IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-702

No. COA22-183

Filed 18 October 2022

Wilson County, Nos. 18 CRS 51881, 53732–33

STATE OF NORTH CAROLINA

v.

JOSHUA ARRON MULLIS

Appeal by defendant from judgment entered 15 July 2021 by Judge Michael J. O'Foghludha in Wilson County Superior Court. Heard in the Court of Appeals 7 September 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sondra C. Panico, for the State.

Daniel J. Dolan for defendant.

DIETZ, Judge.

¶ 1 Defendant Joshua Mullis appeals his convictions for multiple counts of statutory sex offense and indecent liberties with a child. Mullis raises a number of unpreserved evidentiary and instructional challenges. As explained below, Mullis has not overcome the high bar to show plain error with respect to any of these arguments. Mullis also challenges the trial court's order requiring him to register as a sex

offender. Mullis did not timely appeal that order and petitioned this Court for a writ of certiorari with an accompanying request to invoke Rule 2 and consider an unpreserved challenge to the registration order. Applying the rationale from our Supreme Court's recent decision in *State v. Ricks*, 378 N.C. 737, 2021-NCSC-116, in our discretion, we deny the petition and dismiss that portion of the appeal.

Facts and Procedural History

¶ 2 In 2018, twelve-year-old Mary[1] was at the home of her mother's friend Kara, watching a movie with Kara's daughter Alice, when Defendant Joshua Mullis arrived. Mullis and Mary watched the movie together on one couch, while Alice was asleep on another couch. When the movie ended, Mullis asked Mary to take a picture of herself using his phone and she did. Mullis then told Mary that her body looked nice. Mary testified that Mullis started touching her breasts and buttocks. Mullis then started "tongue kissing" her. Mary described that his breath smelled "bad," "like cigarettes and alcohol," and that she did not want to kiss him.

¶ 3 Mary testified that Mullis asked her to perform oral sex on him. After Mary removed his penis from his pants, Mullis put it in her mouth while he pushed her head down with his hands. Mullis ejaculated in Mary's mouth. Mullis then turned

[1] We use pseudonyms throughout this opinion to protect the identity of the juvenile complaining witness. As agreed upon by the parties, we use the pseudonym Mary for the complaining witness, Beth for her mother, Kara for her mother's friend, and Alice for Kara's daughter.

Mary around and pulled down her pants. She described that Mullis "tried to put it in my anal, tried to put it in my butt," but he wasn't able to "put his penis all the way in." When asked, "How much of it was he able to put in," Mary stated, "Just the tip." Mary pulled her pants back up and Mullis put his penis in her mouth again. Mary told Mullis that she wanted him to stop.

¶ 4 Alice woke up, saw what was happening, and separated Mullis from Mary. Mary testified that Kara was home but asleep while all of this was happening, and that she did not wake Kara because she was worried how Kara would react. Mary stated that she "just didn't know what to do," that she was "12 at the time and just in a really fragile state of mind" so she "didn't say anything." Alice told Kara what she had seen.

¶ 5 Mary's mother, Beth, testified that she received a call from Kara that something had happened with Mary. Beth rushed back to Kara's house. Beth questioned Mary about what had happened. Mary eventually told her mother that Mullis had kissed her and then made her have oral and anal sex with him. Beth went out to her car and called the police. When law enforcement arrived, Beth told them what Mary had said. An ambulance arrived and paramedics took Mary to the hospital for examination and collection of a sexual assault kit. Officers arrested Mullis.

¶ 6 In 2019, the State charged Mullis for three counts of statutory sex offense with a child and three counts of indecent liberties with a child. The case went to trial in

July 2021.

¶ 7 At trial, Mary and her mother testified to the events described above. The State also presented testimony from several investigating officers. Detective Juan Quintanilla testified that he responded to Beth's call in May 2018. Beth reported to him that Mullis had engaged in oral and anal sex with her minor daughter. Detective Quintanilla located Mullis and detained him. He also attempted to interview Alice, but she refused to speak with him.

