NO. COA09-1574 DISTRICT 14

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Durham County
	)	
JOHN F. DYE	)	

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BRIEF FOR THE STATE

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BRIEF FOR THE STATE

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QUESTIONS PRESENTED

I. DID THE TRIAL COURT ERR IN OVERRULING DEFENDANT'S OBJECTION TO THE "CONSISTENT WITH" OPINION OF THE MEDICAL EXPERT?

II. DID THE COURT COMMIT PLAIN ERROR IN ALLOWING THE STATE'S EXPERT TO TESTIFY ABOUT "SECONDARY GAIN?"

III. DID THE TRIAL COURT ERR IN DENYING DEFENDANT'S MOTION FOR A MISTRIAL?

STATEMENT OF CASE

While the State agrees generally with the Defendant's "Statement of the Case," nevertheless several specific facts are omitted that are helpful to an understanding of the case. The indictments alleged the following charges:

Two counts of statutory rape/sex offense; two counts of incest of child under the age of 16; one count of second-degree rape; one count of incest; and one count of a crime against nature. The prosecutor took a volunteer dismissal of the crime against nature charges.

The jury found Defendant guilty on all remaining charges.

STATEMENT OF THE FACTS

Evidence for the State at trial tended to show:

T.L., age 19 at the time of trial, was born in Hawaii on October 9, 1989. (T p. 36) Her mother divorced her biological father early on and began dating Defendant when T.L. was about four. (T pp. 36-37) They married and eventually moved to Chapel Hill, North Carolina, where Defendant attended graduate school at the University of North Carolina and received his PH.D. in Education. (T p. 39)

Defendant was a very controlling husband and stepfather. (T pp. 46, 47, 54, 55, 60, 67, 99, 159, 160, 166) He often criticized and belittled T.L. and her mother (T pp. 42, 46, 49, 53, 60, 160) Although T.L. had attended the Durham School of the Arts

and had played the flute there, Defendant forced her to withdraw and took her flute away from her. (T pp. 48-49)

Once she entered high school, T.L. very much wanted to play in the marching band. (T p. 52) Around the first week in August 2004, T.L. was participating in band camp and Defendant "started getting angrier and angrier" for no apparent reason. (T p. 54) He expressed to T.L. that she did not deserve to be in the band and "wasn't good enough." (T p. 54) As expressed in her own words at trial, Defendant forced her to have sex in order to gain his permission to stay in the marching band:

> So he told me that in order to stay in this group I had to do something to show that I wanted to be in the marching band. I was 14-years-old and I had no idea what he was talking about. I wasn't allowed to watch movies or anything like that. I had no idea really what sex was. I had no idea. My body was probably physically ready for that; I wasn't mentally. I had no idea.
>
> So his telling me, oh, I had to do something. I'm like, oh, I got to go make a garden or something out in the yard. I had to go mow the lawn. I'm like, I can do that, I can stay in the marching band and keep doing these things. That's not really what he meant.

(T pp. 54-55)

T.L. then described how, at age 14, her step-father took her into her parents' bedroom and had vaginal intercourse with her prior to taking her to band camp for the day.(T pp. 55-56)

T.L. cried and asked him to stop but he said it "was supposed to happen." (T p. 56)

Over the next two years, Defendant continued to force her to have sex with him in order to earn his permission for various things. (T pp. 56, 95, 99) Sex acts included intercourse and anal sex as well as performing oral sex on the Defendant. (T pp. 58, 59) T.L. stated that, prior to the first couple of times when she had anal sex, Defendant had her drink vodka so it would not hurt as much. (T p. 59) Defendant would use olive oil to lubricate his penis. (T p. 59)

At some point while T.L. was still in high school, Defendant became employed to teach at Nazareth College in Rochester, New York. (T p. 57) T.L. and her mother remained here in North Carolina and Defendant would return home once or twice every month. (T p. 57) When he was at home he forced T.L. to have sex with him or give him oral sex every day while he was there. (T p. 58)

T.L. never told anybody. (T p. 62) She was afraid. (T p. 62) Defendant threatened her, telling her no one would believe her, that her mother would leave, and that the family would have no money because they "couldn't last without him." (T p. 99)

