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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-312

Filed 21 March 2023

Lincoln County, Nos. 19CRS052886, 19CRS052915

STATE OF NORTH CAROLINA, Plaintiff,

v.

JOHNNY RAY IZARD, Defendant.

Appeal by defendant from judgment entered 8 July 2021 by Judge Athena F. Brooks in Lincoln County Superior Court. Heard in the Court of Appeals 30 November 2022.

Attorney General Joshua H. Stein by Assistant Attorney General Alesia Balshakova, for the State of North Carolina.

Joseph P. Lattimore for the Defendant-Appellant.

DILLON, Judge.

On 8 July 2021, Defendant Johnny Ray Izard was found guilty of a crime against nature and second-degree forcible sex offense in connection with an encounter he had with his girlfriend's intoxicated 18-year-old daughter (hereinafter "Sue").

I. Background

The State's evidence tended to show as follows: On 8 September 2019, Sue fell

asleep in her room at her mother's home after becoming intoxicated/impaired. Sometime later, Sue woke up to Defendant pulling her jeans down and licking her genital area. Defendant threw the covers over Sue, ran out of the door, and then walked back to the door to ask if she was okay. Sue did not respond and went to her mother's room to tell her mother what had happened.

Defendant chose not to testify.

Defendant was convicted by a jury of a crime against nature *and* second-degree forcible sexual offense. The trial court entered judgment in accordance with the verdict. Defendant timely appealed.

II. Analysis

Defendant makes several arguments, which we address in turn.

A. Admissibility of Prior Sexual Assault

Defendant argues the trial court erred by allowing out-of-court statements of a non-testifying witness to establish Defendant engaged in prior sexual conduct similar to the conduct he engaged in with Sue. Specifically, the trial court allowed a State witness to testify that, seven years prior to Defendant's assault of Sue, she was sleeping in the same bed as her cousin; her cousin woke up to Defendant touching her cousin's vagina; her cousin immediately screamed waking up the witness; and the cousin immediately told the witness what Defendant had just done to her.

Defendant argues the admission of the testimony violated his Sixth Amendment right to confront the witnesses against him. U.S. Const. amend. VI; N.C.

Const. art. I, Section 23. Indeed, where testimonial evidence is at issue, “the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). “Accordingly, Confrontation Clause analysis begins with a determination of whether or not an out-of-court statement is testimonial or nontestimonial.” *Id.*

Statements made in the context of a private conversation outside the presence of a law enforcement officer are non-testimonial and outside the scope of *Crawford*. See *State v. Lawson*, 173 N.C. App. 270, 275-76, 619 S.E.2d 410, 413-14 (2005) (holding that the statements were non-testimonial and did not fall within the category protected by the Confrontation Clause because they were not made in the presence of any law enforcement officer but during a private conversation).

Here, the statement by the witness’ cousin to her was non-testimonial and outside the scope of *Crawford*: It was made in the context of a private conversation the State’s witness had with her cousin. This conversation was outside the presence of any law enforcement officer. Accordingly, the trial court did not violate the Confrontation Clause by admitting this evidence.

Defendant further argues the evidence was inadmissible hearsay. However, under our Rules of Evidence, “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition is an exception to the hearsay rule.” N.C. R. Evid., Rule 803(2) (2019). To qualify as an excited utterance, the statement must relate to “(1) a sufficiently

startling experience suspending reflective thought and (2) [be] a spontaneous reaction, not one resulting from reflection or fabrication.” *State v. Maness*, 321 N.C. 454, 459, 364 S.E.2d 349, 351 (1988).

In this case, the statement by the earlier victim to the State’s witness was accompanied by fear and crying as she related the abuse. Accordingly, we conclude the statement is admissible under this hearsay exception. *See State v. McLaughlin*, 246 N.C. App. 306, 324, 786 S.E.2d 269, 283 (2016) (holding that a statement by a victim of sexual abuse to his mother was an excited utterance when the child was afraid and scared when relating the abuse).

Defendant argues that the testimony was inadmissible under Rule 404(b) of our Rules of Evidence, which provides evidence of prior conduct must also be relevant to be admissible:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. R. Evid. 404 (2017). We review *de novo* a trial court’s “legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b).” *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 158 (2012).

In the instant case, evidence of Defendant committing a sex crime similar to

the crime for which he was on trial was relevant as it showed evidence of a common plan or scheme under Rule 404(b). Each incident involved a relationship where Defendant was dating the victim's close relative and was in a position of trust over her. Also, both victims were female teenagers living in a home where Defendant often spent the night, giving him access to enter their rooms at night. In each situation, Defendant was alleged to have touched the genital areas of each victim while sleeping at night. These similarities tended to demonstrate proof of his opportunity, intent, and common plan or scheme; and, therefore, this evidence was admissible under Rule 404(b). *See State v. Greene*, 294 N.C. 418, 423, 241 S.E.2d 662, 665 (1978) (our Supreme Court notes that it "has been very liberal in admitting evidence of similar sex crimes in construing the exception to the general rule of 404(b)").

Finally, Defendant contends any probative value of the testimony was substantially outweighed by the danger of unfair prejudice under Rule 403. N.C. R. Evid. 403 (2019). We review a challenge to an evidentiary ruling based on Rule 403 for abuse of discretion. *State v. Triplett*, 368 N.C. 172, 178, 775 S.E.2d 805, 809 (2015).

