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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 16-288

Filed: 21 February 2017

Forsyth County, Nos. 12 CRS 55599-55602

STATE OF NORTH CAROLINA

v.

ROBY GEAN DAVIS

Appeal by defendant from judgments entered 8 September 2015 by Judge A. Moses Massey in Forsyth County Superior Court. Heard in the Court of Appeals 6 October 2016.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jennie Wilhelm Hauser, for the State.

J. Clark Fischer for defendant-appellant.

McCULLOUGH, Judge.

Roby Gean Davis (“defendant”) appeals from judgments entered upon his conviction on four counts of first degree sex offense with a child and four counts of indecent liberties with a child. For the following reasons, we find no error.

I. Background

Defendant was arrested and, on 2 June 2012, indicted by a Forsyth County Grand Jury on five counts of first degree sex offense with a child and four counts of

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indecent liberties with a child. All charges came on for trial together in Forsyth County Superior Court on 31 August 2015. At the conclusion of the trial, the jury returned verdicts finding defendant guilty on four counts of first degree sex offense with a child and four counts of indecent liberties with a child. The jury found defendant not guilty on one count of first degree sex offense with a child. The trial court entered judgments on the convictions on 8 September 2015 sentencing defendant to consecutive sentences totaling 864 to 1,076 months imprisonment. Defendant gave notice of appeal in open court.

II. Discussion

Now on appeal, defendant raises the following two issues: whether the trial court erred (1) in allowing the State to present expert testimony regarding actions of unrelated and unidentified victims of sexual abuse; and (2) in denying his motion for a mistrial. We address the issues in order.

1. Expert Testimony

Regarding expert testimony, Rule 702 of the North Carolina Rules of Evidence provides that

[i]f 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

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2015). Yet, our Courts have long held that the credibility of a witness is a matter to be determined by the jury and an expert witness

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may not opine that a witness is credible, believable, or truthful. *State v. Hannon*, 118 N.C. App. 448, 451, 455 S.E.2d 494, 496 (1995) (citing *State v. Aguallo*, 318 N.C. 590, 350 S.E.2d 76 (1986); *State v. Kim*, 318 N.C. 614, 350 S.E.2d 347 (1986); *State v. Heath*, 316 N.C. 337, 341 S.E.2d 565 (1986)). Therefore,

[i]n a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility. However, an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith.

State v. Stancil, 355 N.C. 266, 266–67, 559 S.E.2d 788, 789 (2002) (internal citations omitted) (emphasis in original). “In applying [Rule 702], the trial court is afforded wide discretion and will be reversed only for an abuse of that discretion.” *State v. Anderson*, 322 N.C. 22, 28, 366 S.E.2d 459, 463, *cert. denied*, 488 U.S. 975, 102 L. Ed. 2d 548 (1988).

In this case, defendant recognizes the *Stancil* holding, but takes issue with portions of the testimony by two of the State's expert witnesses. Specifically, defendant contends “the prosecution, over objection, was permitted to go well beyond the limits of *Stancil* and its progeny, and through its experts present evidence of specific behaviors of unidentified sexual abuse victims and the irrelevant personal opinion of a therapist that some victims never disclose.”

The first portion of challenged testimony was proffered during the State's redirect examination of Dr. Meggan Goodpasture ("Dr. Goodpasture"), a physician at Wake Forest Baptist Medical Center who was tendered by the State and accepted by the court as an expert in the field of pediatrics and child sex abuse evaluations over defendant's objection. In response to the State's inquiry as to how many children disclose sexual abuse while at the clinic to be treated for something other than sexual abuse, Dr. Goodpasture responded, "Vast minority. Very few." When pressed for further detail, the following exchange took place:

Q. Out of a hundred?

A. One or two; meaning it's -- let me make sure I understand this question.

Q. Um-hm?

A. Meaning if they come to me for another reason, as a General Pediatrician, how many also disclose sexual abuse? Very few. I don't know that if I've ever thought about that question. So I hope that I'm answering it accurately, but it is very few. It happens, occasionally.

Q. "Occasionally"?

A. Yes.

Defendant now argues this testimony was improper because, "[b]y interjecting specific numbers, the doctor presented the jury with information about particular cases totally unrelated to the charges at issue." Defendant, however, did not preserve this argument for review. "In order to preserve a question for appellate review, a

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party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent.” *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991); *see also* N.C. R. App. P. 10(a)(1) (2016). In this case, defendant objected to the State’s tender of Dr. Goodpasture as an expert, but did not otherwise object to the challenged testimony. Furthermore, defendant does not argue that the testimony amounts to plain error. *See* N.C. R. App. P. 10(a)(4) (“In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is *specifically and distinctly contended to amount to plain error.*”) (emphasis added).

