NO. COA05-1231

NORTH CAROLINA COURT OF APPEALS

Filed: 17 October 2006

STATE OF NORTH CAROLINA

v.

ANTHONY MICHELE LOFTON,
Defendant.

Durham County
Nos. 03 CRS 21132
03 CRS 21133
03 CRS 59427
03 CRS 59428

Appeal by defendant from judgments entered 29 April 2005 by Judge Robert H. Hobgood in Durham County Superior Court. Heard in the Court of Appeals 16 May 2006.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth J. Weese, for the State.

Terry W. Alford for defendant-appellant.

GEER, Judge.

Defendant Anthony Michele Lofton appeals from his convictions for second degree rape, second degree sexual offense, sexual offense by one in a parental role, and incest. Defendant first contends that the trial court erred by failing to grant him a mistrial after a witness reported a statement by defendant during the State's direct examination that had not been disclosed to defendant during pre-trial discovery. We find no abuse of discretion in the trial court's decision to sanction the discovery violation by excluding the statement, giving a curative instruction to the jury, and polling the juror to ensure they could abide by

the instruction. Defendant also argues that a sexual assault nurse who testified for the State was improperly allowed to testify to the victim's credibility. We disagree because the nurse was describing characteristics of sexual assault victims, rather than expressing an expert opinion as to the victim's credibility. We likewise find defendant's remaining arguments unpersuasive and, therefore, uphold defendant's convictions and sentences.

Facts and Procedural History

The State's evidence tended to show the following facts. Defendant is the stepfather of the victim, N.D.L., and has been a father figure in N.D.L.'s life since she was less than a year old.[1] On 22 November 2003, N.D.L.'s mother picked N.D.L. up at her high school at around 9:00 or 10:00 p.m., after N.D.L.'s basketball game. When they got home, N.D.L. had something to eat and went to a bedroom that she shared with her younger brother. She fell asleep on her bed in her clothes.

N.D.L. woke up coughing. She sat up in bed for a while until her coughing stopped and then lay down and went back to sleep. Soon after, defendant awakened her to ask if she was all right and told her to come into the kitchen to take some medicine. After defendant gave her a pill in the kitchen, he followed her down the hallway back to her bedroom, asked her again if she was all right, and inquired about her basketball game. He also asked her if she

[1]Throughout his brief, defendant refers to N.D.L. by her full name. We urge counsel to take appropriate steps in cases involving alleged minor victims of crimes to identify the children by use of initials, a pseudonym, or some similar device to disguise the child's identity. We do so here.

would like to go lie in bed with him. N.D.L. answered "no," went into her room, shut the door, and went back to bed.

A few seconds later, defendant opened the door, lay down in N.D.L.'s bed with her, and began to massage her shoulders and back. N.D.L. tried to get off the bed, but defendant pulled her to him and, although she resisted, pulled her pants and shorts down. N.D.L. was still wearing a gray T-shirt over a tank top. After inserting his finger into her vagina for a few seconds, defendant pulled his shorts down and inserted his penis into her vagina. N.D.L. testified that, at this point, the medicine defendant had given her was starting to take effect. She felt very drowsy and drained. She also testified that although she told defendant to stop and continued to try to get away, there "wasn't much I could do because he had his arms around my stomach. He had his hands — he had the palm of his hand on my stomach."

N.D.L. testified that defendant reinserted his fingers into her vagina, licked her vagina, again inserted his fingers, and finally ejaculated onto her stomach and onto her shirt up near her shoulder. Defendant attempted to wipe N.D.L. off with his underwear. He then put his shorts back on and left, closing the door behind him. N.D.L. put her pants back on and remained in her bed.

N.D.L.'s mother, who had been asleep in the living room, got up at the sound of the bedroom door closing. She went down the hallway toward the bedrooms. The mother testified that, when she looked into the bedroom she shared with defendant, he "turned

around and asked me, what the F was my problem. I said nothing, I had to go to the bathroom." The mother entered N.D.L.'s room. She noticed that N.D.L. was awake and had a strange look on her face and asked her what was wrong. N.D.L. sat up and, without speaking, pointed to the wet stain on her shirt near her shoulder. The mother asked, "[W]as he in here?" When N.D.L. nodded, the mother asked, "[I]s that what I think it is?" N.D.L. nodded again.

N.D.L.'s mother immediately took her to the hospital, where evidence was collected from her body and clothing. She was also interviewed by the police and a sexual assault nurse examiner. It was ultimately determined that the semen on N.D.L.'s shirt matched defendant's DNA and that DNA analysis of other semen stains on N.D.L.'s panties and genital swabs could not exclude defendant.

