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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-938

Filed 20 August 2024

Wake County, No. 18 CRS 219359

STATE OF NORTH CAROLINA

v.

JOSHUAL LAMAR DAVIS, Defendant.

Appeal by Defendant from judgment entered 18 November 2021 by Judge Keith O. Gregory in Wake County Superior Court. Heard in the Court of Appeals 5 September 2023.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Tracy Nayer, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Emily Holmes Davis, for defendant-appellant.*

MURPHY, Judge.

Defendant argues that a law enforcement investigator's testimony was inadmissible hearsay and that the trial court committed plain error by failing to give a limiting jury instruction. Alternatively, Defendant argues that trial counsel's

failure to request a limiting instruction amounted to ineffective assistance of counsel (“IAC”). However, Defendant fails to demonstrate the trial court’s alleged error amounted to plain error or that trial counsel’s mistake was prejudicial.

As conceded by the State, the trial court erred by imposing lifetime registration where Defendant was not convicted of an aggravated offense or found to be a recidivist or a sexually violent predator. Accordingly, we reverse and remand for a new registration hearing.

### **BACKGROUND**

Defendant was charged with statutory sexual offense with a child by an adult and taking indecent liberties with a child. Trudy,<sup>1</sup> the minor daughter of Defendant’s close friend, recounted to her mother (“Mother”) and older sister two instances where Defendant touched her “private part.” Defendant had been a close friend to Mother and stayed overnight in the home of Trudy, Mother, and Trudy’s older sister the weekend the assault occurred.

At trial, Trudy testified about the acts Defendant committed upon her. Regarding the first sexual attack, Trudy testified that Defendant got on the couch and touched her “private part” with his fingers. According to the State’s theory, the first attack by Defendant on Trudy constituted an indecent liberty and occurred in late June 2018. The second sexual attack occurred on a subsequent night in late June

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<sup>1</sup> We use a pseudonym to protect the juvenile’s identity and for ease of reading.

2018 when Defendant got into Trudy's bed, touched the inside of her "private part" with his hands. The State prosecuted the second attack by Defendant as statutory sex offense with a child by an adult.

After Trudy told Mother what Defendant had done to her, Mother called the police, and Defendant was arrested. Mother took Trudy to the hospital for an initial examination that day and the next when Trudy complained of experiencing pain while urinating. Trudy had not experienced these pains before the sexual attacks by Defendant. The hospital took urinary samples from Trudy that showed evidence of a high concentration of diphtheroid, which is a bacterium that is commonly found on skin and mucous membranes.

At trial, Investigator Graham Horne with the juvenile division of the Wake County Sheriff's Office testified about a conversation he had with Mother while she was at the hospital on 29 June 2018. At trial, Investigator Horne testified, without objection, that, upon asking Mother about why she was at the hospital, she told him that "[Trudy] had trouble peeing and that it was in relation to [Defendant] sexually assaulting her."

At trial, the State also presented testimony by Dr. Karen Todd, Ms. Tiffany Bonapart-Hampton (a former child abuse evaluation specialist who evaluated Trudy), and Mother. Dr. Todd, a general pediatrician with WakeMed Health and Hospitals who also served as Medical Director and pediatrician at the SafeChild Advocacy Center, testified as an expert witness in the field of pediatrics. Dr. Todd examined

Trudy at the SafeChild Advocacy Center a month after Trudy underwent a forensic evaluation at the hospital. Dr. Todd received and reviewed medical reports from two hospital physicians prior to her meeting with Trudy. The medical reports “noted some erythema, or redness, around the urethral opening and the mons pubis.” Dr. Todd also testified that her own urinalysis from July 2018 was inconsistent with the initial urinalysis conducted by WakeMed in June 2018. The first urinalysis showed “pyuria, or pus or white blood cells” in Trudy’s urine, as well as “a small amount of something called leukocyte esterase, which is a byproduct of bacteria.” Moreover, Dr. Todd testified that the high concentration of diphtheroid bacteria found in the first urinalysis was likely due to interaction with skin and mucous membranes. However, she noted that the repeat urinalysis, which was conducted “about six or seven weeks after the event,” revealed mixed bacteria contaminants in the urine culture “consistent with improper cleaning.”

