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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-1046

Filed 5 November 2024

Stanly County, Nos. 19 CRS 51683–84, 51696

STATE OF NORTH CAROLINA

v.

ROBERTO CARLOS AYALA, Defendant.

Appeal by Defendant from judgments entered 8 February 2022 by Judge Patrick T. Nadolski in Stanly County Superior Court. Heard in the Court of Appeals 31 October 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Marissa K. Jensen, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellant Defender Sterling Rozear, for the defendant-appellant.

STADING, Judge.

I. Background

Roberto C. Ayala (“Defendant”) appeals from judgments entered by Judge Patrick T. Nadolski in Stanly County Superior Court upon a jury finding him guilty of two counts of taking indecent liberties with a child; two counts of incest with a child

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Opinion of the Court

under thirteen; and one count each of first-degree rape, attempted first-degree rape, and second-degree rape. Defendant concedes the first incest count but contests the second. He also asserts that the trial court committed plain error by allowing the admission of certain opinion testimony of two investigating officers. For the reasons discussed below, we discern no error.

On 25 July 2006, Defendant married Yessica Ayala, the victim’s mother, and moved into Mrs. Ayala’s home with her four children. Within the next month, Defendant attempted to rape the victim, then age eleven. About a month later, Defendant acted again—this time “fully penetrat[ing]” her. While on her mother’s bed in the “same situation” as with his first attempt, Defendant put his penis “in the same spot, but . . . he just smashed it in, and then that’s when he fully penetrated [the victim].” The abuse continued through at least January 2017, when the victim became pregnant with Defendant’s child after she had attained the age of majority.

In September 2017, Mrs. Ayala discovered her daughter’s pregnancy. At Defendant’s insistence, the victim lied about the source. The victim told Mrs. Ayala that she accidentally impregnated herself by masturbating with a syringe she found in their bathroom. Defendant and Mrs. Ayala had long struggled to conceive a child of their own so they would use syringes as one of several at-home artificial insemination procedures. Out of fear, the victim repeated this “syringe story” to investigators from both the Department of Social Services (“DSS”) and Albemarle Police Department.

Defendant's trial commenced on the week of 18 January 2022. The State presented testimony from several witnesses, including Captain Laws and Detective Lear from the Albemarle Police Department, as well as DSS Investigator Amanda Lewellen. Both Detective Lear and Investigator Lewellen testified as lay witnesses about their respective investigations of the victim's pregnancy, and each discussed in part their skepticism of the victim's syringe story. Defendant testified in his own defense to deny all the allegations.

On 8 February 2022, the jury returned guilty verdicts on all seven charges. The trial court sentenced Defendant to between thirty-six and forty-five years of prison. Defendant timely appealed to this Court.

II. Jurisdiction

Under N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a)(1), this Court has jurisdiction to hear Defendant's appeal of the trial court's entry of final judgment. N.C. Gen. Stat. §§ 7A-27(b)(1) (2023) (superior court's final judgment); *id.* § 15A-1444(a)(1) (pled not guilty but found guilty).

III. Analysis

Defendant raises three issues on appeal: (1) whether the trial court erred by denying his motion to dismiss one of the two incest charges; (2) whether the trial court committed plain error by instructing the jury on two completed acts of incest instead of only one; and (3) whether the trial court committed plain error by admitting opinion testimony of Detective Lear and Investigator Lewellen. For the reasons

below, we reject each of Defendant's arguments.

A. Attempt & Completion

Defendant first argues that the trial court erred by denying his motion to dismiss the first incest charge because the State adduced substantial evidence for a jury of only the second incest charge. We disagree.

The portion of N.C. Gen. Stat. § 14-178(a) (2023) relevant here, provides that a defendant commits incest by “engag[ing] in carnal intercourse with [his] . . . stepchild.” Our courts have not limited the meaning of “carnal” to only vaginal intercourse by penetration. *See State v. Whittemore*, 255 N.C. 583, 585, 122 S.E.2d 396, 397 (1961) (“There is ‘carnal knowledge’ or ‘sexual intercourse’ in a legal sense if there is the slightest penetration of the sexual organ of the female by the sexual organ of the male. It is not necessary that the vagina be entered or that the hymen be ruptured; the entering of the vulva or labia is sufficient.”). Both our case and statutory law recognize that the State can legally prove sexual intercourse by the slightest penetration of a vagina, including the labia itself. *See id.*; *see also State v. Robinson*, 310 N.C. 530, 533–34, 313 S.E.2d 571, 574 (1984); N.C. Gen. Stat. § 14-27.20(4) (2023) (“Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person’s body.”). Our courts apply this meaning of “penetration” across North Carolina’s defined criminal sex offenses. *E.g.*, *State v. Bellamy*, 172 N.C. App. 649, 658, 617 S.E.2d 81, 88 (2005) (citation omitted) (“Our Supreme Court has held that in the context of rape, evidence that the defendant

entered the labia is sufficient to prove the element of penetration. We find no reason to establish a different standard for sexual offense.”). “[A] prosecuting witness is not required to use any particular form of words to indicate that penetration occurred.” *State v. Kitchengs*, 183 N.C. App. 369, 375, 645 S.E.2d 166, 171 (2007) (quoting *State v. Ashford*, 301 N.C. 512, 514, 272 S.E.2d 126, 127 (1980)).

