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NO. COA04-1727

NORTH CAROLINA COURT OF APPEALS

Filed: 3 January 2006

STATE OF NORTH CAROLINA

v. Cumberland County
Nos. 03CRS051568-69

DANIEL SAINT WALTERS MOORE, JR.

Appeal by defendant from judgment entered 3 August 2004 by Judge Evelyn Hill in Cumberland County Superior Court. Heard in the Court of Appeals 10 October 2005.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Laura E. Crumpler, for the State.

McAfee Law, P.A., by Robert J. McAfee, for defendant-appellant.

HUNTER, Judge.

Daniel Saint Walters Moore, Jr. ("defendant") appeals from judgment entered 3 August 2004 consistent with a jury verdict finding him guilty of taking indecent liberties with a student and taking indecent liberties with a child. For the reasons stated herein, we find no error by the trial court.

The following issues are presented by defendant in this appeal: (1) whether the trial court's comments deprived defendant of a trial by a fair and impartial judge; (2) whether the trial court erred by denying defendant's motion for mistrial; (3) whether the trial court erred by qualifying Dr. Sharon Cooper ("Dr.

Cooper") as an expert; and (4) whether defendant was denied effective assistance of counsel.

The evidence tends to show the following: In the spring of 2002, B.T., a thirteen-year old eighth-grader at Anne Chestnutt Middle School in Fayetteville, North Carolina, developed a friendship with defendant, who was then twenty years old. Defendant was an occasional substitute teacher for health and P.E. classes and an assistant coach for the school's football and wrestling teams.

In October 2002, defendant saw B.T. at a concert in a nearby college town. B.T. thought defendant was intoxicated and remembered defendant "mention[ing] that he -- something that had to do with him going to have sex or something. I mean, he asked did I want to watch." One week later, defendant approached B.T. at school and gave her two handwritten notes, one asking if she remembered what he said at the concert, and another asking B.T. for a favor. Defendant also gave B.T. his phone number.

Defendant and B.T. then began talking to one another once or twice per week. B.T. felt comfortable talking to defendant. On one occasion, defendant took B.T. out of her first period class into an empty classroom where defendant began to kiss her and touch her breasts. On another occasion, defendant met B.T. in a school hallway and kissed her. On 21 October 2002, defendant arranged to pick up B.T., and they drove to a nearby neighborhood, where defendant and B.T. had sex.

Defendant was indicted on 24 June 2003 for statutory rape, statutory sexual offense, first degree kidnapping, sexual activity with a student, indecent liberties with a minor, and indecent liberties with a student. The trial court granted defendant's motion to dismiss the first degree kidnapping charge at the close of the State's evidence. Defendant did not testify at trial.

On 3 August 2004, defendant was found guilty of indecent liberties with a student and indecent liberties with a minor. However, the jury acquitted defendant of statutory rape, statutory sex offense, and sexual activity with a student. Defendant was sentenced to a term of sixteen to twenty months imprisonment. The execution of the sentence was suspended, and defendant was placed on special probation for twenty-four months, serving an intermediate punishment of four months imprisonment. Defendant appeals.

I.

Defendant first contends that the trial court's derogatory comments directed toward defense counsel deprived defendant of a trial by a fair and impartial judge. We disagree.

A "fundamental [precept of] due process [is] that every defendant be tried 'before an impartial judge and an unprejudiced jury in an *atmosphere of judicial calm*.'" *State v. Brinkley*, 159 N.C. App. 446, 450, 583 S.E.2d 335, 338 (2003) (quoting *State v. Carter*, 233 N.C. 581, 583, 65 S.E.2d 9, 10 (1951)). N.C. Gen. Stat. § 15A-1222 (2003) directs that "[t]he judge may not express during any stage of the trial, any opinion in the presence of the

jury on any question of fact to be decided by the jury." *Id.* "The judge's duty of impartiality extends to defense counsel. He [or she] should refrain from remarks which tend to belittle or humiliate counsel since a jury hearing such remarks may tend to disbelieve evidence adduced in defendant's behalf." *State v. Coleman*, 65 N.C. App. 23, 29, 308 S.E.2d 742, 746 (1983).

However, "not every improper remark will require a new trial[;] a new trial may be awarded if the remarks go to the heart of the case." *State v. Sidbury*, 64 N.C. App. 177, 179, 306 S.E.2d 844, 845 (1983). "'In evaluating whether a judge's comments cross into the realm of impermissible opinion, a totality of the circumstances test is utilized.'" *State v. Mack*, 161 N.C. App. 595, 598, 589 S.E.2d 168, 171 (2003) (citation omitted), *disc. review denied*, 358 N.C. 379, 598 S.E.2d 140, *cert. denied*, *Mack v. North Carolina*, ___ U.S. ___, 160 L. Ed. 2d 336 (2004). "'"[W]hether the accused was deprived of a fair trial by the challenged remarks [of the trial judge] must be determined by what was said and its probable effect upon the jury in light of all attendant circumstances, the burden of showing prejudice being upon the appellant."'" *State v. Wright*, ___ N.C. App. ___, ___, 616 S.E.2d 366, 369 (citations omitted), *per curiam affirmed*, ___ N.C. ___, ___ S.E.2d ___ (No. 483A05 filed 1 December 2005).

