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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-85

No. COA21-69

Filed 1 February 2022

Buncombe County, No. 17 CRS 490

STATE OF NORTH CAROLINA

v.

MARVIN ORLANDO TORRES

Appeal by defendant from judgment entered 29 October 2019 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 17 November 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Margaret A. Force, for the State.

Mark Montgomery for defendant.

DIETZ, Judge.

¶ 1 Defendant Marvin Torres appeals his conviction for taking indecent liberties with a child. Torres argues that the trial court erred by admitting a detective's testimony conveying out-of-court statements made by the victim's mother during an interview.

¶ 2 As explained below, the trial court was within its sound discretion to admit the

detective's testimony to corroborate the mother's own testimony. Although the detective's testimony of what the mother told him varied from the mother's own testimony, and included some additional facts, it was substantially similar to, and added credibility to, the mother's testimony that it corroborated. It was thus within the court's discretion to admit that testimony for purposes of corroboration. Accordingly, we find no error in the trial court's judgment.

Facts and Procedural History

¶ 3 In 2017, the State charged Defendant Marvin Torres with one count of indecent liberties and four counts of first-degree sexual offense based on allegations that Torres sexually abused the daughter of his former girlfriend. The case went to trial in October 2019.

¶ 4 At trial, Carol¹ testified that she was eleven years old and lived with her mother in 2015 and 2016. Torres was in a relationship with Carol's mother and stayed with Carol and her mother on weekends. Carol testified that, at first, she liked Torres, but then later she became uncomfortable around him after he started coming into her room late at night and touching her sexually. Carol testified that, on multiple occasions, Torres came into her room late at night while her mother was asleep. Carol testified that Torres would touch her breasts, then get on top of her and try to pull

¹ We use a pseudonym to protect the identity of the juvenile victim.

her pants down, grind on her and hold her hands down, and put his penis against her underwear or in her mouth. Carol stated that she would “push him and . . . tell him to leave.” Carol did not identify specific dates when these incidents occurred.

¶ 5 Carol testified that she did not disclose what Torres did to her until February 2017, when she was called to the principal’s office at her school after someone reported that she was cutting herself. When asked why she was cutting herself, Carol asked to speak with the guidance counselor. She told the counselor that she was cutting because she was unhappy with herself and that her mother’s boyfriend had touched her inappropriately. The counselor called Carol’s mother, Miriam, and told her what Carol had reported. Miriam then took Carol to the Child Advocacy Center, where Carol was interviewed by a forensic examiner.

¶ 6 At trial, Miriam testified that she felt guilty when she heard what Carol reported. She recalled that Carol liked Torres at first, but then later changed and did not want to see him. Miriam testified that Carol “changed completely” from being a “very happy girl” to being sad. She also explained that Carol would go to her great-aunt’s house to avoid being alone with Torres. Miriam testified that she once woke up around 3 a.m. and saw Torres quickly leaving Carol’s room.

¶ 7 Relevant to this appeal, Miriam also testified that, after she broke up with Torres, she spoke with him on the phone. Miriam explained that Torres asked her “would I forgive him, if that had happened, would I forgive him and we could go off

somewhere else.” She testified that she spoke with Detective Ryan of the Buncombe County Sheriff’s Office about Carol’s allegations, but she did not give any details as to what she told Detective Ryan.

¶ 8 The State also presented incriminating testimony from a number of other witnesses including the school guidance counselor, the forensic examiner who interviewed Carol, and Detective Ryan. During Detective Ryan’s testimony, he recounted what Miriam told him when he interviewed her, over Torres’s objection.

¶ 9 Torres testified in his own defense. He denied doing anything inappropriate or engaging in any sexual conduct with Carol.

¶ 10 The jury convicted Torres of taking indecent liberties with a child and acquitted him of the first-degree sexual offense charges. The trial court sentenced Torres to a term of 16 to 29 months in prison with credit for 926 days served and ordered him to register as a sex offender. Torres appealed.

