

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-964

Filed 05 September 2023

Buncombe County, Nos. 18 CRS 92717 and 18 CRS 92718

STATE OF NORTH CAROLINA

v.

WILLIAM DARRYL MARLER, Defendant.

Appeal by defendant from judgment entered 6 January 2022 by Judge Steve R. Warren in Buncombe County Superior Court. Heard in the Court of Appeals 23 May 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tamika L. Henderson for the State.

William D. Spence, for the Defendant.

DILLON, Judge.

Defendant William Darryl Marler appeals from a jury's verdict convicting him of first-degree sexual offense with a child and indecent liberties with a child. We conclude that Defendant received a fair trial, free of reversible error. However, we remand to the trial court for resentencing.

I. Background

STATE V. MARLER

Opinion of the Court

This appeal concerns multiple sexual offenses committed by Defendant against his stepdaughter, Sue¹.

In June of 2011, Sue was 12 years old and lived in a home with her mother, brother, and Defendant. Defendant was the husband of Sue's mother, who worked as a nurse. On the days when Sue's mother worked late into the evening, Defendant was responsible for picking up Sue from school.

On one occasion, Defendant told Sue that she was not applying sunscreen on her body properly. He began rubbing sunscreen on Sue's body. Sue testified that Defendant rubbed the sunscreen underneath her bathing suit and that she "tensed up" when Defendant touched her vagina. When she attempted to move away from Defendant, he told her to stop treating him like a "pervert".

Later that afternoon, Defendant asked Sue to define a "pervert". When Sue could not answer, Defendant pulled down his pants and flashed Sue, saying "this is what a pervert is. A pervert does this." Sue testified that Defendant shook his genitalia around and said, "Look at this, look at this, little girl. Don't you want this?" When Sue turned around to look away, Defendant grabbed her from behind and began groping her all over. After a short period of time, Sue broke free and escaped into her bedroom. Sue did not tell her mother about the incident out of fear Defendant would hurt her or her mother.

¹ A pseudonym.

STATE V. MARLER

Opinion of the Court

After turning 18, Sue disclosed to a healthcare provider that Defendant had sexually abused her when she was 12 years of age while her mother was at work. A warrant was issued for Defendant's arrest for first-degree sexual offense with a child under 13 and indecent liberties with a child. On 6 January 2022, a jury found Defendant guilty of both counts. Defendant appeals his convictions.

II. Analysis

A. Rule 404(b) Testimony

Defendant first argues the trial court erred by allowing testimony from both Sue and Sue's mother that Defendant had perpetrated domestic violence in the home. Defendant had filed a pretrial motion in limine to exclude this testimony. However, he failed to object during the trial to this testimony he now challenges on appeal, except to Sue's testimony that Defendant "would drink a lot... [and] was abusive." Thus, this statement is the only testimony Defendant has preserved for appellate review. *State v. Hill*, 347 N.C. 275, 293, 493 S.E.2d 264, 274 (1997) ("A party objecting to an order granting or denying a motion in limine... is required to object to the evidence at the time it is offered at the trial" to preserve the issue for appeal). The remaining testimony Defendant challenges is unpreserved and reviewable only for plain error. *State v. Lawrence*, 365 N.C. 506, 516, 732 S.E.2d 326, 333 (2012).

During a pre-trial hearing on Defendant's motion in limine, the State argued that the testimony should be admitted under Rule 404(b), which provides that:

Evidence of other crimes, wrongs, or acts is not admissible

STATE V. MARLER

Opinion of the Court

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. Gen. Stat. § 8C-1, Rule 404(b) (2021).

The trial court denied Defendant's motion and allowed the testimony, instructing the jury that the testimony should only be considered for the Rule 404(b) purpose of explaining Sue's delay in disclosing the sexual abuse, namely, because she feared Defendant.

Our Supreme Court, however, has held that evidence of domestic violence against a victim's mother unrelated to the alleged incident(s) for which a defendant is charged may be relevant "to show why [the victim] delayed in reporting the sexual abuse" against her. *State v. Betts*, 377 N.C. 519, 526, 858 S.E.2d 601, 606 (2021). We have similarly held. *See State v. Espinoza-Valenzuela*, 203 N.C. App. 485, 491, 692 S.E.2d 145, 151 (2010) ("evidence of the defendant's domestic violence to show why the victims delayed reporting the sexual abuse defendant perpetrated against them.")