The second portion of challenged testimony was proffered during the State’s direct examination of Ms. Cynthia Davis-Stewart (“Ms. Davis-Stewart”), an employee of Wake Forest Baptist Medical Center who works with the pediatricians to conduct child sex abuse evaluations. The State tendered Ms. Davis-Stewart as an expert in the field of social work specializing in the field of forensic interviews and child sex abuse evaluation. Over defendant’s objection, the court accepted Ms. Davis-Stewart as an expert. Ms. Davis-Stewart testified about her interview of the alleged victim and then testified about characteristics she observed during her interview with the alleged victim that were consistent with victims of sexual abuse. When directly asked

for her opinion on whether the alleged victim displayed characteristics consistent with victims of sexual abuse, defendant objected. The court overruled the objection and Ms. Davis-Stewart testified that she was of the opinion that the alleged victim displayed characteristics consistent with victims of sexual abuse. Defendant acknowledges that “[u]p to this point, Ms. Davis-Stewart’s testimony was within the parameters of *Stancil* and was largely unremarkable.”

The following exchange then took place:

[Defense Counsel]: Your Honor, as we discusses [sic] at the Bench.

THE COURT: The Court notes that Counsel has a continuing objection to this line of questioning. Objection overruled. Counsel may proceed.

The State then continued its direct examination of Ms. Davis-Stewart as follows:

Q. Ms. [Davis-]Stewart, based on your experience in interviewing thousands of kids, do children often disclose complete incidents? Let me rephrase that, please.

Based on your experience, do most children disclose complete detail of sexual abuse, or physical abuse?

A. No. It’s very often progressive.

Q. What do you mean by “progressive”?

A. In that, for example, there are different type [sic] types of disclosure. Some children intentionally decide ‘Okay. Now is the time. I’ve got to tell somebody about it’, oftentimes. Other times, it comes out, accidentally. With this particular situation, it was an accidental disclosure. Even though he was open about talking with me about things, he did not describe, in detail, the sexual acts.

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Q. Did he, if you can recall, tell you how many times certain particular acts took place?

A. No. We just talked about that, at one point. So we didn't specifically talk about the oral, how many was [sic] times that was, that kind of thing.

Q. Now as long as you've been doing these interviews, is it normal for children to disclose speaking to their ongoing pediatrician about sexual abuse?

A. It sometimes happens, but it's not very common. It does happen. Concerns arise from primary pediatricians and family practice doctors. Say for example, if children are exhibiting sexualized behaviors, or signs of emotional distress, sometimes it will come to their attention. But it's not necessarily something that children are going to decide to disclose.

Q. To their pediatrician?

A. To their pediatrician.

Q. You already said that children disclose some details, but not all details, when there has been a disclosure?

A. Over the years, I have concluded that it's a miracle that they ever tell us.

Q. So if a child, say on the first meeting you had a Forensic Interview; the child disclosed oral sex. Then you had a second forensic, and the child disclosed anal sex. Then if you had a third one, the child might have disclosed digital penetration with the finger; would you feel either of the three disclosures were less valuable than the first one, because the child didn't disclose it all at one time?

A. I would not.

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Ms. Davis-Stewart then testified that children usually will not disclose every detail unless specifically asked. She stated that,

very rarely do children disclose immediately after what's happened to them. It's more likely that they don't know what it is that's happened to them. There's a the [sic] whole variety of reasons that children delay in disclosing. That is more common that children may delay years, and years, and may not ever tell; may tell in their – may disclose in their adulthood. I am convinced that some victims never disclose.

Ms. Davis-Stewart explained that children often don't understand that the sexual abuse is wrong until they reach a certain age, adding from her own experience that,

[a]n adult and therapist, once told me that she didn't know what was happening to her -- with her father -- until she got into a class in college. So oftentimes the knowledge -- just the fact that they don't know what it is, and they think it's all right, that keeps them from disclosing.

Because defendant's case involved a delayed disclosure by the alleged victim, defendant contends "[t]he effect of the above testimony . . . was to present Ms. Davis-Stewart's expert opinion that [the alleged victim's] testimony was no less 'valuable' due to the delay," which constitutes an endorsement of the alleged victim's credibility. Defendant also contends the testimony about another individual's personal experience is irrelevant hearsay.

Yet, we again hold that the issue was not properly preserved for review. As detailed above, the court noted a continuing objection for defense counsel to the questioning of Ms. Davis-Stewart based on discussions during a bench conference.

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That bench conference, however, was not on record and there is no way for this Court to know the basis of the objection. Defense counsel made no further objections during the testimony of Ms. Davis-Stewart until the witness was being dismissed, at which time defense counsel renewed his objection. At that time, the court responded that it “notes the continuing objection to Ms. [Davis-]Stewart being received as an expert and her opinion.” All that is apparent from the record is that defendant objected to the State’s tender of Ms. Davis-Stewart as an expert and her opinion testimony.