During the two-year period, Defendant bought T.L. a pink negligee and also a crucifix necklace that he made her wear during sex. (T pp. 91-92) In addition, Defendant would use objects other than his penis to penetrate her vagina, including a pen and a

cucumber. (T p. 87-88) He would move the cucumber in and out of her vagina. (T p. 88) Defendant also took numerous pictures of T.L. or forced her to take pictures of herself. (T pp. 88-90)

Defendant's sexual advances continued past T.L.'s sixteenth birthday. (T p. 64) On September 24, 2006, while Defendant was home from Rochester, he forced T.L. to have sex again in the parents' bedroom. Defendant was preparing to return to New York and told T.L. "he wanted something before he left." (T pp. 66-67) T.L.'s mother was downstairs making sandwiches for Defendant to take with him. (T pp. 66, 184) She went upstairs to ask him what kind of potato chips he wanted, found the door handle to her bedroom locked but not completely latched, pushed on the door, and entered the room. (T p. 184) In her words at trial:

> [T]here was John on top of my daughter on the floor in my bedroom having sex . . . . and as soon as he noticed I was in the room, he pulled out, and she grabbed her clothes that were near her and curled up by my bed, she curled up in a ball by my bed, and he just stayed there on all four's {sic}, and I watched this fluid just come out of his penis. I didn't know if it was urine, or semen, or maybe both. I just watched him do that into the carpet.

(T pp. 184-85)

T.L. ran to a friend's house. (T p. 66) T.L.'s mother screamed and told Defendant to get out. (T p. 191) She asked him how long it had been going on and he responded "two years." (T p. 187) Defendant kept crying that he was a "sick man." (T p. 187) T.L.'s

mother "literally" threw the Defendant's suitcase at him, threw his computer onto the sidewalk, and threw his shoes out. (T p. 194) That evening her mother took T.L. to the police station and from there to Duke Hospital to be examined. (T p. 201) All of the police officers, social workers, and hospital workers who interviewed T.L. and her mother gave accounts at trial that were entirely consistent with T.L.'s and her mother's testimony about the events leading up to the mother's discovery that morning of September 24, 2006. (T pp. 261-62; 288-90; 322; 374-75; 421; 553-61; 589-98)

Both T.L. and her mother testified that they owned two parrots that were kept in the living room. (T pp. 95-96; 216) Both parrots could talk. (T p. 96) At least one of the birds, having been in the living room while Defendant forced T.L. to have sex, began making sounds that sounded like T.L.'s voice, screaming "John" and "no" and "making sex noises." (T pp. 96, 216-17) T.L.'s mother specifically mimicked the sound on the stand so the jury could hear exactly how the bird sounded. (T pp. 216-17)

After Defendant left the premises on September 24, 2006, he ended up going to the Dominican Republic. (T pp. 539-47)

He was extradited and returned to the United States. (T pp. 546-47)

Defendant did not testify or offer any evidence at trial.

The jury returned verdicts of guilty on all charges. The trial court sentenced Defendant to a minimum of 1,049 months and a

maximum of 1,305 months. (R pp. 30-41) Defendant appealed to the Court of Appeals.

Additional facts will be set forth as necessary to a fuller understanding of the issues presented.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN OVERRULING DEFENDANT'S OBJECTION TO THE "CONSISTENT WITH" OPINION OF THE MEDICAL EXPERT.

ASSIGNMENT OF ERROR NO. 5 (R p. 49)

STANDARD OF REVIEW

Defendant bears the burden to demonstrate that the trial court committed prejudicial error warranting a new trial. Defendant must show error and then must show that there is a reasonable possibility that, had the error not occurred a different result would have been reached by the jury. G.S. §15A-1443(a)

Defendant contends that the trial court erred in admitting, over his objection, expert testimony that T.L.'s symptoms were "consistent with the history that she provided of chronic sexual assault." (T p. 388) This contention is without merit and this Assignment of Error should be overruled.