Defendant was indicted for (1) sexual offense through vaginal intercourse by one who has assumed the position of parent to the victim, (2) second degree rape, (3) incest between near relatives, (4) crime against nature by performing cunnilingus, and (5) second degree sexual offense. The following charges were submitted to the jury: second degree rape, second degree sexual offense, incest, and sexual offense by one who has assumed the position of parent to the victim. On 28 April 2005, the jury convicted defendant of all four charges, and defendant received a consolidated sentence of 81 to 107 months for the second degree sexual offense and second degree rape convictions, along with a second consolidated sentence of 24 to 38 months for the convictions for incest and sexual offense by one in a parental role. The trial judge ordered that the sentences

be served consecutively, but suspended the latter sentence with defendant to be placed on probation following completion of his first sentence. Defendant filed a timely appeal to this Court.

Discussion

In connection with each of the arguments asserted by defendant on appeal, defendant has contended that his constitutional rights were violated. At trial, however, defendant raised no constitutional issues. It is well established that "a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal." *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982). Defendant has made no argument explaining why this general rule should not apply in this case. We, therefore, do not address defendant's constitutional arguments.

I

Defendant first argues that the trial court abused its discretion by failing to grant him a mistrial based on the following exchange between N.D.L. and the prosecutor:

> Q. Did you get yourself together and get ready to go to the hospital?
>
> A. Yes. As I was getting myself together, [my mother] had already left and went into her bathroom. [Defendant] had came [sic] to the bathroom door.
>
> Q. Which bathroom door?
>
> A. My bathroom door.
>
> Q. Okay.
>
> A. In the hallway. He looked at me. The whole time he was looking at me, he was

> like talking real loud like, what did you say to your mother[?] What did you say to your mother? But, under his breath, while he was talking, he was like, don't say nothing; don't say nothing.

Defense counsel immediately objected to this testimony, and the judge sent the jury out, telling them he had "a procedural matter [he] must conduct in [its] absence."

Defense counsel requested a mistrial, arguing that defendant's statement urging N.D.L. not to say anything had not been disclosed in discovery. The trial judge sustained defendant's objection based on the failure to disclose the statement, but denied the motion for a mistrial. When the jury returned, the trial judge instructed the jurors:

> The objection is sustained. Members of the jury, I do instruct you to totally disregard and dismiss from your minds the statement of this witness that the defendant said to her in a low voice, don't say nothing; don't say nothing.
>
> You are to dismiss that from your minds. It shall take no part in your deliberations in this case.
>
> Can you follow that instruction? If you can, raise your hand. If you can dismiss that from your minds and have it take no part in your deliberations, raise your hand.

The trial judge noted for the record that each juror raised his or her hand.

Defendant argues that the statement was so inherently prejudicial — as the only statement by defendant implying acknowledgment of wrongdoing — that no juror could disregard the statement. This case does not, however, involve the admission of

otherwise inadmissible evidence. Instead, the trial court sustained the objection and issued instructions to the jury to disregard the testimony as a *sanction* for discovery violations under N.C. Gen. Stat. § 15A-910 (2005).

N.C. Gen. Stat. § 15A-910 provides:

> (a) If at any time during the course of the proceedings the court determines that a party has failed to comply with this Article [governing discovery] or with an order issued pursuant to this Article, the court in addition to exercising its contempt powers may
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> (1) Order the party to permit the discovery or inspection, or
>
> (2) Grant a continuance or recess, or
>
> (3) Prohibit the party from introducing evidence not disclosed, or
>
> (3a) Declare a mistrial, or
>
> (3b) Dismiss the charge, with or without prejudice, or
>
> (4) Enter other appropriate orders.

Our Supreme Court has held that while this statute provides for several possible remedies for discovery violations, "the trial court is not required to impose any sanctions." *State v. Taylor*, 311 N.C. 266, 271, 316 S.E.2d 225, 228 (1984). Further, the decision regarding which sanction, if any, to impose rests entirely within the discretion of the trial court, and that decision will not be reversed in the absence of a showing of abuse of discretion. *Id.* *See also State v. Smith*, 135 N.C. App. 649, 658, 522 S.E.2d 321, 328 (1999) ("A trial court is not required to impose sanctions for late discovery. Instead, it is a matter of discretion for the

trial judge."), *disc. review denied*, 351 N.C. 367, 543 S.E.2d 143 (2000).