Analysis

¶ 11 Torres argues that the trial court erred by admitting Detective Ryan’s testimony about what Miriam told him. Specifically, Torres challenges the portion of Detective Ryan’s testimony in which he explained that Miriam told him Torres admitted that he sexually abused Carol. The trial court determined that this testimony was admissible to corroborate Miriam’s own testimony. We thus begin by examining the standard for admitting corroborative testimony.

¶ 12 A trial court’s ruling that “a prior consistent statement can be admitted for corroborative, nonhearsay purposes” is reviewed for abuse of discretion and the court’s decision will be overturned only if it was “manifestly unsupported by reason” and “so arbitrary that it could not have been the result of a reasoned decision.” *State v. Tellez*, 200 N.C. App. 517, 528, 684 S.E.2d 733, 740–41 (2009). “A trial court has wide latitude in deciding when a prior consistent statement can be admitted for corroborative, nonhearsay purposes.” *State v. Lloyd*, 354 N.C. 76, 104, 552 S.E.2d 596, 617 (2001).

¶ 13 Under the North Carolina Rules of Evidence, “hearsay” is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted” and is “not admissible except as provided by statute or by these rules.” N.C. R. Evid. 801(c), 802. However, “out-of-court statements offered for a purpose other than to prove the truth of the matter asserted are not hearsay.” *Tellez*, 200 N.C. App. at 526, 684 S.E.2d at 739. Thus, “evidence offered for corroboration and not as substantive evidence will not be excluded as hearsay.” *Id.*

¶ 14 “Corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness.” *State v. Bell*, 159 N.C. App. 151, 155, 584 S.E.2d 298, 301 (2003). “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." *Id.* Corroborative evidence "may contain new or additional facts when it tends to strengthen and add credibility to the testimony which it corroborates." *Id.* Thus, "prior consistent statements are admissible even though they contain new or additional information so long as the narration of events is substantially similar to the witness' in-court testimony." *State v. Williamson*, 333 N.C. 128, 136, 423 S.E.2d 766, 770 (1992).

¶ 15 Here, Miriam testified about phone conversations she had with Torres following Carol's allegations:

[MIRIAM]: Okay. So immediately after that on a Sunday, . . . we had a call. He called me privately and said why are you inventing so much stuff. I said, I said a lot of ugly things because I was really upset. But after that he hung up. After I spoke with the policeman who was my friend that goes to my job, I asked him what, what do you advise me to do. He said to be calm and try to talk to him. After he called again and I was more calm, he said he wanted to come to Asheville if I would drop all the charges. *One day he said, one time he said would I forgive him, if that had happened, would I forgive him and we could go off somewhere else.*

[THE STATE]: Did you ever ask him if he committed these acts?

A. Yes.

Q. And what was his response?

A. That we could not speak on the phone.

(Emphasis added). Miriam also testified that she spoke with Detective Ryan and that

they “had a long talk,” but she did not give any specific details of what she told him.

¶ 16 The State later questioned Detective Ryan about his conversation with Miriam:

[THE STATE]: And what do you recall from that conversation?

[DET. RYAN]: She had indicated that she had a telephone conversation with Mr. Torres and she asked him directly if, if he had done something sexual to her daughter.

Q. Did she tell you anything else about that?

Torres’s counsel objected, stating, “I am going to object to this on hearsay and if allowed I’d ask for a limiting instruction” because “it’s in multiple layers, what [Torres] said to Miriam to Detective Ryan.” The State responded, “these are the defendant’s own statements. Miriam testified yesterday in regards to this conversation and was available for cross-examination upon this issue.” The trial court overruled the objection, giving a limiting instruction that evidence of Miriam’s out-of-court statements to Detective Ryan was admitted only for purposes of corroborating her earlier trial testimony and could not be considered “as evidence of the truth of what was said at that earlier time.” The State then resumed its questioning of Detective Ryan:

[THE STATE]: What do you recall her telling you Mr. Torres’s response was?

