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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-313

Filed 07 March 2023

Mecklenburg County, Nos. 17 CRS 203968-70

STATE OF NORTH CAROLINA

v.

TITUS EDWARD SMITH, Defendant.

Appeal by Defendant from judgments entered 31 August 2021 by Judge George C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 January 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Ellen A. Newby, for the State.

Daniel M. Blau for the Defendant.

GRIFFIN, Judge.

Defendant Titus Edward Smith appeals from judgments entered upon a jury's verdict finding him guilty of statutory rape, statutory sex offenses, and indecent liberties with a child. Defendant argues the trial court erred in excluding relevant evidence, committed plain error at various points throughout the trial, and erred in the sentencing of Defendant. We find no error in the trial court's exclusion of evidence

and all assertions of plain error. However, we vacate the judgment and remand Defendant's case solely for resentencing.

I. Factual and Procedural Background

In January 2017, Defendant was living with his girlfriend and her daughter, K.M.¹ On 20 January 2017, Defendant came home to find K.M. in her room with her boyfriend, even though she was not allowed to have boys in the house without her mother. K.M. testified that after her boyfriend left the house, Defendant came up to her room and raped her orally and vaginally before ejaculating on her bedsheet.

K.M. then called her boyfriend, who came to pick her up. After he picked her up, her boyfriend called K.M.'s mother and told her that K.M. was raped. When they got home, the mother went up to K.M.'s room and cut off the bedsheet where Defendant had ejaculated. The police then talked to K.M. and her mother before sending K.M. to the hospital. The police then collected all the physical evidence of the rape.

At the hospital, K.M. had a sexual assault kit done by a sexual assault nurse. The police tested the sexual assault kit and the bedsheet cut off by the mother. The sexual assault kit showed sperm inside K.M.'s vagina and cervix. Sperm was also found on the bedsheet from K.M.'s bed. The samples were sent for genetic testing to compare the DNA found in the vaginal swabs with Defendant's DNA and that testing

¹ We use a pseudonym to protect the identity of the minor child and for ease of reading. *See* N.C. R. App. P. 42(b).

resulted in the conclusion that the DNA obtained from the vaginal swabs matched Defendant's DNA. The DNA from the bedsheet also matched Defendant's DNA.

On 26 July 2021, Defendant was indicted for statutory rape of a person fifteen years of age or younger, statutory sex offense with a person fifteen years of age or younger, and indecent liberties with a child. The jury found Defendant guilty on all counts on 30 August 2021. Defendant timely appeals.

II. Analysis

A. Rule 412 Ruling

Defendant argues that the trial court erred in limiting the scope of cross examination concerning K.M.'s prior sexual behavior because it was relevant for the purpose of showing motive. Additionally, Defendant asserts that these errors were done, in part, in violation of the Sixth and Fourteenth Amendments of the United States Constitution.

Defendant specifically contends that his counsel's assertion at trial that the admission of the disputed evidence was essential "for [] [Defendant] to have effective defense[,]” preserves his ability to invoke constitutional arguments on appeal. “Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal.” *State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473 (2002) (citation omitted). We conclude that counsel's assertion at trial was not sufficient to preserve his constitutional arguments for this appeal. We therefore decline to review

these constitutional claims and will not invoke Rule 2 to review these claims. *See* N.C. R. App. P. 2.

We review limitations on cross-examination for an abuse of discretion. *See State v. Herring*, 322 N.C. 733, 743, 370 S.E.2d 363, 370 (1988) (citation omitted). (“The scope of cross-examination, however, is within the sound discretion of the trial court, and its rulings thereon will not be disturbed absent a showing of abuse of discretion.”) A court commits an abuse of discretion when its decision is one “so arbitrary that it could not have been the result of a reasoned decision.” *State v. Thompson*, 314 N.C. 618, 626, 336 S.E.2d 78, 82 (1985).

In general, Rule 412 of the North Carolina Rules of Evidence bars introducing evidence of a victim’s sexual behavior, except under four circumstances. N.C. R. Evid. 412. However, evidence of the victim’s sexual behavior “may be admissible even though it does not fall within one of the” exceptions to 412. *State v. Mbaya*, 249 N.C. App. 529, 537, 791 S.E.2d 266, 271 (2016) (citations and internal quotation marks omitted). For example, this Court has found that evidence of a complainant’s sexual behavior “tending to show that the [complainant] had a motive to falsely accuse the defendant is certainly relevant[.]” *State v. Martin*, 241 N.C. App. 602, 610, 774 S.E.2d 330, 336 (2015).

Defendant argues that K.M.’s sexual behavior is relevant and highly probative because it reveals K.M.’s alleged motive in accusing Defendant of rape. In support of this argument, Defendant cites *State v. Martin*, a case where the victim was caught

performing fellatio on three different boys in a locker room. *Id.* In *Martin*, the defendant argued that the evidence of the victim's sexual behavior was relevant because it supported the defendant's allegation that the only reason she was accusing him of rape was to hide her prior sexual acts in the locker room. *Id.*

Here, unlike in *Martin*, Defendant was able to sufficiently cross-examine K.M. on the alleged motive without mention of K.M.'s sexual behavior. During Defendant's cross-examination of K.M., K.M. testified that she was not supposed to have boys at the house when her mother was not home, she knew Defendant was aware of this, and she believed that, when Defendant came home and saw her boyfriend there, she was in trouble and afraid that Defendant would tell her mother. Thus, Defendant was able to adequately cross-examine K.M. on her alleged motive to accuse Defendant of rape so that she wouldn't get in trouble. We hold the trial court did not abuse its discretion in limiting Defendant's cross-examination to the exclusion of K.M.'s past sexual encounters.