Defendant argues, however, that the issue of Sue's delayed disclosure was irrelevant because Defendant did not dispute whether the incident occurred. As a result, Defendant argues, Sue's credibility regarding her testimony of the sexual abuse was not at issue, thus negating the need for any testimony to that effect. Despite Defendant's admission to the incident applicable here, Defendant *does* dispute whether the element of "penetration" occurred, which is required to sustain

a conviction for first-degree sexual offense. Further, Defendant questioned Sue during cross-examination about her delay in coming forward. Thus, Sue's credibility *was* at issue. Accordingly, because there were disputed issues at trial that put Sue's credibility at issue, and our caselaw instructs that such testimony is admissible, we conclude that the trial court did not abuse its discretion.

B. Expert Testimony

Next, Defendant argues that the trial court erred when it qualified s State's expert to testify on the topic of delayed disclosures in child sexual abuse cases. Specifically, Defendant argues that the expert's testimony was not reliable under Rule 702, and further, that the opinion improperly bolstered Sue's credibility.

We review a trial court's ruling on Rule 702(a) for abuse of discretion. *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016). The trial court "is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony" and will be reversed "only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984); *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986).

Rule 702(a) of our Rules of Evidence requires a trial court to perform a "three-pronged" analysis to determine the reliability of an expert's testimony. *See* N.C. Gen. Stat. § 8C-1, Rule 702(a) (2021).

Here, Defendant's argument is couched under the first prong, whether the

expert's testimony was "based on sufficient facts or data." N.C. Gen. Stat. § 8C-1, Rule 702(a)(1) (requiring the trial court to determine whether an expert's opinion is based upon "sufficient facts or data"). Defendant argues that "the 30 or so articles [the expert] read were not sufficient upon which to base his testimony." However, Defendant's argument neglects the expert's other testimony stating additional facts and data he based his opinion on, including his experience spanning three decades.

During voir dire, the expert testified that (1) he is the acting executive director of the Mountain Child Advocacy Center where he provides "clinical supervision for a team of therapists that are trained in a variety of trauma-- evidence-based trauma therapies", (2) he has a Master's degree in social work and is a licensed clinical social worker, (3) he has been published four times on various topics related to trauma experienced by sexually abused children, (4) he serves as a mental health consultant at Duke University and the University of Oklahoma, which is a national center for child abuse and neglect, (5) he has had "a lot of specialized training around trauma, around forensic interviewing and being a forensic specialist", and that (6) his opinion testimony was based on literature from peer-reviewed articles, as well as training and experience from working with both victims and perpetrators of sexual offenses.

The facts in this case are similar to those in *State v. Carpenter*, and *State v. Shore*. In both *Carpenter* and *Shore*, our Court upheld the admission of an expert's testimony on the topic of delayed disclosures when the defendant challenged the testimony on Rule 702 grounds and the impact on the credibility of the victim's

testimony, as is the case here. *State v. Carpenter*, 147 N.C. App. 386, 394, 556 S.E.2d 316, 322 (2001); *State v. Shore*, 255 N.C. App. 420, 436, 804 S.E.2d 606, 616 (2017).

In *Carpenter*, the expert testified that her testimony was based on literature, journal articles, training, and experience. *Carpenter*, 147 N.C. App. at 394, 556 S.E.2d at 321. During trial, the expert testified as to her “extensive experience, training, and education”, specifically in the area of evaluating and interviewing child sex abuse victims. *Id.* at 393, 556 S.E.2d at 321². Our court concluded that “[t]hough she did not specifically cite supporting texts, articles, or data, [the expert] testified on *voir dire* that she was basing her conclusions on literature, journal articles, training, and her experience.” *Id.* at 394, 556 S.E.2d at 321.

Likewise in *Shore*, the expert testified that her testimony was based on “200 hours of training, eleven years of forensic interviewing experience, conducting over 1,200 forensic interviews with 90% of those focusing on sex abuse allegations, and reviewing over twenty articles on delayed disclosures.” *State v. Shore*, 255 N.C. App. at 433, 804 S.E.2d at 614-15.

In both *Carpenter* and *Shore*, our Court held the expert testimony did not improperly bolster the victim’s credibility, since both experts spoke in “general terms”

² We note that *State v. Carpenter* was decided prior to the 2011 amendments to our Rules of Evidence. However, in *Shore*, our Court concluded that “*Carpenter* is still good law as it does not conflict with the reliability requirements of the *Daubert* standard.” See *McGrady*, 368 N.C. at 888, 787 S.E.2d at 8; *Shore*, 255 N.C. App. at 433, 804 S.E.2d at 615.

and did not “express an opinion” regarding the victim’s credibility. *Carpenter*, 147 N.C. App. at 394, 556 S.E.2d at 322; *Shore*, 255 N.C. App. at 433, 804 S.E.2d at 615.

