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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-368

Filed 6 February 2024

Wake County, Nos. 21 CRS 201978-80

STATE OF NORTH CAROLINA

v.

RIGOBERTO VELASQUEZ

Appeal by defendant from judgment entered 29 June 2022 by Judge Rebecca W. Holt in Wake County Superior Court. Heard in the Court of Appeals 9 January 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General John F. Oates, Jr., for the State.

Reid Cater for the defendant-appellant.

TYSON, Judge.

Rigoberto Velasquez (“Defendant”) appeals from judgments entered upon a jury’s verdicts of guilty of two counts of second-degree rape and two counts of second degree forcible sexual offense. We find no error.

I. Background

Defendant and Milady Cedenó began dating in 2011. Cedenó moved from the Dominican Republic to live with Defendant in Raleigh. Cedenó then arranged for her three children and her parents to move to Raleigh in 2013. Defendant, Cedenó, Cedenó's children and her parents lived together.

Cedenó's oldest child and daughter, M.C., was eighteen years old when she moved to Raleigh in 2013. M.C. had suffered *inter alia*: epileptic seizures, bipolar disorder, autism, and exhibited learning difficulties. M.C. attended Millbrook High School, but was assigned to remedial and special education classes.

While enrolled at Millbrook, M.C. told a pastor in 2014 that Defendant had left her two younger brothers at a pizza restaurant. Defendant then drove with M.C. to a parking lot where they had sexual intercourse. The Raleigh Police Department investigated the allegation, but no charges were filed.

M.C.'s grandmother took her to Duke Raleigh Hospital on 6 June 2020 because of M.C.'s abdominal pain. M.C. told a nurse Defendant had sexual intercourse with her four times between March 2020 and the day prior. Staff at Duke Raleigh Hospital contacted the Raleigh Police Department. Officer Zachary Sisson was dispatched to the hospital to speak with M.C. about her allegations.

Officer Sisson had trouble communicating with M.C. because of language barriers and M.C.'s disabilities. Officer Sisson was able to interview M.C. with the assistance of a hospital translator. M.C., through the translator, told Sisson that she experienced "vaginal area issues" because Defendant had touched her. Defendant

commenced the sexual encounters by kissing M.C., removing her clothes, and kissing her body. M.C. stated the encounters would end by using the term “ejaculate.”

M.C. was examined by a sexual assault nurse examiner and a rape kit was collected. Swabs from M.C.’s vaginal area contained no DNA, and swabs from other parts of her body showed insufficient male DNA to base a comparison.

Defendant was indicted for two counts of second-degree rape and two counts of second-degree forcible sex offense. Defendant was convicted of all charges and sentenced as a prior record level I to four consecutive active terms of 72 to 147 months. Defendant appeals.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2023).

III. Issues

Defendant argues the trial court erred by allowing an improperly-qualified expert witness to testify and by denying his motion to dismiss for insufficient evidence tending to show M.C. was mentally disabled. Defendant also argues the trial court committed plain error by allowing an expert to testify to matters not based on facts or data, which were not the product of reliable principles and methods, the expert did not apply the principles and methods reliably to the facts of the case, and the court allowed the prosecutor to improperly vouch for or bolster M.C.’s credibility during closing arguments.

IV. Admission of Leigh Howell as an Expert

A. Standard of Review

A trial court's ruling on the admission of expert testimony under Rule 702(a) is reviewed for abuse of discretion. *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016). "A trial court may be reversed for abuse of discretion only upon showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986) (citations omitted).

When error is asserted that "the trial court's decision is based on an incorrect reading and interpretation of the rule governing admissibility of expert testimony, the standard of review on appeal is *de novo*." *State v. Parks*, 265 N.C. App. 555, 563, 828 S.E.2d 719, 725 (2019) (citation omitted).

B. Analysis

North Carolina Rule of Evidence 702 governs admission of opinion testimony by an expert witness:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply

- (1) The testimony is based upon sufficient facts or data.
- (2) The testimony is the product of reliable principles and methods.

(3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2023).

