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NO. COA01-709

NORTH CAROLINA COURT OF APPEALS

Filed: 21 May 2002

STATE OF NORTH CAROLINA

v.

Cumberland County
No. 99 CRS 058689

KAREN ROBERTS

Appeal by defendant from judgment dated 14 November 2000 by Judge Gregory A. Weeks in Cumberland County Superior Court. Heard in the Court of Appeals 16 April 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Gerald K. Robbins, for the State.

Public Defender Ronald D. McSwain, by Assistant Public Defender Joe Coffey, for defendant-appellant.

GREENE, Judge.

Karen Roberts (Defendant) appeals a judgment dated 14 November 2000 entered consistent with a jury verdict finding her guilty of felonious child abuse.

Defendant was indicted on 30 August 1999 for "unlawfully, willfully[,] . . . feloniously[,] . . . [and] intentionally inflict[ing] serious physical injury, to wit: skull fracture, on Robert E. Skinner, Jr. [(Robbie)], who was ten (10) months old and thus under sixteen (16) years of age" on 13 May 1999.

Loralie Ephraim-Skinner (Skinner), Robbie's mother, testified

that in 1999, Defendant provided care for Robbie while Skinner worked. On 13 May 1999 at approximately 5:45 a.m., Skinner dropped Robbie off at Defendant's house; prior to dropping him off, Skinner had not noticed anything different about Robbie's physical appearance or his eating habits. Later that day at approximately 2:00 p.m., Defendant telephoned Skinner informing her that Robbie had fallen from a couch and Defendant had telephoned 911. Shortly after Robbie was admitted into the hospital on 13 May 1999, Skinner was informed that Robbie was blind. Upon Robbie's discharge from the hospital on 4 June 1999, Skinner took him daily to the hospital for physical therapy to improve his lower extremities and occupational therapy to improve the use of his hands. As a result of Robbie's injuries, he is hemiplegic, which is a form of cerebral palsy, and the right side of his body is paralyzed. At this point in Skinner's testimony, Defendant objected "to the relevance . . . [of] the aftercare of the child." The trial court overruled Defendant's objection, and Skinner continued to testify as to Robbie's condition, stating: Robbie cannot use his right arm; "[h]e cannot stand up on his own[;] [h]e can't crawl[;] [h]e can't pull himself up[;] [and] [h]e can't feed himself." As a result of the therapy performed by the Morehead School of the Blind, Robbie's sight has improved. In addition, Robbie takes phenobarbital, a seizure medication, twice a day, he has to bathe using a back chair, for thirty minutes per day, he has to be placed in a "stander," a device that holds him upright to build strength in his legs, he has a special feeding table, and he has a

wheelchair/stroller. Robbie is unable to stand or sit on his own. In order to adjust to Robbie's medical condition, Skinner, her husband, and her daughter eat dinner on the floor.

Prior to Dr. Sharon W. Cooper (Dr. Cooper) testifying, Defendant requested the trial court to rule on the admissibility of Dr. Cooper's testimony. The State submitted that Dr. Cooper's testimony was being offered to show the seriousness of the injuries and also to describe the mechanism of the injuries and how they occurred, which was inconsistent with Robbie simply falling from the couch. In the presence of the jury, Dr. Cooper testified as an expert in the areas of forensic pediatrics and developmental pediatrics. Robbie's treating physicians had requested Dr. Cooper assess the nature of Robbie's injuries and determine whether the injuries were accidental. When Dr. Cooper first examined Robbie, he had been in a coma, he had swelling on the left side of his face and at the back of his head, and also had bleeding behind both of his eyes, described as retinal hemorrhages. Dr. Cooper stated that retinal hemorrhages are the result of "severe repetitive shaking injury." Defendant objected to Dr. Cooper testifying that Robbie's injuries were caused by shaking; the trial court overruled this objection. Dr. Cooper went on to testify that the presence of the retinal hemorrhaging in a child who is in a coma, "who has had seizures, who has facial trauma[,] and who also has evidence of trauma to the back of the head . . . strongly supports the diagnosis of a shaking injury that led to the coma that [Robbie was] in." In addition, Robbie had "a very large fracture of the