Sections 15-173 and 15-1227 permit a defendant to move to dismiss one or more charges against him based on insufficient evidence for a jury to decide. N.C. Gen. Stat. §§ 15-173, -1227(a) (2023). This *de novo* review requires us to view all evidence “in the light most favorable to the State, giving [it] the benefit of all reasonable inferences.” *State v. Burns*, 278 N.C. App. 718, 720, 862 S.E.2d 431, 434 (2022). “The test for sufficiency of the evidence is the same whether it is circumstantial, direct, or both.” *State v. Sokolowski*, 351 N.C. 137, 143, 522 S.E.2d 65, 69 (1999). If the evidence presented is circumstantial, the question for the court is whether a reasonable inference of the defendant’s guilt may be drawn from the circumstances. *State v. Head*, 79 N.C. App. 1, 9, 338 S.E.2d 908, 912 (1986). “If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty.” *Id.* (quoting *State v. Thomas*, 296 N.C. 236, 250 S.E.2d 204 (1978)). Circumstantial evidence may withstand a motion to dismiss even if the evidence does not exclude every hypothesis of innocence. *Mann*, 355 N.C. at 301, 560 S.E.2d at 781. If the State can show “substantial evidence” that the defendant committed each statutory element, then the trial court

must deny his motion to dismiss. *Burns*, 278 N.C. App. at 720–21, 862 S.E.2d at 434. Evidence is “substantial” if a reasonable juror would accept it “as adequate to support a conclusion” of guilt. *Id.*

In *Burns*, this Court affirmed a trial court’s analogous denial of the defendant’s motion to dismiss charges of sexually abusing his girlfriend’s daughter. 278 N.C. App. 718, 862 S.E.2d 431. The *Burns* Court held that the State adduced substantial evidence of penetration even though the victim testified that the defendant did not “go ‘inside’ her vagina.” *Id.* at 721, 862 S.E.2d at 434. Instead, the *Burns* defendant “penetrated her labia by rubbing his fingers in circles on [the victim’s] vulva” *Id.* This Court reasoned that the actual placement of the defendant’s “fingers in circles on her vulva” allowed the jury to necessarily infer that the defendant placed “his fingers within [the victim’s] labia.” *Id.* at 722, 862 S.E.2d at 435.

Here, Defendant did not “fully penetrate[]” the victim in his first incestuous act; however, the State’s evidence of his actions during that attempt still allowed a reasonable juror to find legal “penetration.” The victim testified that Defendant tried to penetrate her vagina. She described how, right after Defendant’s act, her “vagina burned very bad from . . . him attempting to try to penetrate” her for at least a week after the incident. Also, the victim’s testimony about the “same situation” of the second “full[] penetrat[ion]” would allow a reasonable juror to infer that he at least partially penetrated her the first time. The second time Defendant inserted his penis “in the same spot . . . getting it into the correct area . . . and just smashed it in.” The

victim describes Defendant's first sexual advance with the same logistical framing and physical conduct as the second advance—the same conduct of which Defendant acknowledges sufficient evidence. Because a reasonable juror could infer penetration from the victim's vaginal pain following the first attempt and Defendant's same positioning in the second attempt, this Court holds that the State adduced sufficiently substantial evidence to survive Defendant's motion to dismiss the first incest charge.

B. Plain Error

Next, Defendant argues that the trial court plainly erred by (1) instructing the jury on two completed acts of incest and (2) admitting improper opinion testimony from Detective Lear and Investigator Lewellen. We disagree with both contentions.

Under N.C. R. App. P. 10(a)(4), a defendant may raise an unpreserved issue for the first time on appeal only if “the judicial action questioned is specifically and distinctly contended to amount to plain error.” To show plain error by a trial court, a defendant must establish that it so “fundamental[ly] err[ed]” as to either prejudice him or miscarry justice. *State v. Lawrence*, 365 N.C. 506, 517, 723 S.E.2d 326, 334 (2012) (quoting *State v. Odom*, 307 N.C. 655, 660–61, 300 S.E.2d 375, 378–79 (1983)). A prejudicial error has a “‘probable impact’ on the verdict, not a *possible* one”—*i.e.*, the error was more likely-than-not responsible for the jury's verdict. *State v. Carter*, 366 N.C. 496, 739 S.E.2d 548 (2013) (quoting *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334). A “miscarriage of justice” must be so fundamental as to lack any possibility that justice could have been done. *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (cleaned

up). Our courts find plain error “to be applied cautiously and only in the exceptional case.” *Id.* (cleaned up).