¶ 8 Detective Patricia Hendricks testified that she interviewed Mullis on 19 May 2018 after he waived his *Miranda* rights. Mullis told Detective Hendricks that he was 24 years old. Mullis initially denied having any sexual contact with Mary. After Detective Hendricks explained DNA evidence to Mullis, Mullis then admitted that he kissed Mary and stated that she grabbed his penis. Mullis asserted that he told Mary to stop because it was wrong.

¶ 9 Detective Jamar Battle testified that officers collected DNA evidence during the investigation, including DNA from Mullis and Mary, and sent that evidence to the State crime lab for testing. Detective Battle interviewed Mary and testified that Mary told him that Mullis forced her to perform oral sex. Mary reported that she told Mullis to stop, but that he kept pushing her head down with his hand on the back of her head. Detective Battle testified that Mary told him Mullis attempted to penetrate Mary's anus with his penis, that she was not sure whether it went all the way in, but

that it hurt. Mary told Detective Battle that Mullis only stopped when Alice woke up.

¶ 10 April Perry, a forensic scientist with the State Crime Lab, testified after the trial court accepted her as an expert in forensic biology. Perry described the procedure for comparing DNA in the lab and testified that a rape kit was collected from Mary and a suspect kit was collected from Mullis. The DNA evidence was admitted into evidence without objection from Mullis. Perry explained that she generated a DNA profile from a penile swab of Mullis and found that a major component of the DNA on the swab belonged to Mary. Perry opined that this was more likely caused by an exchange of bodily fluid rather than by casual touch. Perry also testified that a major component of the DNA from Mary's rectal swab, obtained from the opening of the anus and inside of the rectum, was consistent with Mullis's DNA profile, and that it was "very possible" the DNA was from semen. Perry then went on to explain the statistical probability that the DNA from the swabs would match anyone other than Mary and Mullis.

¶ 11 At the close of the State's evidence, Mullis moved to dismiss the charges. The trial court denied the motion.

¶ 12 Mullis testified in his defense. He asserted that Mary tried to grab his penis outside of his pants twice on 19 May 2018, but that he pushed her hand away. Mullis denied asking Mary to take a photo of herself. In his testimony, Mullis admitted that he had kissed Mary two or three days earlier when he had been drinking, but he

denied kissing her on 19 May 2018. He also denied having anal sex with Mary and denied that she performed oral sex on him. Mullis stated that he only took a nap and played cards that day. On cross-examination and recross-examination, the State questioned Mullis about discrepancies between his prior statements to police and his trial testimony. Without objection, the State asked Mullis several times whether he had been "untruthful" in his initial statements to investigators. Mullis admitted that he had.

¶ 13 On 15 July 2021, the jury convicted Mullis of all charges. The trial court entered a consolidated judgment sentencing Mullis to a term of 300 to 420 months in prison. The trial court also determined that Mullis was convicted of an aggravated offense and ordered him to register as a sex offender for life. Following entry of judgment, the trial court asked Mullis's counsel, "Does your client wish to give Notice of Appeal?" Mullis's counsel responded, "Yes," and the trial court made appellate entries.

Analysis

I. Appellate jurisdiction

¶ 14 We must first address our jurisdiction to reach the merits of the issues raised in this appeal. Mullis has filed two separate petitions for a writ of certiorari seeking our review of the criminal judgment and the civil sex offender registration order in this matter.

¶ 15 The first petition seeks review of the criminal judgment. Mullis filed this petition "out of an abundance of caution" because, in open court, his notice of appeal consisted of his counsel's affirmative response to the trial court's question about noticing an appeal, rather than an explicit statement by his counsel that he was giving notice of appeal. Although "admittedly not a model of clarity," we hold that counsel's statement clearly showed "Defendant's intention to enter a notice of appeal" and was sufficient under Rule 4 of the Rules of Appellate Procedure to confer jurisdiction on this Court to review that judgment. *State v. Daughtridge*, 248 N.C. App. 707, 712, 789 S.E.2d 667, 670 (2016). We dismiss his first petition as moot and address the merits of his challenges to the criminal judgment below. *Id.*

¶ 16 The second petition asks us to review the trial court's civil order imposing lifetime sex offender registration. On appeal, Mullis asserts that the trial court erred in finding that he was convicted of an aggravated offense as defined by the applicable statute. Mullis acknowledges that he did not file a written notice of appeal from the order, as required to appeal this type of civil order. *See State v. Brooks*, 204 N.C. App. 193, 194–95, 693 S.E.2d 204, 206 (2010). Mullis further asks this Court to invoke Rule 2 to reach the merits of this issue should we issue a writ of certiorari, conceding that he did not raise any objections to the trial court's registration order or aggravated offense determination in the trial court.