Dr. Aditee Narayan, a pediatrician at Duke Hospital, was tendered and accepted as an expert witness in general pediatrics, child behavior, diagnostic interviewing, and diagnostics and treatment of children suspected of being sexually abused. (T p.

343) Dr. Narayan interviewed T.L. and also performed a physical exam. (T pp. 344-47) There were no significant physical findings during the examination. (T pp. 344-46) Dr. Narayan testified that it was common to have a normal physical exam even after having sex. (T p. 346)

The prosecutor asked Dr. Narayan if she had an opinion as to whether her findings were consistent with T.L.'s history of sexual assault. (T p. 386) Upon the general objection of defense counsel, the trial court excused the jury to hold a voir dire of the witness. (T pp. 386-87) Dr. Narayan on voir dire stated that T.L.'s symptoms were "consistent with the history that she provided." (T p. 387) At that point, the trial judge asked defense counsel if he had any questions or desired to be heard. (T p. 387) Defense counsel responded " No. No argument," and that he did not wish to be heard "if that's going to be the answer." (T p. 387) The judge overruled the objection and instructed the bailiff to return the jury to the courtroom. (T p. 387)

Testimony continued and the prosecution, again, asked the "consistent with" question and the doctor, again, answered the question with her opinion that T.L.'s history, examination, and behavior were "all consistent with the history that she provided of chronic sexual assault." (T p. 388) Before the jury, Defendant did not renew his objection to the prosecutor's question and only lodged a general objection once the doctor had voiced her opinion

as set forth above. Defendant did not make an argument or state his grounds; nor did he move to strike. (T p. 388)

In light of the Defendants' concession during the voir dire that he did not wish to pursue his objection "if that's going to be the answer;" in light of his failure to renew timely an objection to the questions posed; in light of the fact that he only made a general objection after the witness's answer was given; and in light of his failure to move to strike, he should be deemed to have waived any objection to this testimony. See N.C.R. App. P. Rule 10(b)(1); State v. Gardner, 315 N.C. 444, 340 S.E.2d 701 (1986). Moreover, even if Defendant is deemed properly to have preserved his challenge to this testimony, this Court's precedents make it abundantly clear that there was no error in the admission of the doctor's opinion. The law in this area is now well settled:

> In 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.

State v. Stancil, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002). However, an expert:

> 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. Streater, ___ N.C. ___, 678 S.E.2d 367, 373 (2009).

In State v. Aguallo, 322 N.C. 818, 370 S.E.2d 676 (1988). Our Supreme Court addressed this issue and found no error in circumstances remarkably similar to those present here. In Aguallo, the pediatrician testified that the physical findings were consistent with the child's history. The Court noted that the expert did not state that the victim was "believable" or "not lying." Additionally, the Court noted that the expert did not comment on the guilt or innocence of the defendant. *Id.* at 822-23; 370 S.E.2d at 678. See Streater, 678 S.E. 2d 367.

Likewise, in In Re T.R.B., 157 N.C. App. 609,, 582 S.E.2d 279 (2003), appeal dismissed and review improvidently allowed, 358 N.C. 370, 595 S.E.2d 146 (2004). [1] This Court found no error in the admission of expert testimony that the examination of the victim was "consistent with" her interview of him. Id. at 618, 582 S.E.2d at 286. This case is practically indistinguishable from Aguallo and In Re T.R.B. Here the expert did not testify that sexual abuse occurred; did not testify that the victim was believable; and did not make any statement that implicated this Defendant.

Finally, even if there were error, which is strongly denied, such error is harmless. The overwhelmingly consistent accounts given by T.L.'s mother; the multitude of photographs entered into

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[1] Note: This case is cited in Streater using the juvenile surname. In the interests of preserving the confidentiality of juvenile records, the case here will be referred to as " In Re T.R.B."

evidence; the evidence of flight by Defendant, and Defendant's own statement, testified to by T.L.'s mother without objection, that he was "sick" and had been having sex with his stepdaughter for two years - all of this evidence points unquestionably to Defendant's guilt in this case.

In order to show that error was prejudicial, a defendant must show, and has the burden of showing, that there is a reasonable possibility that, had the error not occurred, a different result would have been reached at trial. G.S. §15A-1443(a).