1. Jury Instructions

The trial court did not err by instructing the jury on two completed acts of incest. A defendant is not entitled to an instruction on a lesser offense when the “State’s evidence is sufficient to fully satisfy its burden of proving each element of the greater offense and there is no evidence to negate these elements other than the defendant’s denial that he committed the offense.” *State v. Johnson*, 317 N.C. 193, 205, 344 S.E.2d 775, 782 (1986). As for Defendant’s contested charge, incestuous “carnal knowledge in the legal sense” requires only the “slightest penetration of the sexual organ of the female by the sexual organ of the male.” *See State v. Boyett*, 224 N.C. App. 102, 106, 735 S.E.2d 371, 374 (2012). As noted above, any “evidence that the defendant entered the labia is sufficient to prove the element of penetration.” *State v. Corbett*, 264 N.C. App. 93, 97, 824 S.E.2d 875, 878 (2019) (cleaned up).

Here, Defendant fails to show us how “the jury would have disregarded any portions of the victim’s testimony stating that [penetration occurred] in favor of those instances in which she said [penetration did not occur].” *Boyett*, 229 N.C. App. at 578, 747 S.E.2d at 741 (2013) (alterations in original). The victim’s testimony confirmed Defendant’s actions during the first sexual advance from which a jury could reasonably infer legal penetration—thereby completing the act of incest. Defendant attempts to characterize Captain Laws and Investigator Lewellen’s matching

testimonies of the victim's vaginal "constrict[ion]" to assert that he only attempted incest in their first encounter.

The transcript shows that the victim's and the investigators' usage of "penetrate" was not inconsistent with our case law. Considering the case law interpreting the statutory "element of penetration," the evidence here does not fall short. *See Corbett*, 264 N.C. App. at 97, 824 S.E.2d at 878. The jury could reasonably infer that Defendant would have had to physically enter "between [the victim's] labia" to determine that her vagina was too constricted to permit a full insertion. *Id.* at 99, 824 S.E.2d at 879. As we have discussed above, our jurisprudential distinction between "full" penetration via insertion and penetration of a victim's labia, at issue here, dispels the notion that the trial court so "prejudiced" the jury or "miscarried . . . justice" as to have "a probable impact on [its] finding that [] [D]efendant was guilty" of a second incest charge. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. Contrary to Defendant's argument, the victim's purportedly inconsistent testimony presented an issue for the jury to overcome, not the State. Thus, this Court holds that the trial court did not plainly err by instructing the jury on two completed acts of incest.

2. Testimony Admissions

Although the trial court erred by admitting Detective Lear's and Investigator Lewellen's personal opinions into evidence before the jury, this mistake did not amount to plain error that would otherwise merit a new trial.

N.C. Evidence Rule 701 requires that opinion or inferential lay testimony be “(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.” N.C. R. Evid. 701 (2023). Lay witnesses may not draw “inferences from the evidence . . . to express an opinion as to Defendant’s guilt” because that “task is reserved for the jury.” *State v. Turnage*, 190 N.C. App. 123, 129, 660 S.E.2d 129, 133, *rev’d in part on other grounds*, 362 N.C. 491, 666 S.E.2d 753 (2008). A trial court errs when it allows this witness opining to “impermissibly invade[] the province of the jury.” *Id.* As noted above regarding *plain* error, a defendant bears the burden of proving on appeal either a more likely-than-not chance of a different jury verdict or a fundamental “miscarriage of justice.” *State v. Elkins*, 210 N.C. App. 110, 121, 707 S.E.2d 744, 752 (2011).

Here, Defendant did not meet this burden on either question because—even without the challenged testimonies—the State presented sufficient evidence for a rational jury to find him guilty. Detective Lear and Investigator Lewellen testified to their shared skepticism of the victim’s syringe-induced pregnancy story. Detective Lear “did not believe” “this whole syringe story” that the victim initially told “the DSS workers.” Investigator Lewellen did not “personally believe that” the victim “essentially impregnated herself” via the syringe. Both statements implicated personal opinions that the trial court erred by admitting for the jury’s consideration—but they did not amount to *plain* error. *See State v. Lawrence*, 365 N.C. 506, 723

S.E.2d 326 (2012). Defendant concedes that the State adduced substantial evidence of his second incest charge, and we acknowledged its substantiality for the first charge above. “Absent the error” of admitting the opinion testimony of Detective Lear and Investigator Lewellen, “the jury probably would have reached” the same result in the present matter. *Elkins*, 210 N.C. App. at 121, 707 S.E.2d at 752. Thus, this Court holds that the trial court did not commit *plain error* by permitting Detective Lear and Investigator Lewellen to testify as to their personal opinions of whether the victim had been truthful or dishonest.

IV. Conclusion

For the reasons discussed above, this Court holds that the trial court (1) did not err by denying Defendant’s motion to dismiss the first incest charge, (2) did not commit plain error by instructing the jury on this first completed act of incest, and (3) did not commit plain error by admitting as evidence opinion testimony of the witnesses.

NO ERROR.

Judges ZACHARY and THOMPSON concur.

Report per Rule 30(e).