Along with the medical reports, Dr. Todd reviewed the forensic interview session between Trudy and Ms. Bonapart-Hampton. At trial, Dr. Todd also testified about consistencies between the medical examination results from Trudy’s June 2018 WakeMed visits and Trudy’s disclosures during the forensic interview session with Ms. Bonapart-Hampton.

Dr. Todd testified as to Trudy’s recorded interview disclosures to Ms. Bonapart-Hampton as follows:

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[STATE]: What was your understanding of what sexual contact [Trudy] had disclosed to Ms. [Bonapart-Hampton]?

[DR. TODD]: I believe she stated that . . . [Defendant] touched her one time in the private part, and she was very specific to say the part where she pees, and that he had touched her, and I quote, way, way, way inside. That he touched her hard and when she would pee, it hurt.

The jury convicted Defendant of statutory sex offense with a child by an adult in violation of N.C.G.S. § 14-27.28 and taking indecent liberties with a child in violation of N.C.G.S. § 14-202.1. Defendant received consecutive active sentences of 317 to 441 months and 21 to 35 months.

Directly after sentencing Defendant, the State presented the trial court with forms to make judicial findings as to whether Defendant should register as a sex offender after his active prison sentence. The trial court determined that Defendant committed “a sexually violent offense under [N.C.G.S. §] 14-208.6(5)”; that Defendant’s sexually violent offenses “involve[d] the physical, mental, or sexual abuse of a minor”; and ordered that “[D]efendant shall register as a sex offender for the period of his natural life.” The State advised the trial court about the then-pending satellite-based monitoring (“SBM”) issue in *State v. Grady*, 372 N.C. 509 (2019), considering “whether or not [courts] can order [a defendant] to serve [SBM] for a period of their natural life.” The State requested that a hearing be conducted before Defendant is released to determine whether lifetime SBM would be appropriate in the matter since Defendant was not a recidivist, which is the issue “*Grady* actually

deal[t] with[.]” The trial court took the State’s recommendation under advisement and did not conduct a hearing to address satellite-based monitoring at that time. Instead, the trial court announced that, “[p]rior to the release of [Defendant], a satellite-based monitoring hearing shall occur.”

Defendant gave oral notice of appeal but made no objection to the imposition of lifetime registration as a sex offender and never filed a written notice of appeal as to the registration order. Defendant filed a petition for writ of certiorari seeking review of the trial court’s registration order.

### **ANALYSIS**

Defendant raises three arguments on appeal: (A-1) that the trial court plainly erred in failing to give a limiting instruction about Investigator Horne’s testimony regarding Mother’s out-of-court statement; (A-2) alternatively, that defense counsel’s failure to request the limiting instruction was ineffective assistance of counsel; and (B) that the trial court erred in ordering lifetime registration where Defendant was not convicted of an aggravated offense pursuant to N.C.G.S. § 14-208.23, Defendant was not a recidivist, and the trial court found that Defendant was not classified as a sexually violent predator under N.C.G.S. § 14-208.20. Additionally, since oral notice of appeal was insufficient to confer jurisdiction on this Court to consider the registration order, Defendant contemporaneously petitions for writ of certiorari to review the merits.

#### **A. Lack of Limiting Instruction**

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Defendant argues that the trial court plainly erred in failing to give a limiting instruction when Investigator Horne testified to Mother’s out-of-court statement. Specifically, Defendant contends that, with a proper limiting instruction on the use of Mother’s statement, the jury probably would have reached a different result because, without the substantive use of Mother’s hearsay statement, the State did not present overwhelming evidence to convince the jury of Defendant’s guilt.