skull which went from just above [his] left ear all the way over to just around [his] right ear." Such a large fracture also is consistent with "shaken impact syndrome." According to Dr. Cooper, the type of fracture present in Robbie's skull was not the type of fracture commonly seen in accidental injuries. Dr. Cooper testified, over Defendant's objection, that in her opinion, Robbie's injuries were most compatible with the smaller subgroup of shaken baby syndrome classified as shaken impact syndrome. Outside the presence of the jury, Defendant argued that Dr. Cooper's testimony was highly prejudicial and not probative as to whether the crack in the skull was of an intentional or accidental nature. Again, the trial court overruled Defendant's objection. Dr. Cooper testified that a child suffering from shaken impact syndrome often experiences "significant developmental problems, oftentimes at minimum cerebral palsy, . . . and frequently mental . . . retardation or cognitive deficits as well." Over Defendant's objection, Dr. Cooper was permitted to testify that Robbie is "definitely a developmentally delayed toddler" who has cerebral palsy, a seizure disorder, and global developmental delay by which every area of his development is affected. Robbie's speech and language, as well as "his fine motor skills, what he can do with his hands, his gross motor skills, what he can do with his legs and his feet, his language ability, his ability to speak or respond when spoken to and his personal interaction with care providers are all affected." Robbie's right-side paralysis is a permanent disability and he will never "regain 100 percent of his sight and

vision." The State then asked Dr. Cooper: "What is the level of care that has to be maintained on a daily basis for Robbie Skinner?" The trial court sustained Defendant's objection to this question. Subsequently, the State asked Dr. Cooper if she could "speak to the level of care that Robbie had been receiving while he's been out of the hospital." Again, Defendant objected, and the State asked to be heard outside the presence of the jury. The State argued that the level of care Robbie was receiving negated the issue of whether Skinner had harmed Robbie. The trial court indicated it would grant some latitude, "but there [wa]s a risk factor" in that the State should not "want to do surgery with a chain saw in making the point." In the presence of the jury, Dr. Cooper testified that Robbie's parents "have provided very good and relatively intense care for him."

On cross-examination, Dr. Cooper testified that the logical deduction to be made from Robbie's injuries was that the shaking and the impact occurred at the same time. On redirect, Dr. Cooper testified that Robbie's injuries logically occurred fifteen-to-thirty minutes before he started displaying symptoms.

Dr. Carol Wadon (Dr. Wadon) testified as an expert in neurosurgery. According to Dr. Wadon, Robbie's injuries were inconsistent with a child falling from a couch onto a carpeted floor; instead, Robbie's injuries were consistent with child abuse, specifically violent shaking. Dr. Wadon testified that Robbie's injuries were life threatening and not caused by accidental trauma.

Defendant testified and stated that she was aware of shaken

infant syndrome, but she did not shake Robbie. In addition, Dr. Cooper was recalled by the State to testify and was permitted to testify in detail, without objection, concerning shaking infant syndrome, repetitive shaken injury, shaken impact syndrome, and the consistency of Robbie's injuries with child abuse.

The issues are whether the trial court erred by allowing the testimony of: (I) Skinner concerning Robbie's aftercare; (II) Dr. Cooper concerning Robbie's long-term prognosis; and (III) Dr. Cooper concerning the level of care Robbie was receiving.¹

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1999). Generally, "[a]ll relevant evidence is admissible," N.C.G.S. § 8C-1, Rule 402 (1999), except where "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless

¹We note Defendant also assigns error to the trial court permitting Dr. Cooper to testify regarding repetitive shaken injury, shaken baby syndrome, and shaken impact syndrome. Although Defendant initially objected to Dr. Cooper's testimony, Dr. Wadon, Defendant, and Dr. Cooper later testified regarding shaken infant syndrome without objection from Defendant. Accordingly, Defendant waived her objection to the trial court permitting Dr. Cooper to testify concerning the consistency of Robbie's injuries with some form of a shaken injury. See *State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984) (if "evidence is admitted over objection, and the same evidence . . . is later admitted without objection, the benefit of the objection is lost").

presentation of cumulative evidence," N.C.G.S. § 8C-1, Rule 403 (1999). "Evidence which is probative of the State's case necessarily will have a prejudicial effect upon the defendant; the question is one of degree." *State v. Coffey*, 326 N.C. 268, 281, 389 S.E.2d 48, 56 (1990). While the question under Rule 403 of whether the evidence is unfairly prejudicial is a matter left to the sound discretion of the trial court, "a trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard." *State v. Wallace*, 104 N.C. App. 498, 502, 504, 410 S.E.2d 226, 228, 230 (1991), *disc. review denied and appeal dismissed*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241 (1992). Such rulings relating to relevance, however, "are given great deference on appeal." *Id.* at 502, 410 S.E.2d at 228.

