause the jury to render a guilty verdict.” *State v. Jones*, 176 N.C. App. 678, 685, 627 S.E.2d 265, 269 (2006) (citation and internal quotation marks omitted). Defendant contends that, because the jury heard Atkins testify that she lied to the police, had prior convictions, and had charges pending against her at the time of trial, “the jury did not have to find Atkins credible or believe her testimony implicating” Defendant; thus, the “only purpose of [the challenged testimony] was to convince the jury [that Defendant] must be guilty of child abuse since the State agency charged with investigating child abuse made the decision to take custody after investigating alleged abuse.”

¶ 15 However, Defendant only challenges this one exchange from Foltz’s testimony and does not otherwise challenge the State’s evidence. As regards the 13 August incident, the unchallenged evidence includes testimony from Atkins that she left Adam in the care of Defendant and Jessup; Jessup’s testimony that he subsequently left Defendant alone with Adam; and Atkins’ testimony that she returned home to

find Defendant holding Adam, who was “pale and not breathing right.” The State also presented expert testimony from Dr. Norrell Atkinson, the child-abuse pediatrician who examined Adam at Children’s Hospital following this incident. Dr. Atkinson diagnosed Adam as having “abusive head trauma” resulting from a “significant head injury[,]” similar to one most often seen after “a high speed motor vehicle collision” or “a high fall[.]” Nor does Defendant challenge any of the State’s evidence concerning the 8 August incident.

¶ 16 Further, Atkins provided testimony—which Defendant does not challenge on appeal—that was similar to Foltz’s challenged testimony. Atkins testified that Adam was not released to her upon his discharge from the hospital, that she no longer has custody of him, and that her parental rights were terminated. This unchallenged testimony, from a mother who had not “seen [her] son in over three years[,]” could certainly have left as great an impression on the jury as Foltz’s challenged testimony.

¶ 17 Defendant cannot show that the jury probably would have reached a different result absent the challenged testimony, particularly given the similar *unchallenged* testimony by Atkins. In light of Defendant’s burden on plain error review to show that “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, the admission of this testimony cannot have constituted plain error. Defendant’s argument is overruled.

Conclusion

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Opinion of the Court

¶ 18 For the foregoing reasons, Defendant received a fair trial, free from prejudicial error.

NO ERROR.

Chief Judge STROUD and Judge GORE concur.

Report per Rule 30(e).