We “apply the plain error standard of review to unpreserved instructional and evidentiary errors in criminal cases.” *State v. Maddux*, 371 N.C. 558, 564 (2018). Under the plain error standard, a defendant bears the burden of demonstrating, *inter alia*, that there was a fundamental error at trial. *State v. Lawrence*, 365 N.C. 506, 518 (2012). “[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.” *Id.* (marks omitted). Furthermore, “because plain error is to be applied cautiously and only in the exceptional case,” *id.*, “the alleged error ‘must seriously affect the fairness, integrity or public reputation of judicial proceedings.’” *State v. Patterson*, 269 N.C. App. 640, 644 (quoting *State v. Thompson*, 254 N.C. App. 220, 224 (2017)), *disc. rev. denied*, 375 N.C. 491 (2020).

We need not reach a firm conclusion on whether the trial court’s failure to provide a limiting instruction was erroneous “because assuming *arguendo* the trial court erred, it was not plain error[.]” *State v. Jones*, 280 N.C. App. 241, 260 (2021), *disc. rev. denied*, 868 S.E.2d 861 (Mem) (2022). Defendant has not met his burden to

demonstrate that the alleged error “had a probable impact on the jury’s finding that [Defendant] was guilty.” *Lawrence*, 365 N.C. at 518. Further, we hold Defendant did not receive IAC and was not prejudiced under *Strickland v. Washington*. See generally *Strickland v. Washington*, 466 U.S. 668, *reh’g denied*, 467 U.S. 1267 (1984).

### 1. Plain Error

Defendant first contends that if Investigator Horne’s testimony had not been offered as substantive evidence, the jury probably would have reached a different verdict “because juries give undue deference and value to law enforcement testimony.” Defendant cites *State v. Belk*, 201 N.C. App. 412 (2009), *disc. rev. and writ denied*, 364 N.C. 129 (2010), for the proposition that “the jury believed and relied on the lead investigator’s testimony” about mother’s out-of-court statements. See *id.* at 418 (“[B]ecause the witness was a police officer with eighteen years of experience, the jury likely gave significant weight to Officer Ring’s testimony.”).

In *Belk*, the defendant argued that the trial court erred in allowing a police officer to testify about the defendant’s identity in a surveillance video. *Id.* at 414. This Court recognized lay opinion testimony identifying a criminal defendant may be admissible “where such testimony is based on the perceptions and knowledge of the witness[] [because] the testimony would be helpful to the jury in the jury’s fact-finding function rather than invasive of that function, and the helpfulness outweighs the possible prejudice to the defendant from admission of the testimony.” *Id.* at 415 (quoting *State v. Buie*, 194 N.C. App. 725, 730 (2009)). However, there, the officer’s



familiarity with the defendant's appearance was confined to a few brief encounters "on a few occasions[.]" *Id.* at 417. We determined "there was no basis for the trial court to conclude that the officer was more likely than the jury correctly to identify [the defendant] as the individual in the surveillance footage." *Id.* "The only factor supporting the trial court's conclusion [was the officer's] familiarity with [the defendant's] appearance, based on three brief encounters[.]" *Id.* at 418. "Accordingly, we [held] the trial court erred by allowing [the officer] to testify that, in her opinion, the individual depicted in the surveillance video was [the defendant]." *Id.*

Moreover, in *Belk*, we concluded the error in admitting the officer's testimony was prejudicial where "the State's case rested exclusively on the surveillance video and [the officer's] identification testimony." *Id.* We considered and rejected similar arguments in *Lowery*, where

[the officer's] testimony and the recording were not the only evidence from which the jury could conclude [the defendant] was [the victim's] assailant. Indeed, as noted, there were numerous instances of witnesses identifying [the defendant] at trial. Thus, we [could not] conclude there is a reasonable possibility that, had [the] testimony been excluded, the jury would have reached a different result.

*State v. Lowery*, 278 N.C. App. 333, 345 (2021). We hold the prejudicial impact here is more akin to *Lowery* than it is to *Belk*.