¶ 17 "This Court routinely allows a petition for a writ of certiorari to review a

criminal judgment where the defendant failed to timely appeal," but it "is less common for this Court to allow a petition for a writ of certiorari where a litigant failed to timely appeal a civil judgment." *State v. Friend*, 257 N.C. App. 516, 519, 809 S.E.2d 902, 905 (2018). With respect to civil orders, the "petition for the writ must show merit or that error was probably committed below." *State v. Bishop*, 255 N.C. App. 767, 769, 805 S.E.2d 367, 369 (2017).

¶ 18 Our Supreme Court recently examined a similar case in which review of the merits of a civil judgment connected to a criminal proceeding would require both issuance of a writ of certiorari and invocation of Rule 2 to excuse the failure to preserve the issue for appeal. *State v. Ricks*, 378 N.C. 737, 2021-NCSC-116, ¶ 5. In *Ricks*, our Supreme Court emphasized that "invocation of Rule 2 and writ of certiorari cannot substitute for a timely objection and notice of appeal." *Id.* ¶¶ 10–11. Where the defendant "committed two fatal procedural errors and failed to show that a refusal to invoke Rule 2 would result in manifest injustice," the Court held that there was no basis to issue the writ of certiorari and doing so constitutes an abuse of discretion. *Id.*

¶ 19 Applying the reasoning from *Ricks*, we hold that Mullis has not shown how he is "different from other defendants who failed to preserve" their arguments and he has not argued "any specific facts to demonstrate that invoking Rule 2 would prevent manifest injustice." *Id.* ¶ 8. We therefore decline, in our discretion, to issue a writ of

certiorari. We dismiss this portion of Mullis's appeal for lack of appellate jurisdiction.

II. Admission of expert testimony on DNA testing

¶ 20 We next turn to Mullis's evidentiary challenges. Mullis first argues that the trial court committed plain error by admitting April Perry's expert opinions about the DNA evidence and test results in this case. Mullis contends that Perry's expert testimony did not establish the necessary foundation required for admissibility under Rule 702.

¶ 21 Mullis acknowledges that he did not object to the challenged testimony and thus we are limited to reviewing for 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." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations omitted). In other words, the defendant must "show that, absent the error, the jury probably would have returned a different verdict." *Id.* at 519, 723 S.E.2d at 335. Plain error "is to be applied cautiously and only in the exceptional case" where the error seriously affects "the fairness, integrity or public reputation of judicial proceedings." *Id.* at 518, 723 S.E.2d at 334.

¶ 22 Rule 702(a) requires that, to be admissible, expert opinion testimony must be "the product of reliable principles and methods" and must show that the "witness

applied the principles and methods reliably to the facts of the case." N.C. R. Evid. 702(a)(2)–(3). An "expert witness must be able to explain not only the abstract methodology underlying the witness's opinion, but also that the witness reliably applied that methodology to the facts of the case." *State v. Coffey*, 275 N.C. App. 199, 211, 853 S.E.2d 469, 479 (2020). But the "precise nature of the reliability inquiry will vary from case to case depending on the nature of the proposed testimony. In each case, the trial court has discretion in determining how to address the three prongs of the reliability test. The trial court must have the same kind of latitude in deciding *how* to test an expert's reliability . . . as it enjoys when it decides *whether* that expert's relevant testimony is reliable." *State v. McGrady*, 368 N.C. 880, 890, 787 S.E.2d 1, 9 (2016) (citations omitted). Our Supreme Court has explained that "Rule 702(a) . . . does not mandate particular procedural requirements for exercising the trial court's gatekeeping function over expert testimony." *Id.* at 893, 787 S.E.2d at 11. Where the subject of the testimony is "sufficiently common or easily understood," the required "foundation can be laid with a few questions in the presence of the jury." *Id.*

¶ 23 This Court has held that expert testimony on forensic DNA testing from an employee of the State Crime Lab was properly admitted under Rule 702 where the witness "testified to her qualifications in the area of DNA analysis as well as her training and experience in gathering evidence for DNA profiles," the witness "explained the methods and procedures of performing [the] testing and analyzed [the]

DNA sample following those procedures," and the "particular method of testing has been accepted as valid within the scientific community and is a standard practice within the state crime lab." *Coffey*, 275 N.C. App. at 211–13, 853 S.E.2d at 479–80.