Here, the trial judge chose not to grant a mistrial, but rather excluded the evidence by giving a strong instruction to the jury to disregard the testimony and then polling the jury to ensure that each juror could do so. Defendant has failed to demonstrate that the selection of this sanction was manifestly unreasonable.[2] *See Taylor*, 311 N.C. at 271, 316 S.E.2d at 228 (upholding trial court's decision to exclude physical evidence and all but one photograph as a sanction for failing to disclose evidence); *Smith*, 135 N.C. App. at 658, 522 S.E.2d at 328 (holding that trial court did not err in denying a mistrial and imposing a lesser sanction for the State's failure to disclose statements made by the defendant).

Even if this appeal did not involve discovery sanctions, this Court has previously held that a trial court did not abuse its discretion in denying a mistrial after the State elicited testimony previously determined to be inadmissible when the trial court undertook the same curative actions used by the trial judge in this case. *See State v. Vines*, 105 N.C. App. 147, 154, 412 S.E.2d 156, 161 (1992) (trial judge discussed mistrial with counsel, issued curative instructions to the jury to disregard the testimony,

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[2] *See State v. King*, 343 N.C. 29, 45, 468 S.E.2d 232, 242 (1996) ("Our system of trial by jury is based upon the assumption that the trial jurors are men [and women] of character and of sufficient intelligence to fully understand and comply with the instructions of the court, and are presumed to have done so." (alteration in original) (internal quotation marks omitted)).

polled the jurors to determine if they could disregard the testimony, and had each juror raise his or her hand to indicate an ability to do so). We, therefore, overrule this assignment of error.

II

Defendant next objects to the trial court's admission of testimony from Ella Buchanan, a sexual assault nurse who testified as follows during the State's redirect examination:

> Q. During the time that you [have] . . . worked as a sexual assault nurse examiner, examining persons who indicated they were victims of sexual assault and also during your training as a sexual assault nurse examiner, how often would you say, a percentage, do you run across there being any type of injury to a female's genitals after being sexually assaulted?
>
> MR. VANN [defense counsel]: Objection.
>
> THE COURT: Overruled.
>
> THE WITNESS: In my personal experience or my clinical experience, I rarely have someone who shows physical trauma.
>
> And percentage, the percentage that is generally accepted at this time is around 80 percent or so . . . don't show signs of physical trauma.

Defendant contends that this evidence is improper because it "amounted to a comment on the victim's credibility and was an opinion that sex had occurred."

Defendant relies upon *State v. Grover*, 142 N.C. App. 411, 543 S.E.2d 179, *aff'd per curiam*, 354 N.C. 354, 553 S.E.2d 679 (2001). In *Grover*, we noted: "[T]his Court has held that where 'experts found no clinical evidence that would support a diagnosis of sexual

abuse, their opinions that sexual abuse had occurred merely attested to the truthfulness of the child witness,' and were inadmissible." *Id.* at 413, 543 S.E.2d at 181 (quoting *State v. Dick*, 126 N.C. App. 312, 315, 485 S.E.2d 88, 90, *disc. review denied*, 346 N.C. 551, 488 S.E.2d 813 (1997)). The Court in *Grover* went on to explain:

> [W]e do not hold that an expert cannot testify as to characteristics of abused children. [E]xpert[s] in the field may testify on the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent with this profile. The nature of the experts' jobs and the experience which they possess make them better qualified than the jury to form an opinion as to the characteristics of abused children. Thus, while it is impermissible for an expert, in the absence of physical evidence, to testify that a child has been sexually abused, it is permissible for an expert to testify that a child exhibits characteristics [consistent with] abused children.

Id. at 419, 543 S.E.2d at 184 (alterations in original) (internal citations and quotation marks omitted).

In this case, Nurse Buchanan did not testify that N.D.L. was in fact the victim of sexual offenses. Instead, her testimony pertained to the characteristics or profiles of sexual assault victims and thus came well within *Grover*'s guidelines for acceptable expert testimony. *See also State v. Stancil*, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002) (holding that "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").

Further, the State's questioning of Nurse Buchanan on redirect was a valid response to the defense's extensive questioning during cross-examination, in which counsel emphasized the lack of evidence of physical trauma to N.D.L.'s person. "The purpose of redirect examination is to clarify any questions raised on cross-examination concerning the subject matter of direct examination and to confront any new matters which arose during cross-examination." *State v. Baymon*, 336 N.C. 748, 754, 446 S.E.2d 1, 4 (1994) (defendant's cross-examination of doctor, which suggested sexual assault victim had been coached in her testimony by social workers and family, rendered admissible testimony on redirect examination to the effect that doctor did not believe victim had been told what to say).