First, Investigator Horne's testimony was not an opinion based on his first-hand observations or interactions with Defendant. Investigator Horne's testimony

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was a recitation of a statement made by Mother during an investigatory inquiry at the hospital. Second, unlike in *Belk* and as in *Lowery*, the investigator's testimony was not unique; the State presented other witnesses who testified similarly at trial about Trudy's sexual assault and why she was at the hospital. Finally, the State's case did not rest on Investigator Horne's testimony. Nor did the State reference or rely on the investigator's testimony in making its final arguments to the jury. There is no basis here for us to conclude the jury probably gave undue deference to the investigator's testimony. Even disregarding Investigator Horne's hearsay testimony, the jury heard testimony from Trudy's mother and Dr. Todd that was consistent with Trudy's own testimony of Defendant's sexual attack and its impact.

The State presented evidence connecting Trudy's difficulty with urinating to the bacteria found in her vaginal tract during her initial hospital examination, which was consistent with sexual attack of the kind alleged against Defendant. At trial, Dr. Todd explained the results of Trudy's urinalysis as follows:

[DR. TODD:] The initial -- so the initial urinalysis did show what we call pyuria, or pus or white blood cells. So there were some findings of white blood cells in the initial urine. There was a trace of bacteria. There was a small amount of something called leukocyte esterase, which is a byproduct of bacteria. And so that initial urine could indicate a possibility of urinary tract infection, and so the urine was sent to the lab to be cultured. And then when it was read probably 24 to 48 hours later, it showed 40,000 colonies per milliliter of one particular uropathogen called a diphtheroid.

[STATE:] What does all of that mean?

[DR. TODD:] So -- so diphtheroids are certain bacteria that are found usually on skin or mucous membranes. *In children who are symptomatic who are complaining that it hurts to urinate -- and that is something that [Trudy] was complaining about -- then we have concern for urinary tract infection, when there's more than 10,000 of these colonies growing and it's a single bacteria. Not mixed bacteria.* Like, we all have bacteria in those parts. You might grow out a mixed culture of lots of different bacteria if you didn't clean well before you urinated for this sample. (emphasis added).

Dr. Todd testified that usually diphtheroid bacteria are on skin or in mucous membranes. She testified that the urinalysis showed that too much (foreign) diphtheroid bacteria was present in Trudy's urethra *and* Trudy had painful urination (which did not exist prior to June 2018). Therefore, Dr. Todd—and the WakeMed doctor who performed the urinalysis—believed that she likely had a UTI, so the WakeMed doctor prescribed her antibiotics to treat the suspected UTI.

Absent Investigator Horne's testimony, without a limiting instruction, the jury would still have substantive evidence from both Trudy and Dr. Todd concerning Trudy's urinary pains days after Defendant's sexual attack. We further note that Trudy had testified—before Investigator Horne made his now challenged statement—as follows:

[STATE:] Okay. After -- did your mom take you anywhere that night?

[TRUDY:] Yeah. She took me to the hospital.

[STATE:] And why did you go to the hospital, if you know?

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[TRUDY:] To get myself checked.

[STATE:] You had talked about when he did this to you it felt weird. Did anything else feel weird or hurt?

[TRUDY:] When I was trying to use the bathroom, it really hurt.

[STATE:] Did you tell your mom that?

[TRUDY:] Yes.

. . . .

[STATE:] Before that night that you say that the defendant touched you inside of your private, were you having problems going to the bathroom before that night?

[TRUDY:] Yes. Like --

[STATE:] Go ahead.

[TRUDY:] Like, the next day and then the next day after that.

[STATE:] Okay. But the day before that, were you having problems?

[TRUDY:] No.

Dr. Todd testified, in pertinent part, about Trudy's medical interview as follows:

[STATE:] What was your understanding of what sexual contact [Trudy] had disclosed to Ms. [Bonapart-Hampton]?

[Dr. TODD:] I believe she stated that . . . [Defendant] touched her one time in the private part, and she was very specific to say the part where she pees, and that he had

touched her, and I quote, way, way inside. That he touched her hard and when she would pee, it hurt.