Here, defendant contends that comments made by the trial judge to defense counsel were improper and deprived him of a fair and impartial trial. Defendant cites several portions of the transcript as examples, including the following incidents.

During the preliminary instructions to the jury prior to opening statements, the trial court admonished defense counsel to pay attention. Prior to the State's first witness, the trial court interrupted defense counsel and advised him to refrain from discussing certain matters in front of the jury. On two occasions during defense counsel's cross-examination of the State's initial witnesses, the trial court instructed counsel to not repeat testimony, and on several occasions the court refused to let defense counsel approach a witness, stating that a proper foundation had not been laid. The court refused to hear counsel on the subject, ordering him to sit down and move on to the next question.

The trial court also interrupted defense counsel's cross-examination several times to inquire whether counsel was making statements or asking questions, and the court offered commentary on how to ask a question. At one point, the trial court interrupted defense counsel's cross-examination to reprimand counsel for failing to ask a question properly, but the transcript reveals that a question was asked. The trial court also interrupted and reprimanded defense counsel for "making editorial comments" when counsel attempted to find a document upon which he sought to question the witness.

Finally, the trial court sustained several objections *ex mero motu* throughout the trial. The court also threatened to have the bailiff return defense counsel to the defense table after an off-

the-record discussion with the bench, at which time, the trial court refused to hear anything further from counsel.

Here, utilizing the totality of the circumstances test, appellant has failed to show that the challenged remarks of the trial court to defense counsel deprived defendant of a fair trial. Defendant fails to demonstrate the probable effect upon the jury of the trial court's comments and interruptions, which were directed only toward defense counsel. In the context of this trial, some of the trial court's comments were inappropriate; however, in light of all attendant circumstances, we hold that the trial court's comments were insufficient to show that defendant's right to a fair trial before an impartial judge and an unprejudiced jury was violated. This assignment of error is overruled.

II.

Defendant next argues that the trial court erred by denying defendant's motion for mistrial, which was based on the trial court's comments made during the course of the trial. We disagree.

"The obvious purposes of mistrial are to prevent prejudice arising from conduct before the jury and to provide a remedy where the jury is unable to perform its function." *State v. O'Neal*, 67 N.C. App. 65, 69, 312 S.E.2d 493, 495 (1984).

N.C. Gen. Stat. § 15A-1061 (2003) provides, in pertinent part:

> 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.

Id. "It is well settled that a motion for a mistrial and the determination of whether defendant's case has been irreparably and substantially prejudiced is within the trial court's sound discretion." *State v. King*, 343 N.C. 29, 44, 468 S.E.2d 232, 242 (1996). "However, this discretionary power is not unlimited; a motion for mistrial must be granted if there occurs an incident of such a nature that it would render a fair and impartial trial impossible under the law." *State v. McCraw*, 300 N.C. 610, 620, 268 S.E.2d 173, 179, (1980). The trial court's "decision is not reviewable absent a showing of gross abuse of discretion." *State v. Monk*, 63 N.C. App. 512, 521, 305 S.E.2d 755, 761 (1983).

In the instant case, as discussed *supra* in Section I, we conclude that the trial court's comments were insufficient to deprive defendant of the right to an impartial judge and unprejudiced jury. We further conclude that the trial court did not abuse its discretion by denying defendant's motion for mistrial based on the trial court's comments. This assignment of error is overruled.

III.

Defendant next argues that the trial court abused its discretion by qualifying Dr. Cooper as an expert in "pediatrics specializing in child physical and sexual abuse." Defendant contends that the field of forensic pediatrics does not exist, and the trial court used a synonym, child abuse and neglect, to qualify

Dr. Cooper as a specialist in a non-existent area of expertise. We conclude that the trial court did not abuse its discretion.

Rule 702 of the North Carolina Rules of Evidence, which governs the admissibility of expert testimony, states the following: "If 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) (2003). "Our courts construe this rule to admit expert testimony when it will assist the jury 'in drawing certain inferences from facts, and the expert is better qualified than the jury to draw such inferences.'" *State v. Parks*, 96 N.C. App. 589, 592, 386 S.E.2d 748, 750 (1989) (quoting *State v. Anderson*, 322 N.C. 22, 28, 366 S.E.2d 459, 463 (1988)).