Defendant argues the trial court erred by allowing Leigh Howell to testify about her interview with M.C. using the Recognizing Abuse Disclosures and Responding (“RADAR”) method for alleged *child sex abuse victims*. The Supreme Court of North Carolina has interpreted Rule 702(a) and examined Supreme Court of the United States’ precedents interpreting Rule 702(a). *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136, 139 L. Ed. 2d 508 (1997); and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 143 L. Ed. 2d 238 (1999). Our Supreme Court held:

the witness must be qualified as an expert by knowledge, skill, experience, training, or education. This portion of the rule focuses on the witness’s competence to testify as an expert in the field of his or her proposed testimony. Expertise can come from practical experience as much as from academic training. Whatever the source of the witness’s knowledge, *the question remains the same: Does the witness have enough expertise to be in a better position than the trier of fact to have an opinion on the subject?* The rule does not mandate that the witness always have a particular degree or certification, or practice a particular profession. But this does not mean that the trial court cannot screen the evidence based on the expert’s qualifications. In some cases, degrees or certifications may play a role in determining the witness’s qualifications, depending on the content of the witness’s testimony and the field of the witness’s purported expertise. As is true with respect to other aspects of Rule 702(a), the trial court has the discretion to determine whether the witness is sufficiently qualified to testify in that field.

State v. McGrady, 368 N.C. 880, 889-90, 787 S.E.2d 1, 9 (2016) (citations and quotation marks omitted) (emphasis supplied).

Howell conducted her interview with M.C. using the RADAR method for interviewing alleged child sex abuse victims. Even though M.C. was legally twenty-five years old, Howell opined M.C. had a cognitive age of twelve and the RADAR method was designed for subjects between the ages of three and seventeen. Presuming, without deciding, this was error to allow Howell to testify about M.C.'s capabilities, using an interview method designed for minors, this error is not prejudicial to require a new trial. "An error is not prejudicial unless there is a reasonable probability that, had the error in question not been committed, a different result would have been reached at trial." *See State v. Babich*, 252 N.C. App. 165, 172, 797 S.E.2d 359, 364 (2017). The State published the recorded interview, which allowed the jury to directly observe M.C.'s statements, demeanor, and body language. M.C. also testified through a court-approved interpreter at trial.

V. Motion to Dismiss

A. Standard of Review

This Court's standard of review of a denial of a motion to dismiss is well established: "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*,

351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

“In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.” *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). “Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve.” *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455. Even if circumstantial evidence does not rule out “every hypothesis of innocence,” the motion to dismiss may be overcome and denied. *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988) (citation omitted).

“The denial of a motion to dismiss for insufficient evidence is a question of law which this Court reviews *de novo*.” *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007) (citation omitted).

B. Analysis

Defendant argues the trial court erred by denying his motion to dismiss all charges, because insufficient evidence tends to show he knew or should have known M.C. was allegedly mentally disabled. The essential elements of second-degree rape are: Defendant engages in vaginal intercourse with a person “[w]ho has a mental disability or who is mentally incapacitated or physical helpless, and the person

performing the act knows or should know the other person has a mental disability or is mentally incapacitated or physically helpless.” N.C. Gen. Stat. § 14-27.22 (2023). The essential elements of second-degree sex offense are: the defendant engages in a sexual act with a person “[w]ho has a mental disability or who is mentally incapacitated or physical helpless, and the person performing the act knows or should know the other person has a mental disability or is mentally incapacitated or physically helpless.” N.C. Gen. Stat. § 14-27.27 (2023).

Our General Statutes define a person who has a mental disability as:

A victim who has an intellectual disability or a mental disorder that temporarily or permanently renders the victim substantially incapable of appraising the nature of his or her conduct, or of resisting the act of vaginal intercourse or a sexual act, or of communicating unwillingness to submit to the act of vaginal intercourse or a sexual act.

N.C. Gen. Stat. § 14-27.20(2a) (2023). The State presented substantial evidence tending to show Defendant had lived with M.C., observed her behaviors, and admitted knowing M.C. had intellectual disabilities. The trial court properly denied Defendant’s motion to dismiss. Defendant’s argument is dismissed.

VI. Dr. Modell’s Testimony

Defendant failed to object, but he argues the trial court plainly erred by allowing Dr. Scott Modell to testify as an expert witness in the field of determining the capacity of an intellectually-disabled person to consent to sexual behavior.

A. Standard of Review

“Unpreserved error in criminal cases . . . is reviewed only for plain error.” *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012). In order for a defendant to prove plain error, he must show a fundamental error occurred and establish prejudice. *Id.* at 518, 723 S.E.2d at 334.

The defendant must show “the error had a probable impact on the jury’s finding that the defendant was guilty.” *Id.* (citations and quotation marks omitted). Defendant bears the burden of showing that the unpreserved error “rises to the level of plain error.” *Id.* at 516, 723 S.E.2d at 333.