[DET. RYAN]: My note states that - - well, *she told me that*

there was an admission of some sort from him that she asked him if he did this to her daughter.

Q. Do you recall anything else about that conversation?

A. I just - - that was the gist of it, that *she asked him about, and that he had done this, that he admitted that he had done this to her.*

(Emphasis added).

¶ 17 Torres argues that Detective Ryan’s testimony was not consistent with or corroborative of Miriam’s trial testimony. But considering all of Miriam’s trial testimony in context, the trial court was within its discretion to overrule Torres’s hearsay objection and determine that Detective Ryan’s testimony about Miriam’s prior statements to him was corroborative because it added weight or credibility to Miriam’s testimony. *Bell*, 159 N.C. App. at 155, 584 S.E.2d at 301.

¶ 18 Miriam testified both that she spoke at length to Detective Ryan and that, in a phone conversation with Torres, Torres asked her if she would “forgive him, if that had happened,” and then refused to answer when she asked him directly “if he committed these acts,” explaining that he “could not speak on the phone.” In light of this testimony, Detective Ryan’s testimony that Miriam told him “that there was an admission of some sort from [Torres] that she asked him if he did this to her daughter,” and that the “gist” of his conversation with Miriam was that “she asked him about it” and “he admitted that he had done this to her,” was “generally

consistent” with Miriam’s trial testimony. *State v. Garcell*, 363 N.C. 10, 40, 678 S.E.2d 618, 637 (2009).

¶ 19 To be sure, there were variations between Miriam’s trial testimony and Detective Ryan’s description of what Miriam previously told him. *Id.* In particular, Detective Ryan testified that Miriam told him “that there was an admission of some sort” from Torres and the “gist” of their conversation was “that he admitted that he had done this to her,” but Miriam’s own testimony indicated that Torres asked if she would “forgive him, *if* that had happened” and then, when Miriam asked directly if he did it, explained that he would not answer on the phone. (Emphasis added).

¶ 20 This is the sort of variation in trial testimony that a trial court, in its sound discretion, could find to affect the credibility of the evidence, not its admissibility. *Id.* After all, Miriam’s testimony about her conversation with Torres reasonably could be understood as “an admission of some sort” and the “gist” of that conversation could reasonably be described as an admission, although not a direct one. Thus, Detective Ryan’s testimony, although it varied from Miriam’s trial testimony, added credibility to Miriam’s direct testimony about her conversation with Torres. The trial court also provided a detailed limiting instruction explaining that Detective Ryan’s testimony was admitted solely to corroborate Miriam’s earlier trial testimony and that the jury cannot consider Detective Ryan’s testimony “as evidence of the truth” of what Miriam told the detective. In light of these facts, the trial court’s decision to admit the

testimony as corroboration was not “so arbitrary that it could not have been the result of a reasoned decision” and was thus within the trial court’s sound discretion. *Tellez*, 200 N.C. App. at 528, 684 S.E.2d at 740–41.

¶ 21 Torres also argues that the trial court could not have been exercising its discretion because it ruled on the objection before hearing the complete testimony that Detective Ryan provided. But Torres never objected on this basis and thus, at most, we could review it for plain error. *State v. Lawrence*, 365 N.C. 506, 518–19, 723 S.E.2d 326, 334–35 (2012). This was a discretionary decision by the trial court and this Court repeatedly has held that discretionary decisions by a trial court are not subject to plain error review. *See, e.g., State v. Norton*, 213 N.C. App. 75, 81, 712 S.E.2d 387, 391 (2011). In any event, for the reasons explained above, the trial court was within its sound discretion to admit this testimony accompanied by a limiting instruction and thus, even if we reviewed this issue for plain error, the trial court’s failure to intervene on its own initiative after hearing the remainder of Detective Ryan’s testimony was not an abuse of discretion and thus not plain error.

Conclusion

¶ 22 For the reasons explained above, we find no error in the trial court’s judgment.

NO ERROR.

Judges TYSON and GRIFFIN concur.

Report per Rule 30(e).