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NO. COA05-1432

NORTH CAROLINA COURT OF APPEALS

Filed: 5 September 2006

STATE OF NORTH CAROLINA

v.

DARRICK JEROME MYERS

Forsyth County  
No. 04 CRS 52932-33  
04 CRS 322

Appeal by defendant from judgments entered 16 August 2005 by Judge A. Moses Massey in Forsyth County Superior Court. Heard in the Court of Appeals 7 June 2006.

*Attorney General Roy Cooper, by Assistant Attorney General Linda Kimbell, for the State.*

*James M. Bell for defendant-appellant.*

ELMORE, Judge.

Darrick Jerome Myers (defendant) appeals his convictions for second degree rape, first degree sex offense with a child, and two counts of indecent liberties with a child. After a careful review of the record, we find no error in defendant's trial.

Defendant began dating T.R. in the summer of 2002. T.R. had three children, including the alleged victims in this case, K.R. and S.R. All four moved in with defendant, who lived at his mother's house, shortly after defendant and T.R. began dating. At that time, S.R. was eight years old, and K.R., who is mentally disabled, was ten years old. In May 2003, T.R. and her children

left defendant's mother's house, staying briefly at the Salvation Army before settling into T.R.'s grandfather's house. T.R. and defendant went on dating, and defendant continued to help care for T.R.'s children while she was out. The two broke up in January 2004 after T.R.'s daughters alleged abuse by defendant.

The first accusation of abuse was in January 2004, when S.R. complained to her mother that defendant had tried to touch her inappropriately. S.R. recanted the story later that day. A couple of weeks later, K.R., too, complained of abuse. K.R. also claimed to have seen defendant abuse S.R. In response to these allegations, T.R. took S.R. and K.R. to a medical clinic in February 2004.

At trial, S.R., who was then ten years old, testified that defendant had intercourse with her while she was living in his mother's house. She also testified that he had otherwise sexually abused her on several other occasions. K.R., twelve years old at the time of trial, testified that defendant fondled her and penetrated her vaginally and anally. According to K.R., these incidents occurred both while she lived at defendant's mother's house and later, when she and her family were living with T.R.'s grandfather.

Defendant was convicted of one count of first-degree sex offense with a child, one count of second-degree rape, and two counts of indecent liberties with a child. He pled guilty to habitual felon status. Defendant was sentenced to 360 to 441 months' imprisonment for first-degree sex offense with a child,

indecent liberties with a child, and attaining habitual felon status; and 120 to 153 months for second-degree rape and indecent liberties with a child, to begin at the expiration of the first sentence. Defendant now brings forth numerous issues on appeal.

Defendant first contends that the trial court committed reversible error by denying defendant's motion to continue in order for funds to be made available for the retention of a psychologist to assist the defense. Defendant argues in his brief that there was a violation of his constitutional rights. No such argument was presented at trial, however, and defendant makes no mention of a constitutional claim in his assignment of error. Defendant attempts to characterize his statement, "I feel like I can't have a fair trial unless these matters get looked into," as a constitutional argument. This one statement, made by defendant himself before the trial court with no supporting constitutional arguments, is insufficient, particularly in light of defendant's subsequent failure to raise the constitutional issue in his assignment of error. "Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal." *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001) (citing *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988)). "[T]he 'scope of appellate review is limited to the issues presented by assignments of error set out in the record on appeal; where the issue presented in the appellant's brief does not correspond to a proper assignment of error, the matter is not properly considered by the appellate court.'" *Walker v. Walker*,

\_\_\_ N.C. App. \_\_\_, \_\_\_, 624 S.E.2d 639, 641 (2005) (quoting *Bustle v. Rice*, 116 N.C. App. 658, 659, 449 S.E.2d 10, 11 (1994)). Because the constitutional issue was neither raised at the trial level nor assigned as error, we will not consider it on appeal.

Absent any constitutional issue, “[a] motion for a continuance is ordinarily addressed to the sound discretion of the trial court, and the ruling will not be disturbed absent a showing of abuse of discretion.” *State v. Williams*, 355 N.C. 501, 540, 565 S.E.2d 609, 632 (2002) (quoting *State v. Blakeney*, 352 N.C. 287, 301, 531 S.E.2d 799, 811 (2000), *cert. denied*, 531 U.S. 1117, 148 L. Ed. 2d 780 (2001)), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003). “An abuse of discretion occurs ‘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. Fuller*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 626 S.E.2d 655, 657-58 (2006) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)). In this case, taking into consideration the ages of the victims, the tardiness of defendant’s request, the fact that the case had already been continued, and that the State’s witnesses were available and ready to testify, there is no basis to find an abuse of discretion. Accordingly, defendant’s first contention of error must fail.