Here, the expert only testified in general terms and did not render any opinion regarding the credibility of Sue’s testimony and allegations against Defendant. Therefore, we conclude that the trial court did not abuse its discretion when it admitted the expert’s testimony.

III. Motion to Dismiss

Defendant next argues that the trial court erred when it denied his motion to dismiss both charges for insufficiency of the evidence.

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 evidence to determine whether it is substantial enough to survive a motion to dismiss, 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 at 826. “Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (citations and internal quotation marks omitted). “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) (citation omitted).

STATE V. MARLER

Opinion of the Court

Under N.C. Gen. Stat. § 14-27.28(a),

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) (2021). The term “sexual act” is defined as,

[T]he penetration, however slight, by any object into the genital or anal opening of another person’s body.

N.C. Gen. Stat. § 14-27.20 (2021).

Here, Defendant does not dispute that the incident occurred, nor does he dispute the applicability of the statutory age requirement. He does, however, contend that the requisite “penetration” did not occur.

During trial, Sue testified that Defendant touched her vagina while he was rubbing his hands underneath her bathing suit. She specifically testified that Defendant touched the labia, labia majora and labia minora, and that she felt “pain and pressure” as a result. Because our Courts routinely hold that “evidence of penetrating the labia is sufficient to establish the element of penetration in a sexual act”, we conclude that there was sufficient evidence to send the charge of first-degree sexual act to the jury. *State v. Burns*, 278 N.C. App. 718, 722, 862 S.E.2d 431, 435 (2021); *State v. Bellamy*, 172 N.C. App. 649, 658, 617 S.E.2d 81, 88 (2005) (victim’s testimony she was touched “in between the labia” was sufficient to establish the element of penetration).

Next, Defendant argues that there was insufficient evidence to support the

charge of indecent liberties with a child. The applicable statute states, in relevant portion:

(a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:

(1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or

(2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

N.C. Gen. Stat. § 14-202.1 (2021).

Further, “[i]ndecent liberties’ are defined as ‘such liberties as the common sense of society would regard as indecent and improper.’” *State v. McClees*, 108 N.C. App. 648, 653, 424 S.E.2d 687, 690 (1993); *State v. Every*, 157 N.C. App. 200, 205, 578 S.E.2d 642, 647 (2003). Moreover, “[t]hat the action was for the purpose of arousing or gratifying sexual desire, may be inferred from the evidence of the defendant’s actions.” *State v. Godley*, 234 N.C. App. 562, 569, 760 S.E.2d 285, 291 (2014).

Here, Defendant argues that there was no evidence that Defendant’s conduct was for the purpose of “arousing or gratifying sexual desire”, but instead, his conduct was intended to demonstrate to Sue how to properly apply suntan lotion and “how a pervert would act.” The State, however, presented evidence that Defendant rubbed suntan lotion all over Sue’s body, including rubbing both of her breasts and vaginal

STATE V. MARLER

Opinion of the Court

area under her bathing suit. Further, the evidence showed that Defendant flashed Sue and “shook around his genitalia” at her, he grabbed her from behind and began to “[p]ut his hands over [her] private areas.” Sue described how Defendant grabbed her with both hands over her breasts and vaginal area, as well as her stomach and shoulders. She testified that this lasted around 10-15 seconds. Defendant’s behavior falls within the realm of what society “would regard as indecent and improper.” And the evidence was sufficient to send the issue regarding Defendant’s sexual motives to a jury. Thus, we conclude the State’s evidence was sufficient to support the charge of indecent liberties with a child. *McClees*, 108 N.C. App. at 653, 424 S.E.2d at 690.

IV. Sentencing

On his final assignment of error, Defendant argues, and the State concedes, that Defendant was improperly sentenced under current law instead of the law applicable at the time of the crime.

Here, the trial court imposed a maximum sentence of 320 months, based on N.C. Gen. Stat. 15A-1340.17(f), which became effective on 1 December 2011. However, the State’s indictment reflects an offense date range of 2 December 2009 to 1 September 2011. Accordingly, N.C. Gen. Stat. 15A-1340.17(f) was not in effect when Defendant committed the applicable crimes. Therefore, we remand this matter to allow the trial court to apply the correct sentencing guidelines.

NO ERROR IN PART; REMANDED FOR RESENTENCING.

Chief Judge STROUD and Judge CARPENTER concur.

STATE V. MARLER

Opinion of the Court

Report per Rule 30(e).