Defendant has not properly preserved this issue for review and has failed to demonstrate any error in the admission of Dr. Narayan's testimony. Moreover, even if there were error, Defendant has not met his burden to show prejudicial error warranting a new trial. This Assignment of Error should be overruled.

II. THE TRIAL COURT DID NOT COMMIT PLAIN ERROR IN ALLOWING THE STATE'S EXPERT TO TESTIFY ABOUT "SECONDARY GAIN."

ASSIGNMENT OF ERROR NO. 4 (R p. 48)

Defendant inaccurately states the standard of review for "plain error" and in so doing imposes a burden on the State that is totally inconsistent with settled law. As stated by our Supreme Court, "plain error" exists only in "exceptional" cases; it is error that is "fundamental error, something so basic, so prejudicial, so lacking in elements that justice cannot be done." State v. Hammett, 361 N.C. 92, 98, 637 S.E.2d 518, 522 (2006) (quoting State v. Davis, 349 N.C.1, 29, 506 S.E.2d 455, 470 (1998)

(citations omitted), cert. denied, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999)). Thus, the appellate court has to determine that the jury "would probably have reached a different verdict if this testimony had not been admitted." State v. Hammett, 361 N.C. at 98, 637 S.E.2d at 522.

In the instant case, Dr. Narayan testified regarding her interview of T.L. The prosecutor asked Dr. Narayan if she were familiar with the concept of "secondary gain." (T p. 384) After Dr. Narayan indicated she was, the prosecutor then asked her to explain it to the jury. (T p. 384) The doctor explained as follows:

> Secondary gain is if you do something to get something else out of it. So if you - if you steal a cookie from the cookie jar in an effort to try to get attention from your mom because . . . she wasn't paying any attention to you, that would be secondary gain. When you do one act in order to get something else out of that.

(T p. 384)

The prosecutor then asked if the doctor thought the concept had any application to T.L. and the doctor replied that she thought there was "little secondary gain for [T.L.]." (T p. 385)

Defendant argues that Dr. Narayan's testimony amounted to an opinion on the victim's credibility and this constituted error. This argument is without merit.

First, although Dr. Narayan talked about secondary gain in general and applied the concept to her impression here of the victim, nowhere does she testify that the presence or absence of

secondary gain has any bearing on the truthfulness of a victim. In other words, she never states that the fact that an individual may receive secondary gain means that the individual was untruthful in relating any facts or history necessary for treatment. Nor did she testify that the absence of secondary gain meant an individual was telling the truth. The only importance she attached to "secondary gain" was that it "is something we always consider when we're asked to do these medical evaluations for children." (T p. 385) She stated "That's incredibly important because the recommendations that I would make for that child would be very different than the recommendations that I made for [T.L.]." (T p. 385)

Nowhere did the doctor testify that she interpreted the lack of "secondary gain" here to mean that T.L. was truthful or believable. To the contrary, she specifically pointed out that it was not even T.L. who initially disclosed the sexual abuse; rather, it was her mother who walked in on her. Thus, the implication here was that the concept of secondary gain did not even really apply based on how all this unfolded.

Second, and importantly, defense counsel did not make any objection to this testimony at trial, thus ignoring one of the most basic tenets of trial and appellate advocacy as set forth in Rule 10(b)(1): that it is the obligation of trial counsel to bring to the attention of the trial judge any errors they wish preserved for appeal. It is not the duty of the trial judge to read the minds of

counsel or to stand in their shoes and make strategic decisions about which testimony to object to while the trial is going on. To ignore this obligation of counsel is to set the stage for invited error at trial, encouraging counsel to stand by silently while error goes uncorrected only to press the issue on appeal as "plain error."