¶ 24 Here, before the admission of her expert opinion testimony, Perry testified about her experience and qualifications as a forensic scientist. Perry noted that she had been a forensic scientist for twelve years, worked in the State Crime Lab for five years, and has a degree in forensic science and biology as well as extensive training in DNA evidence and the State Crime Lab's processes for testing DNA evidence. She also stated that she has been accepted as an expert witness in forensic biology on fourteen prior occasions.

¶ 25 After the trial court qualified Perry as an expert in forensic biology, Perry went on to explain in some detail the process she uses to compare DNA in the lab. She then explained how she followed that protocol in collecting and analyzing the DNA evidence in this case before describing the results of her analysis and the conclusions she drew from it. On cross-examination, Perry gave additional explanation about the protocols and standards applied to DNA testing in the State Crime Lab and confirmed that she applied those standards and complied with those protocols during her testing in this case.

¶ 26 We find that Perry's testimony readily satisfied the foundational requirements of Rule 702. She described her qualifications and experience in the field generally and

with DNA testing specifically, she explained the procedures she used in conducting the DNA testing in this case, and then she went on to explain how she formed her opinions regarding the DNA evidence in this case based on the results of the testing. *See id.* Given that her expert testimony pertained to routine and generally accepted DNA testing, we cannot say that the trial court abused its discretion by not requiring her to describe her methodology or the application of that methodology in greater detail. *State v. Pennington*, 327 N.C. 89, 100, 393 S.E.2d 847, 854 (1990); *McGrady*, 368 N.C. at 893, 787 S.E.2d at 11.

¶ 27 In any event, even assuming error in the foundation for Perry's testimony, Mullis has not shown that this is the type of "exceptional case" where the error seriously affects "the fairness, integrity or public reputation of judicial proceedings." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. This type of expert testimony on the results of DNA testing is widely accepted and routinely admitted in all manner of criminal matters. Moreover, the record demonstrates that Perry was qualified to conduct the testing and that she followed the State Crime Lab's standard methods and procedures in conducting the testing. If Mullis believed additional foundation was necessary, he could have raised an objection or requested an opportunity for additional *voir dire* questioning, but he chose not to do so.

¶ 28 Accordingly, we conclude that the trial court did not err, and certainly did not plainly err, in admitting Perry's expert testimony.

III. Cross-examination of Mullis regarding inconsistent statements

¶ 29 Mullis next argues that the State "engaged in gross misconduct" violating his right to a fair trial when the prosecutor questioned him on cross-examination about his "untruthfulness." In the alternative, Mullis asserts that the trial court committed plain error by permitting this line of questioning. We reject this argument.

¶ 30 Mullis again concedes that he did not preserve this argument by objection in the trial court below, limiting the scope of our review. Unpreserved objections to cross-examination questioning typically are subject to plain error review. But, when the State's remarks while questioning a defense witness are "grossly improper and calculated to prejudice the jury," the trial court should act on its own initiative to stop the improper questioning even without an objection from the defendant. *State v. Locklear*, 294 N.C. 210, 215, 241 S.E.2d 65, 68 (1978).

¶ 31 Ordinarily, a lawyer examining a witness "should not assert the opinion that the witness is lying." *Id.* at 217, 241 S.E.2d at 70. This is so because the "question of whether a witness is telling the truth is a question of credibility and is a matter for the jury alone." *State v. Solomon*, 340 N.C. 212, 221, 456 S.E.2d 778, 784 (1995). In *Locklear*, our Supreme Court found the prosecutor's statements that the defendant was "lying through [his] teeth" and "playing with a perjury count" were "grossly improper" and that it was error for the trial court to permit that questioning even in the absence of any objection. 294 N.C. at 215, 241 S.E.2d at 68.