I

Defendant argues that Skinner's testimony relating to Robbie's care was irrelevant and even if it were relevant, it "was so overwhelmingly prejudicial and inflammatory that the unfair prejudice created substantially outweighed its probative value." We disagree.

Relevancy

A defendant is guilty of felony child abuse if she is:

A parent or any other person providing care to or supervision of a child less than 16 years of age who intentionally inflicts any serious physical injury upon or to the child or who intentionally commits an assault upon the child which results in any serious physical injury to the child

N.C.G.S. § 14-318.4(a) (1999). In determining whether a serious physical injury has occurred, the jury may consider such factors as: permanent disfigurement, *State v. Campbell*, 316 N.C. 168, 175, 340 S.E.2d 474, 478 (1986); substantial impairment of bodily functions, *id.*; substantial impairment of the victim's physical health, *id.*; loss of blood, *State v. Church*, 99 N.C. App. 647, 656, 394 S.E.2d 468, 473 (1990); pain, *id.*; hospitalization, *id.*; therapy or treatment, see *State v. Ackerman*, 144 N.C. App. 452, 461, 551 S.E.2d 139, 145, *cert. denied*, 354 N.C. 221, 554 S.E.2d 344 (2001); and death, see *State v. Qualls*, 130 N.C. App. 1, 8, 502 S.E.2d 31, 36 (1998), *aff'd per curiam*, 350 N.C. 56, 510 S.E.2d 376 (1999).

In this case, Skinner was permitted to testify concerning the treatment and therapy Robbie had received since being discharged from the hospital. Skinner's testimony was relevant to establish the seriousness of Robbie's physical injuries, an element of the crime charged in this case. Thus, the trial court properly admitted the evidence under Rule 402 as relevant to an issue in the case.

Unfair Prejudice

Even though Skinner's testimony was relevant to prove the seriousness of Robbie's injuries, it nevertheless may be excluded under Rule 403 if its probative value is outweighed by unfair prejudice. Although Defendant states that Skinner's testimony was "overwhelmingly prejudicial and inflammatory," she offers no argument in her brief to this Court to support this contention.

Due to the seriousness of Robbie's injuries and the evidence concerning Robbie's conditions, we fail to see how Skinner's testimony unfairly prejudiced Defendant. Accordingly, the trial court did not abuse its discretion by admitting Skinner's relevant testimony.

II

Defendant next argues the trial court erred in permitting Dr. Cooper to testify regarding the long-term prognosis of Robbie as the "testimony was not relevant, and even if it were, the evidence was so overwhelmingly prejudicial and inflammatory that the unfair prejudice created substantially outweighed its probative value." We disagree.

Relevancy

In this case, Dr. Cooper testified concerning Robbie's development and the effect of his injuries on his bodily functions. This testimony was relevant to establish the seriousness of Robbie's injuries, including the substantial impairment of his bodily functions and health. Accordingly, Dr. Cooper's testimony was relevant to an issue in the case.

Unfair Prejudice

Moreover, the probative value of Dr. Cooper's testimony was not outweighed by unfair prejudice. There is no indication in the record to this Court that the admission of Dr. Cooper's testimony violated Rule 403. Thus, the trial court did not abuse its discretion in permitting Dr. Cooper to testify regarding the long-term prognosis of Robbie.

III

Defendant finally contends Dr. Cooper's testimony regarding the level of care received by Robbie was irrelevant and so prejudicial that it denied Defendant a fair trial. We disagree.

Even assuming the trial court erroneously admitted Dr. Cooper's testimony regarding the level of care Robbie's parents were providing him, an "erroneous admission of evidence requires a new trial only when the error is prejudicial." *State v. Chavis*, 141 N.C. App. 553, 566, 540 S.E.2d 404, 414 (2000). A defendant attempting to show prejudicial error "has the burden of showing that 'there was a reasonable possibility that a different result would have been reached at trial if such error had not occurred.'" *Id.* (citation omitted).

In this case, there is overwhelming evidence regarding Robbie's injuries and the probability that those injuries were inflicted while Robbie was in Defendant's care. In addition, there was testimony at trial that Defendant's version of events was inconsistent with Robbie's injuries. Although Defendant attempted to show Robbie's injuries were inflicted by Skinner, expert witnesses determined Robbie's injuries occurred within a short time before he showed symptoms and was transported to the hospital. Accordingly, there is no reasonable possibility that had Dr. Cooper's testimony not been admitted, a different result would have been reached at trial. Assuming, therefore, that the admission of the testimony was error, it was not prejudicial error.

No error.

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Judges TIMMONS-GOODSON and HUNTER concur.

Report per Rule 30(e).