This Court has long held that "'[o]rdinarily, whether a witness qualifies as an expert is exclusively within the discretion of the trial judge.'" *FormyDuval v. Bunn*, 138 N.C. App. 381, 385, 530 S.E.2d 96, 99 (2000) (citation omitted). Furthermore, a "'finding by the trial judge that the witness possesses the requisite skill will not be reversed on appeal unless there is no evidence to support it.'" *Parks*, 96 N.C. App. at 592, 386 S.E.2d at 750 (citation omitted). This Court has also determined that "the legislature intended the term 'specialist' to include a physician who is *either* board certified in a specialty or who *holds himself out as a specialist or limits his practice to a specialty*."

FormyDuval, 138 N.C. App. at 389, 530 S.E.2d at 102 (emphasis added).

In the instant case, Dr. Cooper testified that she presently practices medicine as a "developmental and forensic pediatrician" at the Southern Regional Area Health Education Center ("AHEC") in Fayetteville, North Carolina, and at Womack Army Medical Center at Fort Bragg, North Carolina. Dr. Cooper is board certified in pediatrics, and is a member of the American Academy of Pediatrics and the American Professional Society on the Abuse of Children. She holds faculty positions at the University of North Carolina at Chapel Hill and in the Department of Pediatrics at the Uniformed Services University of Health Sciences in Bethesda, Maryland, and also teaches at the Institute of Government, the Womack Army Medical Center, the Southern Regional AHEC, and the National Center for Missing and Exploited Children. Dr. Cooper has also had her work published in a textbook entitled, "Sexual Assault Victimization Across the Life Span" and has written a textbook on the topic of Internet child sexual exploitation.

At trial, the court allowed Dr. Cooper to be qualified as an expert in "pediatrics . . . specializing in child physical and sexual abuse[,]" rather than forensic pediatrics, as suggested by the State. Dr. Cooper testified that "[f]orensic pediatrics is a relatively new subspecialty. . . . [I]t does not as yet have any board certification or a specific examination that you have to take." Dr. Cooper further testified that "[w]ithin the last two years, developmental pediatricians ha[ve] established for the first

time [their] own boards. I haven't as yet taken those boards, but they are now present."

Despite Dr. Cooper's admissions concerning board examinations, she is not precluded from qualifying as a specialist. According to *FormyDuval*, one may be qualified as a specialist, even if not board certified, if one either (1) holds oneself out as a specialist or (2) limits one's practice to a specialty. *FormyDuval*, 138 N.C. App. at 389, 530 S.E.2d at 102. Here, Dr. Cooper both holds herself out as a specialist in child physical and sexual abuse and limits her practice to that specialty, as reflected by her testimony as to her certifications, employment, and publications.

We find the trial court did not abuse its discretion in qualifying Dr. Cooper as an expert specializing in child physical and sexual abuse. This assignment of error is overruled.

IV.

Defendant finally argues that his constitutional rights were violated because he received ineffective assistance of counsel. We disagree.

"Attorney conduct that falls below an objective standard of reasonableness and prejudices the defense denies the defendant the right to effective assistance of counsel." *State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 525 (2001). An ineffective assistance of counsel claim "must establish both that the professional assistance defendant received was unreasonable and that the trial would have had a different outcome in the absence of such assistance." *Id.*

"Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland v. Washington*, 466 U.S. 668, 689, 80 L. Ed. 2d 674, 694-95 (1984) (citations omitted). Furthermore, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." *Id.* at 693, 80 L. Ed. 2d at 697 (citation omitted). In North Carolina, the "statutorily enacted test for prejudice mirrors the *Strickland* test." *State v. Atkins*, 349 N.C. 62, 112, 505 S.E.2d 97, 127 (1998); *see also* N.C. Gen. Stat. § 15A-1443(a) (2003).

In the instant case, defendant contends that the aggregation of numerous incidents involving defense counsel constituted inadequate assistance of counsel, including allegations regarding counsel's demeanor, counsel's conduct toward the trial court and counsel's attempts to elicit inadmissible evidence. We have examined the general claims brought by defendant, most of which do not reference any specific episode, and conclude that defendant's constitutional rights were not violated; defendant did not receive

ineffective assistance of counsel. This assignment of error is overruled.

In summary, we hold that the trial court's comments, under the totality of the circumstances, did not deprive defendant of a trial by a fair and impartial judge, and the trial court did not err in denying defendant's motion for mistrial, or abuse its discretion in qualifying Dr. Cooper as an expert. Furthermore, the record does not support defendant's claim of ineffective assistance of counsel. We, therefore, find no error in defendant's trial.

No error.

Chief Judge MARTIN and Judge STEELMAN concur.

Report per Rule 30(e).