B. Analysis

The trial court found and concluded Dr. Modell has read, studied and formed an expert opinion on the ability and capacity of a mentally-disabled person to consent to sexual behaviors. Defendant has failed to show the trial court erred, nor plainly erred, in admitting Dr. Modell’s testimony. Defendant’s argument is overruled.

VII. Closing Argument

Defendant argues, despite his failure to object during closing arguments, the trial court prejudicially erred by not intervening *ex mero motu* to stop the State from making certain statements during closing arguments. Defendant asserts the State’s statement that M.C. could not make up her version of the crimes because of her disabilities was not based upon the evidence presented, the arguments wrongfully addressed M.C.’s credibility, and were prejudicial.

A. Standard of Review

Our Supreme Court has stated:

The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. Under this standard, [o]nly an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken. To establish such an abuse, defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair.

State v. Waring, 364 N.C. 443, 499-500, 701 S.E.2d 615, 650 (2010) (citations and internal quotation marks omitted), *cert denied*, 565 U.S. 832, 181 L.Ed.2d 53 (2011).

B. Analysis

After *State v. Waring* was decided, our Supreme Court further stated:

when defense counsel fails to object to the prosecutor's improper argument and the trial court fails to intervene, the standard of review requires a two-step analytical inquiry: (1) whether the argument was improper; and, if so, (2) whether the argument was so grossly improper as to impede the defendant's right to a fair trial.

State v. Huey, 370 N.C. 174, 179, 804 S.E.2d 464, 469 (2017) (citation omitted). Only after this Court "finds both an improper argument *and* prejudice will this Court conclude that the error merits appropriate relief." *Id.* (citation omitted) (emphasis supplied).

In North Carolina, "counsel is allowed wide latitude in the argument to the

jury,” but cannot “place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs, and personal opinions not supported by the evidence.” *State v. Hill*, 311 N.C. 465, 472-73, 319 S.E.2d 163, 168 (1984) (citations and internal quotation marks omitted).

The Supreme Court of the United States has further stated: “it is not enough that the prosecutors’ remarks were undesirable or even universally condemned.” *Darden v. Wainwright*, 477 U.S. 168, 181, 91 L.Ed.2d 144, 157 (1986) (citation and internal quotation marks omitted). “The relevant question is whether the prosecutors’ comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Id.* (citation and internal quotation marks omitted).

Here, in the State’s closing, the prosecutor argued:

I would submit to you that the defendant had a hard time keeping his story straight, but [M.C.] did the best she could with the limits that she had. If-then. She can’t continue the fabrication. It would be hard for you or me to continue a story.

The State further argued:

Notice that everyone who came in on the defense said that she would get aggressive and she would hit me. She acknowledged hitting her mom. If she didn’t like him, wouldn’t she say he hit me? She didn’t. She didn’t lash out at him. She gave you very concrete details of sexual abuse.

She can’t read. She can’t learn. She can’t write. She can’t drive . . . She can’t count. Her brother said she doesn’t know her colors. She can’t comprehend abstract concepts.

She can't make this up.

Presuming, without deciding, Defendant met the first prong of *Huey*, he has not shown the remarks were “so grossly improper as to impede the defendant’s right to a fair trial” for this Court to conclude the trial judge “abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken” to offer curative instructions or award a new trial. *Huey*, 370 N.C. at 179, 804 S.E.2d at 469; *State v. Richardson*, 342 N.C. 772, 786, 467 S.E.2d 685, 693 (1996). Defendant’s arguments are overruled.

VIII. Conclusion

Presuming the trial court erred by allowing Howell to testify, Defendant has failed to show any prejudice, where the jury viewed and heard M.C. for themselves. The trial court properly denied Defendant’s motion to dismiss for insufficient evidence tending to show M.C. was mentally disabled.

The trial court did not commit plain error by allowing Dr. Modell to testify. Defendant has also failed to show the trial court committed plain error by declining to intervene *ex mero motu* during the State’s closing argument in the absence of Defendant’s failure to object or to otherwise preserve error, or show prejudice.

Defendant received a fair trial, free from preserved or prejudicial errors. We find no error in the jury’s verdicts or in the judgments entered thereon. *It is so ordered.*

STATE V. VELASQUEZ

Opinion of the Court

NO ERROR.

Judges STROUD and ZACHARY concur.

Report per Rule 30(e).