Nevertheless, even if the continuing objection of an unknown basis was sufficient to preserve the propriety of Ms. Davis-Stewart’s testimony for appellate review, we hold the trial court did not err in allowing the testimony.

Defendant attempts to distinguish “characteristics” evidence that was deemed permissible in prior cases from the evidence presented in this case. We are not persuaded by the distinctions. The totality of the challenged testimony, in context, was that the alleged victim’s delayed and progressive disclosure of sexual abuse is characteristic and consistent with disclosures by other victims of sexual abuse. While the testimony may approach the bounds of impropriety, no testimony was elicited that the alleged victim had been sexually abused or was believable. “The fact that this evidence may support the credibility of the victim does not alone render it inadmissible.” *State v. Kennedy*, 320 N.C. 20, 32, 357 S.E.2d 359, 367 (1987). Citing *Kennedy*, defendant concedes that evidence of the symptoms and characteristics of

sexually abused children may include “secrecy, helplessness, *delayed reporting*, initial denial, depression, extreme fear, nightmares with assaultive content, poor relationships and school performance” *Id.* at 32, 357 S.E.2d at 366 (emphasis added). The testimony about delayed reporting by victims of sexual abuse in this case is testimony about characteristics commonly observed in sexually abused children and we hold such testimony was proper under *Stancil* and its progeny.

We briefly note that Ms. Davis-Stewart’s testimony concerning the personal experience of another therapist was irrelevant hearsay that should not have been admitted. However, defendant has not demonstrated that that single statement, among otherwise proper expert testimony, was prejudicial to his case.

2. Mistrial

Concerning mistrials for prejudice to a defendant, the North Carolina General Statutes provide, in pertinent part, as follows:

Upon motion of a defendant or with his concurrence the judge may declare a mistrial at any time during the trial. The judge must declare a mistrial upon the defendant’s motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant’s case.

N.C. Gen. Stat. § 15A-1061 (2015). “But ‘[n]ot every disruptive event which occurs during trial automatically requires the court to declare a mistrial.’ ” *State v. Glenn*, 221 N.C. App. 143, 153, 726 S.E.2d 185, 191 (2012) (quoting *State v. Allen*, 141 N.C. App. 610, 617, 541 S.E.2d 490, 496 (2000) (citation omitted), *disc. review denied and*

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appeal dismissed, 353 N.C. 382, 547 S.E.2d 816 (2001)). “A mistrial is appropriate only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law.” *State v. Blackstock*, 314 N.C. 232, 243-44, 333 S.E.2d 245, 252 (1985).

“The decision to grant or deny a motion for mistrial is in the discretion of the trial judge and absent abuse will not be disturbed on appeal.” *State v. Cook*, 48 N.C. App. 685, 689, 269 S.E.2d 743, 745 (1980). “Abuse of discretion results where the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

In this case, the events defendant contends warrant a mistrial were as follows: Shortly after the trial court issued its jury instructions and the jury began deliberations, the trial court took an evening recess and excused the jurors. As Juror #7 walked from the court to his car in the parking deck across the street, Juror #7 heard a gentleman who had been seated in the gallery state, “I can’t believe that that boy would lie like that.” Juror #7 turned and glared at the gentleman and continued on his way. Juror #7 recalled that the man who made the statement was approximately 15 to 20 feet away from him and looking back at him with a stern look on his face.

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Upon learning of the improper statement to Juror #7 the following morning, the trial court conducted a *voir dire* of Juror #7 and inquired whether the comment would affect his ability to remain fair and impartial. Juror #7 indicated that it would not. The trial court then denied defendant's motion for a mistrial, explaining that Juror #7 indicated he was not influenced by the statement and that the statement was only harmful to the State.

Defendant now contends that the statement overheard by Juror #7, coupled with the stern look of the declarant, amounts to a threat that was prejudicial to defendant. Defendant further contends the prejudice was not cured by Juror #7's assertion that he could remain fair and impartial. We disagree. Upon review, it appears the trial court performed the proper inquiry and made a reasoned decision to deny defendant's motion for a mistrial based on Juror #7's assertion that the statement heard out of court would not affect his ability to remain fair and impartial. *See State v. Bethea*, 173 N.C. App. 43, 49-51, 617 S.E.2d 687, 692-93 (2005) (holding the trial court made the appropriate inquiry when it addressed the jurors individually concerning their ability to be fair and impartial); *see also State v. Taylor*, 362 N.C. 514, 538, 669 S.E.2d 239, 260 (2008), *cert. denied*, 558 U.S. 851, 175 L. Ed. 2d 84 (2009); *State v. Oliver*, 210 N.C. App. 609, 617-19, 709 S.E.2d 503, 509-10 (2011). The trial court did not err in denying defendant's motion for a mistrial.

III. Conclusion

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For the reasons discussed above, we hold the trial court did not err.

NO ERROR.

Judges STROUD and ZACHARY concur.

Report per Rule 30(e).