B. Hearsay

Defendant's next arguments request plain error review of two different pieces of hearsay testimony he failed to object to during trial. When an alleged evidentiary error is not preserved by objection at trial, this Court may review only for plain error:

[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,

or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Lawrence, 365 N.C. 506, 516–17, 723 S.E.2d 326, 333 (2012) (citation and internal quotation marks omitted).

The first piece of hearsay evidence Defendant challenges is a recording of an interview between K.M.'s mother and a detective concerning the investigation. In the interview, the detective states:

I just want to be clear, I don't want you to think anything differently of us. We will one-hundred percent believe a child and go to the ends of the earth for the child, until proven differently. We will always believe what the child says, until we have reason not to.

Defendant argues that the “detective[']s vouching probably affected the jury's resolution of the case because it had to make a credibility determination between K.M. and [Defendant].” Further, Defendant makes the argument that the error would affect the fairness and integrity of the judicial proceeding.

Assuming that the audio recording is inadmissible hearsay, it is still not enough to constitute plain error. Plain error is only to be applied where an error is a “fundamental error”, or one that is so egregious that it deprived Defendant of a “fundamental right.” *Lawrence*, 365 N.C. at 516–17, 723 S.E.2d at 333. Other than

conclusory language to that end, Defendant does not allege a specific “fundamental right” that was taken from him as a result of this hearsay statement being admitted.

Defendant does contend that the alleged hearsay statement “probably affected the jury’s resolution of the case because it had to make a credibility determination.” This argument once again does not consider the overwhelming amount of physical evidence against Defendant. Testimony at trial presented that analysis of the victim’s rape kit “support[ed] that [Defendant was] the source of the major male DNA profile obtained through sperm cell fraction of the vaginal swabs.” The DNA analyst also testified that the DNA found on the victim’s vaginal swabs matched Defendant’s DNA such that there was a “1 in 100 octillion”² chance that the identification was an error. The DNA analyst later testified that analysis of DNA samples taken from the victim’s bedsheets showed to a similar certainty that Defendant’s DNA was consistent with the samples.

Defendant fails to meet the high burden of proving that the admission of the audio recording deprived him of a “fundamental right” or committed “fundamental error” so egregious that it probably affected the jury’s verdict. *Lawrence*, 365 N.C. at 516–17, 723 S.E.2d at 333.

² According to the DNA analyst’s testimony, an octillion is represented using an integer followed by twenty-seven zeros, and there are far fewer humans presently living.

Defendant also contends that the trial court committed plain error when it allowed testimony by the victim about her PTSD. The testimony in question is as follows:

Q. [K.M.], tell the jury what [e]ffects this has had on your life.

A. I have to go to three different therapists. I suffer from anxiety and PTSD.

Q. Okay. And that anxiety and PTSD, how has that affected your life – your normal life? How does it affect you?

A. Like, now, being around a lot of people – I couldn't go to the gym. I couldn't – I don't want to go to the store or anything. And I used to have sleep paralysis[.]

Defendant purports the trial court plainly erred when it allowed this testimony by the victim because this testimony was used for the substantive purpose of proving that the rape occurred. This argument again ignores the overwhelming physical evidence against Defendant. The State presented an abundance of physical evidence to the jury that showed Defendant's DNA was inside of the victim, and on her bedsheet. Even if this testimony was excluded from the trial, we cannot say that it would have had a probable impact on the outcome of the case. Thus, the trial court's admission of the hearsay testimony did not constitute plain error.

C. Sentencing

Finally, Defendant argues that the trial court erred in entering judgments that were inconsistent with the sentences announced in open court, and considered

improper factors during the sentencing process, namely that Defendant got a harsher sentence imposed because he did not accept a plea deal from the State. “Sentencing errors are preserved for appellate review even if the defendant fails to object at the sentencing hearing.” *State v. Patterson*, 269 N.C. App. 640, 645, 839 S.E.2d 68, 73 (2020) (citation omitted).

Sentences within statutory limits “will be presumed regular and valid[,]” but “such a presumption is not conclusive.” *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977). Where it is found that irrelevant and improper factors were considered “in determining the severity of the sentence, the presumption of regularity is overcome, and the sentence is in violation of [a] defendant’s rights.” *Id.* (citing *State v. Swinney*, 271 N.C. 130, 133–34, 155 S.E.2d 545, 548 (1967)). In other words,

Where it can reasonably be inferred from the language of the trial judge that the sentence was imposed at least in part because [the] defendant did not agree to a plea offer by the state and insisted on a trial by jury, [the] defendant’s constitutional right to trial by jury has been abridged, and a new sentencing hearing must result.

State v. Cannon, 326 N.C. 37, 39, 387 S.E.2d 450, 451 (1990).

Here, the trial court judge stated, “I’m of the opinion that if a victim has to take the stand and relive a moment in her life, and you’re ultimately convicted, I’m not going to run sentences concurrently. I’m going to run them consecutive.” The trial court went on to say, in contemplating Defendant’s potential sentence if he were to plead guilty, “[W]hat I would likely do if you make a determination that you’re not

going to make a 19-year-old girl take the stand, I would probably find a way to use the [c]ourt's discretion to sentence you to the bare minimum."

We conclude a reasonable inference can be made from the trial court judge's statements to Defendant, regarding whether to plead guilty or not, that Defendant's sentence was imposed, at least in part, due to his decision to proceed to trial in this case. Given this, and the State's concession to such, we remand Defendant's case for the limited purpose of holding a resentencing hearing.

III. Conclusion

We conclude there was no error in Defendant's conviction. However, Defendant's case is remanded for the limited purpose of holding a resentencing hearing.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Judges ZACHARY and HAMPSON concur.

Report per Rule 30(e).