In the present case, the challenged testimony served to clarify an issue raised by defendant himself and was aimed at informing the jury about the percentage of sexual assault victims who show no signs of physical trauma, a statistic with which the jury was unlikely to be familiar. As such, we hold that the trial court properly allowed the challenged testimony.

III

Defendant next argues that the trial court erred in denying his motion to dismiss for insufficiency of the evidence. In ruling upon a motion to dismiss, the trial court must determine if the State has presented substantial evidence of each essential element of the offense and of defendant's being the perpetrator. *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255, *cert. denied*, 537 U.S. 1006, 154 L. Ed. 2d 404, 123 S. Ct. 488 (2002). "'Evidence is

substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion.'" *Id.* (quoting *State v. Parker*, 354 N.C. 268, 278, 553 S.E.2d 885, 894 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162, 122 S. Ct. 2332 (2002)). In considering the motion, the trial court must view the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence and resolving any contradictions in favor of the State. *Id.*, 561 S.E.2d at 256.

Defendant argues as to all four charges that his motion to dismiss should have been granted because (1) N.D.L.'s "statements are all over the place," (2) N.D.L. had not previously experienced any problems with defendant, (3) N.D.L.'s mother and brother did not wake up although she claims that she fought defendant and told him to stop, (4) N.D.L. experienced no injuries or pain, and (5) "[t]he DNA issue is completely questionable." In summing up his argument, defendant states in his brief: "Her story is not believable. And then, which story? Yes, this was for the jury to wade through and decide. But sometimes it is proper for the Court to stop the case."

As defendant acknowledges, he is making arguments regarding the credibility of witnesses and the weight that should be afforded various pieces of evidence. Those issues were for the jury to resolve and do not fall within the province of the trial judge or the appellate courts. *See State v. Hyatt*, 355 N.C. 642, 666, 566 S.E.2d 61, 77 (2002) ("[I]t is the province of the jury . . . to assess and determine witness credibility."), *cert. denied*, 537 U.S.

1133, 154 L. Ed. 2d 823, 123 S. Ct. 916 (2003); *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980) ("The trial court in considering such motions is concerned only with the sufficiency of the evidence to carry the case to the jury and not with its weight."). Contradictions and discrepancies in the testimony or evidence are for the jury to resolve and cannot warrant dismissal. *King*, 343 N.C. at 36, 468 S.E.2d at 237. Since defendant offers no other arguments to justify dismissal, we hold that the trial court properly denied defendant's motion to dismiss.

IV

Finally, defendant challenges the trial court's response to a question the jury submitted during deliberations: "Does resignation or feeling it's futile to resist take the place of physical force?" Over defendant's objection, the trial judge instructed the jury as follows:

> In response to your question, if the resignation or feeling that it is futile to resist is based on a threat of the defendant to use force, that can take the place of physical force.
>
> Also, difference in size and strength can be considered by the jury on the question of what force is sufficient to overcome any resistance. Fear or coercion may take the place of physical force.

Defendant contends this re-instruction — which tracked the pattern jury instructions, *see* N.C.P.I.--Crim. 207.20 (2002), and echoed the trial judge's earlier instruction on the same topic — placed undue emphasis on a particular portion of the instructions.

N.C. Gen. Stat. § 15A-1234(b) (2005) provides that "[a]t any time the judge gives additional instructions, he may also give or repeat other instructions to avoid giving undue prominence to the additional instructions." Our Supreme Court has cautioned, however, that "needless repetition is undesirable and has been held erroneous on occasion." *State v. Dawson*, 278 N.C. 351, 365, 180 S.E.2d 140, 149 (1971). In short, "the trial court is in the best position to determine whether further additional instruction will aid or confuse the jury in its deliberations, or if further instruction will prevent or cause in itself an undue emphasis being placed on a particular portion of the court's instructions." *State v. Prevette*, 317 N.C. 148, 164, 345 S.E.2d 159, 169 (1986). Any challenge that arises solely on the basis of undue emphasis is reviewed for abuse of discretion only. *Id.* (holding that trial court, in responding to a question from the jury on first degree murder, did not abuse its discretion in refusing to also reinstruct as to second degree murder).

Here, we find that the trial court did not abuse its discretion by issuing the additional instructions. In arguing that no further instruction should have been given, defendant only reiterates his contentions regarding the credibility of N.D.L. Defendant's arguments are not sufficient to demonstrate that the trial judge's decision to respond to the jury's question with a correct statement of the law was manifestly unreasonable. Defendant's final assignment of error is, accordingly, overruled.

No error.

Judges WYNN and STEPHENS concur.

Report per Rule 30(e).