Accordingly, to demonstrate "plain error" as Defendant now attempts to do, the Appellant must show "fundamental" error and this Court should only find such error in exceptional cases. State v. Hammett, 361 N.C. 92, 637 S.E.2d 518. The burden is on the defendant and that burden is to show that the jury probably would have reached a different verdict absent the challenged testimony. Id. Defendant cannot do this here. The victim's account of the sexual abuse in this case was repeated consistently, over and over, by every witness at trial who had interviewed her. Her mother's account was also consistent. Her mother walked in on Defendant and T.L. engaged in sexual intercourse. Defendant admitted to T.L.'s mother that he was "sick" and this had been going on for two years. Defendant immediately left the country following the incident when he was caught in the act. Defendant wrote and apologized to T.L. Even the household parrots had been mimicking sexual noises and the sounds of the victims screaming. It is very unlikely, and improbable, that in light of the overwhelming evidence here, the jury would have rendered different verdicts about the doctor's

benign testimony about "secondary gain." The transcript was seven volumes. There were about fourteen witnesses for the State. The "secondary gain" reference consisted of about one page of testimony. It was de minimus and it was benign. It likely had no impact on the verdicts whatsoever.

Defendant cannot meet his burden of showing error, much less plain error, and this Assignment should be overruled.

III. THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR A MISTRIAL.

ASSIGNMENT OF ERROR NO. 6 (R p. 49)

The victim had two outbursts during the closing argument by defense counsel. (T pp. 646-647) There was a third disturbance during the jury charge. (T pp. 664-65) After the judge's instructions, defense counsel began to recite for the record exactly what had occurred during his closing argument. (T p. 662) After hearing from both counsel, the trial judge made findings which summarized the incidents and which found that two of the outbursts were intentional. (T p. 666) At that point, the judge specifically asked defense counsel if he were moving for a mistrial. (T p. 667) The following transpired:

> MR. CAMPBELL: No, Judge, not at this time.
>
> THE COURT: All right. Since counsel is not moving at this point for a mistrial, the Court of course, will not do so Ex mero motu. Anything else at this time?

MR. CAMPBELL: No Judge.

(T p. 667)

Thus, defense counsel plainly decided not to move for a mistrial when specifically offered that opportunity. Rather, he elected to await the outcome and make his motion after the jury entered verdicts. (T p. 716) Defendant now wants to contend it was error for the judge to deny his motion, made after the guilty verdicts were in, to grant a mistrial based on the outbursts of the victim. This argument is without merit and should be dismissed.

N.C. Gen. Stat. § 15A-1061 provides, 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 that occurs during the trial on 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.

Defendant's argument here is without merit for three reasons:

First, the decision whether to grant a mistrial rests in the sound discretion of the trial judge and will not be overturned absent a showing of abuse of that discretion. State v. King, 343 N.C. 29, 44, 468 S.E.2d 232, 242 (1996). Defendant has failed to show an abuse of discretion.

Second, "the court may exercise its power under N.C. Stat. § 15A-1061 only 'during the trial.'" State v. O'Neal, 67 N.C. App.

65, 68, 312 S.E. 2d 493, 495 modified, 311 N.C. 747, 321 S.E.2d 154 (1984).

> The obvious purposes of mistrial are to prevent prejudice rising from conduct before the jury and to provide a remedy where the jury is unable to perform its function. Once the Court has discharged the jury, there is no purpose in ordering a mistrial: the proceedings may be determined by rulings of the Court on matters of law, including new trial motions.

Id. at 69, 312 S.E.2d at 495. Accordingly, the trial court here was without authority under N.C. Gen. Stat. § 15A-1061 to order a mistrial once the verdicts were entered.

Third, and finally, defense counsel's own conduct should bar him from complaining here given that he was specifically extended the opportunity to request relief after the charge but prior to the jury's returning to deliberate. Instead, defense counsel elected to take his chances with the verdicts and only when those verdicts were adverse to his client did he want to move for a mistrial. Defense counsel cannot have it both ways and, having elected to forego the opportunities to timely move for mistrial, should not now be heard to complain.

The Assignment of Error should be dismissed.

CONCLUSION

Defendant received a fair trial, free from prejudicial error, and this Court should find **NO ERROR** in the trial below.

Respectfully submitted, this the 5th day of March 2010

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **BRIEF FOR THE STATE** was served upon counsel for defendant by depositing the same in the United States mail, first class postage prepaid, and addressed to:

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This the 5th day of March 2010.

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