¶ 32 Nevertheless, the State "is given wide latitude and has the right and duty to cross-examine vigorously a defendant who takes the stand in his own defense" and this includes questions that discredit the witness "no matter how disparaging the question may be." *State v. Rush*, 340 N.C. 174, 185–86, 456 S.E.2d 819, 826 (1995). To this end, the State is permitted on cross-examination to ask a defendant about prior inconsistent statements by the defendant and whether those statements were truthful. *State v. Westbrooks*, 345 N.C. 43, 65, 478 S.E.2d 483, 496 (1996).

¶ 33 Here, on cross-examination, the State questioned Mullis about when he "started to be truthful" and whether he was "untruthful" in his initial statements to the investigating officers:

> [PROSECUTOR]. And it wasn't until after Detective Hendricks brought up DNA that you started to be truthful; is that correct?
>
> [MULLIS]. Yes, sir.
>
> Q. In fact, she told you about DNA and she told you now it's time to be truthful.
>
> A. Yeah.
>
> Q. But you still said, I didn't touch her or nothing because she is a really young girl.
>
> A. Yep, because I wasn't going to say nothing still.
>
> Q. *That wasn't truthful; was it*?
>
> A. No. But, like I said, I wasn't going to tell her nothing at

> all in the beginning. When I started thinking about what they could be leading to where DNA, you know what I'm saying, is murder and rape, only thing I was thinking in my head, told her only thing I did.
>
> Q. *After you were admittedly untruthful* to the detective –
>
> A. Yeah.
>
> . . .
>
> Q. So when you said nothing happened today, *that was being untruthful*.
>
> A. Yes.
>
> Q. So *you admit you were untruthful* to the detective multiple times before you started saying something.
>
> A. Yes.

(Emphasis added). Then on recross-examination, the State asked Mullis for further clarification, stating, "And you admitted that you basically did not tell the detective the truth for most of that interview." Mullis responded, "No, I did not."

¶ 34 Mullis contends that the "prosecutor's questions about Mullis's 'untruthfulness' were the equivalent of calling him a liar." We disagree. The prosecutor's statements were not impermissible opinions about whether Mullis was lying in his trial testimony; they were statements establishing that Mullis gave false statements to law enforcement during the investigation, which is a permissible line of questioning to call into question Mullis's credibility in his trial testimony.

Westbrooks, 345 N.C. at 65, 478 S.E.2d at 496; *Locklear*, 294 N.C. at 215, 241 S.E.2d at 68. The questioning in this case is more analogous to *Rush*, where our Supreme Court found the State's question "regarding when the fabrication occurred" was not improper because it "was simply a vigorous cross-examination properly designed to discredit defendant's belated" defense theory and changing story. 340 N.C. at 185–86, 456 S.E.2d at 826. Accordingly, we hold that the challenged cross-examination did not amount to gross misconduct or plain error.

IV. Failure to instruct jury on attempted statutory sex offense

¶ 35 Mullis next contends that the trial court committed plain error by failing to instruct the jury on the lesser included offense of attempted statutory sex offense with a child with regard to the alleged anal sex. Mullis argues that this instruction was required because the evidence of penetration, an essential element of the sex offense charge, was conflicting. Again, Mullis concedes that he did not object to the lack of this instruction at trial and we thus review the argument solely for plain error.

¶ 36 "An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002). "When determining whether there is sufficient evidence for submission of a lesser included offense to the jury, we view the evidence in the light most favorable to the defendant." *State v. Ryder*, 196 N.C. App. 56, 64, 674 S.E.2d 805, 811 (2009).

"The trial court may refrain from submitting the lesser offense to the jury only where the evidence is clear and positive as to each element of the offense charged and no evidence supports a lesser-included offense. The determining factor is the presence of evidence to support a conviction of the lesser included offense." *State v. Tillery*, 186 N.C. App. 447, 450, 651 S.E.2d 291, 294 (2007) (citations omitted).