In this case, we conclude that the trial court did not abuse its discretion when it determined that the probative value of the testimony outweighed any prejudicial effect to Defendant.

B. Second-Degree Forcible Sex Offense

Defendant was convicted for violating Section 14-27.27(a)(2) of our General

Statutes, which provides that a person commits a second-degree forcible sex offense when he “engages in a sexual act with another person” who is “physically helpless” and he “knows or should reasonably know that the other person [is] physically helpless.” N.C. Gen. Stat. § 14-27.27(a)(2) (2019).

On appeal, Defendant contends the trial court committed plain error by not instructing the jury that the State had the burden of proving that Sue was asleep during the assault, beyond a reasonable doubt. In this case, the judge instructed the jury, in pertinent part, as follows:

The defendant has been charged with second degree forcible sex offense. For you to find the defendant guilty of this offense, the [S]tate must prove three things beyond a reasonable doubt:

...

Second, that the alleged victim was physically helpless. A person is physically helpless if that person is unconscious. A person who is asleep is physically helpless.

Though the instruction includes the burden to prove all three elements beyond a reasonable doubt, Defendant takes issue with the fact that the instruction does not specifically tailor the disputed fact of sleeping (the word *asleep*) to the burden of proof (*beyond a reasonable doubt*), noting the State’s case hinged on Sue’s testimony that she was asleep at the time the sexual act occurred.

The instruction given by the trial court is similar to an instruction which our Supreme Court found to be erroneous in *State v. Smith*, 360 N.C. 341, 348, 626 S.E.2d

258, 262 (2006) (holding that the trial court erred by not granting a new trial because the jury instructions did not shift the burden of proof to the defendant on the third element of lack of consent for second-degree rape).

However, unlike the defendant in *Smith*, Defendant failed to object to the jury instruction. For this reason, we do not review for prejudicial error as was done in *Smith*, but rather for plain error. N.C. R. App. P. 10(a)(4) (2019). “For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred . . . [that] had a *probable* impact on the jury’s finding[.]” *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (emphasis added).

We conclude any error in the instruction did not rise to the level of plain error, given the evidence of Defendant’s guilt. For instance, evidence tended to show Sue was asleep during the assault, Defendant was aware that Sue was impaired, and he admitted to licking Sue’s genital area during his interview with an investigator, though telling the investigator that she consented.

While the jury instruction *may* have constituted prejudicial error, we cannot say such error rose to the level of plain error.

C. Crime Against Nature

Defendant next argues the trial court erred by failing to dismiss the charge of crime against nature because the State’s evidence was insufficient to support a finding of penetration. We agree.

To survive a motion to dismiss, there must be substantial evidence of each

essential element of the crime and that the defendant is the perpetrator. *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015). When reviewing the sufficiency of the State's evidence, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference from the evidence. *Id.* at 574, 780 S.E.2d 826. "Whether the State presented substantial evidence of each essential element is a question of law", which we review *de novo*. *State v. Phillips*, 365 N.C. 103, 133-34, 711 S.E.2d 122, 144 (2011).

Defendant was charged with a crime against nature or sexual intercourse contrary to the order of nature in violation of Section 14-177 of our General Statutes. "Proof of penetration of or by the sexual organ is essential to conviction." *State v. Whittemore*, 255 N.C. 583, 585, 122 S.E.2d 396, 398 (1961). The requisite penetration, however, "is not limited to penetration by the male sexual organ." *State v. Joyner*, 295 N.C. 55, 66, 243 S.E.2d 367, 374 (1978). Rather, the statute is "broad enough to include all forms of oral and anal sex" involving penetration. *State v. Stiller*, 162 N.C. App. 138, 140, 590 S.E.2d 305, 307 (2004). However, our Court has held that evidence that a defendant "licked" the victim's "private area" does not, without more, support a reasonable inference that penetration occurred. *In re R.N.*, 206 N.C. App. 537, 542, 696 S.E.2d 898, 902 (2010).

We must, therefore, conclude the evidence, when viewed in the light most favorable to the State, is insufficient to support the jury's verdict. Though the State's evidence showed that Defendant licked Sue's genital area, there was no evidence of

actual penetration by Defendant's tongue. *See id.* at 542, 696 S.E.2d at 902 (concluding that the trial court erred by denying the defendant's motion to dismiss the charge of crime against nature based on the allegation that he "lick[ed] the genitals [sic] area of the victim").

At the hearing, a nurse who examined Sue shortly after the assault testified that Sue's genital exam revealed no findings of penetration. She further testified that when she asked Sue if there had been penetration to her genital area, Sue said that there had not been.

Accordingly, the trial court should have granted Defendant's motion to dismiss this charge at the close of the State's evidence.

III. Conclusion

The trial court erred by failing to dismiss the crime against nature charge, as there was no evidence of penetration. We, therefore, reverse the judgment entered against him convicting him of that charge.

We find no error in Defendant's conviction for the charge of second-degree forcible sex offense.

We remand the matter for resentencing. *See State v. Moore*, 327 N.C. 378, 383, 395 S.E.2d 124, 127-28 (1990) (ordering remand for resentencing when one of the convictions is set aside).

NO ERROR IN PART, REVERSED IN PART AND REMANDED.

STATE V. IZARD

Opinion of the Court

Judges MURPHY and HAMPSON concur.

Report per Rule 30(e).