Accordingly, we hold that the trial judge's decision to allow the hearsay testimony without a limiting instruction did not prejudice Defendant under plain error. *See Lawrence*, 365 N.C. at 519 ("In light of the overwhelming and uncontroverted evidence, defendant cannot show that, absent the error, the jury probably would have returned a different verdict. Thus, he cannot show the prejudicial effect necessary to establish that the error was a fundamental error.").

## **2. Ineffective Assistance of Counsel**

Additionally, Defendant alleges IAC pertaining to this issue, asserting that he was prejudiced by defense counsel's failure to request a limiting instruction on the investigator's hearsay testimony. Whether a defendant was denied the effective assistance of counsel is a question of law that we review de novo. *See State v. Wilson*, 236 N.C. App. 472, 475 (2014).

To successfully assert an ineffective assistance of counsel claim [under *Strickland*], defendant must satisfy a two-prong test. First, he must show that counsel's performance fell below an objective standard of reasonableness. Second, once defendant satisfies the first prong, he must show that the error was so serious that a reasonable probability exists that the trial result would have been different absent the error.

*State v. Clark*, 380 N.C. 204, 215 (2022).

[I]n claims for ineffective assistance of counsel, the test for prejudice asks whether there is a "reasonable probability" that, absent the errors, the result of the proceeding would

have been different. To satisfy this test, the defendant “need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.”

*State v. Reber*, \_\_ N.C. \_\_, \_\_ 900 S.E.2d 781, 787 (2024) (quoting *Strickland*, 466 U.S. at 695, 693). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694.

Here, Defendant only contends that, “[h]ad defense counsel asked for the limiting instruction, the trial court would have been required to give the instruction[,]” and, “[h]ad the trial court given [the] instruction, the jury probably would have reached a different result.” Defendant offers no other evidence to buttress this assertion except that “[t]he State’s evidence was not overwhelming.” As we have already determined, Defendant failed to show that a different outcome at trial would have occurred “[i]n light of the overwhelming and uncontroverted evidence” presented by the State. *Lawrence*, 365 N.C. at 519. Here, too, we discern no reasonable probability that the outcome at trial would have been different had the testimony at issue been excluded. The record shows that Defendant cannot satisfy the second *Strickland* prong.

### **B. Lifetime Sex Offender Registration Order**

Having failed to file a notice of appeal of the trial court’s lifetime sex offender registration order, Defendant petitions this Court to review the registration order by writ of certiorari. We allow his petition.

Defendant contends, the State concedes, and we agree, that the trial court

erred by ordering Defendant to register as a sex offender for the duration of his life when Defendant was not a recidivist, was not classified as a sexually violent predator, and was not convicted of an aggravated offense.

“The General Assembly has ‘recognize[d] that sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and that protection of the public from sex offenders is of paramount governmental interest.’” *State v. Hilton*, 378 N.C. 692, 702-03 (2021) (quoting N.C.G.S. § 14-208.5 (2019)). A sex offender registrant is required to provide to the public their “name, sex, address, physical description, picture, conviction date, offense for which registration was required, the sentence imposed as a result of the conviction, and registration status.” N.C.G.S. § 14-208.10 (2023). Furthermore, sex offender registrants who are deemed “aggravated offenders are required to remain on the sex offender registry for life” and “certain liberty, movement, and privacy restrictions apply even after the completion of any post-release supervision term.” *Hilton*, 378 N.C. at 709.

Under N.C.G.S. § 14-208.6A, there are two sex offender registration requirements for two different classes of sexual offenders. *See* N.C.G.S. § 14-208.6A (2023). In pertinent part, N.C.G.S. § 14-208.6A provides that

[i]t is the objective of the General Assembly to establish a 30-year registration requirement for [defendants] convicted of certain offenses against minors or sexually violent offenses with an opportunity for those [defendants] to petition. . .to shorten their registration time. . . It is the

further object of the General Assembly to establish more stringent set of registration requirements for recidivists, . . . aggravated [offenders], and . . . highly dangerous sex offenders . . . determined by a sentencing court . . . to be sexually violent predators.