¶ 37 "A person is guilty of statutory sexual offense with a child by an adult if the person is at least 18 years of age and engages in a sexual act with a victim who is a child under the age of 13 years." N.C. Gen. Stat. § 14-27.28(a). "Sexual act" includes "anal intercourse," which "requires penetration of the anal opening of the victim by the penis of the male." *Id.* § 14-27.20(4); *State v. DeLeonardo*, 315 N.C. 762, 764, 340 S.E.2d 350, 353 (1986).

¶ 38 This Court has held that a victim's testimony "that defendant 'inserted his penis . . . into [her] butt,' *however slight*" and "that the incident was painful" was sufficient evidence to establish the penetration element of a statutory sex offense charge. *State v. Sprouse*, 217 N.C. App. 230, 237, 719 S.E.2d 234, 240 (2011) (emphasis added). In contrast, this Court has found that an attempted rape instruction was required due to conflicting evidence of penetration where the victim "testified in one instance that she was not sure the defendant penetrated" her, the victim told others that "defendant had attempted to rape her," and testing of a rape kit did not show the presence of any of the defendant's DNA on the victim or the

victim's DNA on the defendant. *State v. Couser*, 163 N.C. App. 727, 734, 594 S.E.2d 420, 425 (2004).

¶ 39 Here, as to the element of anal penetration, the State presented Mary's testimony that Mullis "tried to put [his penis] in my anal, tried to put it in my butt," but that he was not "able to put his penis all the way in." When asked, "How much of it was he able to put in," Mary responded, "Just the tip." The State also presented Detective Battle's testimony describing Mary's statements to him during the investigation. Battle stated that Mary told him Mullis "tried to put his thing in her butt . . . but she didn't think it went all the way in but it hurt." Battle explained that, "Me knowing what I know, the type of cases I investigate, typically that type of pain comes from penetration." Battle noted that Mary also mentioned that afterwards Mullis's "penis tasted nasty, which to me kind of goes hand in hand with his penis being in her anal area possibly penetrating inside of her." To support the testimonial evidence, the State submitted DNA evidence indicating that Mullis's DNA was found on a rectal swab obtained from the opening of Mary's anus and inside of her rectum, and it was "very possible" the DNA was from semen. In his defense, Mullis testified that he never engaged in any anal sex with Mary.

¶ 40 We hold that the instruction on attempted statutory sex offense as to the alleged incident of anal sex was not supported by the evidence at trial and the trial court did not err in choosing not to instruct the jury on it. *Millsaps*, 356 N.C. at 561,

572 S.E.2d at 771. There was no conflicting evidence of penetration or evidence that Mullis attempted anal sex but did not complete the required act of penetration. *Cf. Couser*, 163 N.C. App. at 734, 594 S.E.2d at 425. The State's evidence was "clear and positive" as to the element of penetration, with all of the testimony and DNA evidence the State presented indicating that at least some penetration, "however slight," occurred. *Tillery*, 186 N.C. App. at 450, 651 S.E.2d at 294; *Sprouse*, 217 N.C. App. at 237, 719 S.E.2d at 240. Mullis's competing defense evidence, if believed—namely his testimony denying that any sexual contact or anal sex ever occurred—would have supported his acquittal of the charged offense entirely, but not his conviction of the lesser attempted offense.

¶ 41 Additionally, even assuming that the evidence supported an attempt instruction, we are not convinced that the failure to instruct on that lesser charge rose to the level of plain error. In light of Mary's testimony and the State's other evidence, Mullis has not met his burden to show that, had the instruction on the lesser included offense been given, the jury probably would have convicted Mullis of that lesser offense instead of the greater one, nor has Mullis shown that this is the type of exceptional error that calls into question the fairness and integrity of the criminal justice system. *Lawrence*, 365 N.C. at 518–19, 723 S.E.2d at 334–35. Accordingly, we again find no error, and certainly no plain error.

Conclusion

¶ 42 We find no plain error in the trial court's criminal judgments. We deny Mullis's petition for a writ of certiorari as to the civil order imposing lifetime sex offender registration and dismiss that portion of this appeal for lack of jurisdiction.

NO PLAIN ERROR IN PART; DISMISSED IN PART.

Judges COLLINS and CARPENTER concur.

Report per Rule 30(e).