*Id.* Lifetime registration is recognized by the General Assembly, and contemplated by N.C.G.S. § 14-208.23, as reserved for sex offenders who pose a high risk of engaging in sex offenses even after being released from incarceration; sex offenders who are classified as sexually violent predators; or sex offenders who are convicted of an aggravated sexual offense. “A [defendant] who is a recidivist, who is convicted of an aggravated offense, or who is classified as a sexually violent predator shall maintain registration for the [defendant’s] life.” N.C.G.S. § 14-208.23 (2023).

Consequently, it is improper for a sentencing court to order a defendant to maintain lifetime registration absent a determination of his status as a recidivist, aggravated offender, or sexually violent predator. Where a defendant is convicted of “an offense against a minor [or] a sexually violent offense” as defined under N.C.G.S. § 14-208.6 (1a), they have a reportable conviction. N.C.G.S. § 14-208.7(a) (2023); *see also* N.C.G.S. § 14-208.6(4) (2023) (defining reportable offenses). When a defendant “has a reportable conviction[,]” the trial court “shall . . . require[] [them] to maintain registration with the sheriff of the county where [they] reside[] . . . for a period of at least 30 years.” *Id.* In other words, under N.C.G.S. § 14-208.7, a defendant sentenced at trial for a “reportable conviction” is required to register as a sex offender “for a period of at least 30 years [,]” not for the duration of their lifetime. *Id.* A “reportable



conviction” includes both “[a] final conviction for an offense against a minor” and “a sexually violent offense, or an attempt to commit any of those offenses[.]” N.C.G.S. § 14-208.6(4)(a) (2023). Under N.C.G.S. § 14-208.6(5), sexually violent offenses include violations of both N.C.G.S. § 14-27.28 (statutory sexual offense with a child by an adult), and N.C.G.S. § 14-202.1 (taking indecent liberties with children). N.C.G.S. § 14-208.6(5) (2023).

Following the statutory definitions above, Defendant was rightly convicted for sexually violent offenses against Trudy. The two sexually violent offenses under which Defendant was sentenced were “reportable offenses” under N.C.G.S. § 14-208.6(4)(a), subject to the requirements of N.C.G.S. § 14-208.7(a), which authorized the trial court to impose at least a 30-year sex offender registration by order. However, the record indicates that the trial court ordered Defendant to register as a sex offender for his natural life, absent the court establishing that Defendant was a recidivist, an aggravated offender, or a sexually violent predator.

In *Harding*, we “reversed the order and remanded to the trial court for entry of a registration order based upon proper findings” where a trial court entered an order imposing lifetime registration based on an erroneous finding that a conviction was an aggravated offense. *State v. Harding*, 258 N.C. App. 306, 321, *disc. rev. and writ denied*, 371 N.C. 450 (2018) (marks omitted). Here, the trial court made no such findings that Defendant’s convictions made him an aggravated offender, nor did the trial court determine whether Defendant was a recidivist or a sexually violent

predator. The trial court's order imposing lifetime registration violated its statutory mandate. We reverse the order and remand to the trial court for entry of Defendant's sex offender registration order upon proper findings. *See id.*

**CONCLUSION**

The trial court did not commit plain error in failing to give a limiting instruction on the investigator's hearsay testimony. Additionally, defense counsel's failure to request a limiting instruction did not rise to the level of ineffective assistance of counsel. Finally, the trial court violated its statutory mandate by ordering that Defendant register as a sex offender for life absent the findings it needed to make. Accordingly, we reverse and remand the order to the trial court for a new registration hearing.

NO PLAIN ERROR IN PART; NO ERROR IN PART; REVERSED AND  
REMANDED IN PART.

Chief Judge DILLON and Judge THOMPSON concur.

Report per Rule 30(e).