Defendant next contends that the trial court committed reversible error by denying defendant’s motion *in limine* to restrict statements regarding his incarceration and by allowing the State to play tape-recorded conversations between defendant and

T.R. made while he was incarcerated. Because these assignments of error deal with essentially the same issue, we will address them together.

Once again, defendant attempts to raise a constitutional issue in his brief after failing to either raise the issue at trial or to include the issue in his assignments of error. As a result, we may not consider the constitutional issues on appeal. See *Lloyd*, 354 N.C. at 86-87, 552 S.E.2d at 607; *Walker*, \_\_\_ N.C. App. at \_\_\_, 624 S.E.2d at 641. Defendant makes no other arguments in his brief. "Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." *State v. McNeill*, 360 N.C. 231, 241, 624 S.E.2d 329, 336 (2006) (quoting N.C.R. App. P. 28(b)(6) and citing *State v. Augustine*, 359 N.C. 709, 731 n.1, 616 S.E.2d 515, 531 n.1 (2005)). Accordingly, we will not review these assignments of error.

We will next address defendant's contention that the trial court committed reversible error by finding K.R. and S.R., respectively, to be competent witnesses. "Absent a showing that the trial court's ruling on a challenge to the competency of a witness could not have been the result of a reasoned decision, we must leave the ruling undisturbed." *State v. Hyatt*, 355 N.C. 642, 664, 566 S.E.2d 61, 76 (2002) (citing *State v. Hicks*, 319 N.C. 84, 89, 352 S.E.2d 424, 426 (1987)).

There is a presumption of competency under the North Carolina Rules of Evidence. N.C. Gen. Stat. § 8C-1, Rule 601 (2005). A

person may be disqualified, however, upon a determination by the trial court that he is "(1) incapable of expressing himself concerning the matter as to be understood, either directly or through interpretation by one who can understand him, or (2) incapable of understanding the duty of a witness to tell the truth." *Id.* In this case, the trial court allowed *voir dire* for both K.R. and S.R. to determine their competency prior to allowing their testimony to be heard by the jury.

Following K.R.'s testimony on *voir dire*, during which both the State and defense had the opportunity to ask questions of the witness, the trial judge gave a summary of his findings:

The court finds that this witness knows her name, and can spell her name, knows the date of her birth, knows the name of her family members, knows their ages, knows what school she attends, knows what grade she is in, states her teachers [sic] names, states . . . the address where she lives; and who she lives with; she states the name of the church that she attends; . . . expresses what happens . . . when she misbehaves at school; what happens when she misbehaves at home; expresses the opinion that lying is bad; that adults go to . . . jail when they lie; that she knows what a promise is; that she knows what it means to tell the truth; she's able to distinguish colors; she expresses that her definition of what the oath that she took with her hand on the Bible means to be going to tell the truth to the Lord.

Likewise, the court allowed a *voir dire* of S.R. With regards to that examination, the trial judge gave the following summary:

The Court finds that this witness is able to express herself; that she indicates that she understands that the truth is to be honest; it appears from her answers that she is able to understand the duty to tell the truth; she's expressed what happens when people disobey,

and what happens to people who don't tell the truth, saying that some adults go to jail for not doing so.

Based upon these findings, the trial court determined that K.R. and S.R. were capable of expressing themselves and understanding their duty to tell the truth, and allowed them to testify before the jury. We cannot say that the trial court failed to make a reasoned decision. Consequently, we will leave the ruling undisturbed.

Defendant next contends that the trial court committed reversible error by allowing the State's expert witness, Cynthia Stewart, to refer to articles and literature in answering a question on direct examination over defendant's objection. Though defendant specified in his brief that the objection was that the testimony was in violation of the hearsay rule, defendant made only a general objection at trial. Generally, "to preserve a question for appellate review, a party must have presented to the trial court a timely . . . objection . . . stating the *specific grounds* for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(b)(1) (2005) (emphasis added). "Defendant made only general objections to the witnesses' testimony, and this Court has held 'a general objection, if overruled, is ordinarily not effective on appeal.'" *State v. Parker*, 140 N.C. App. 169, 183, 539 S.E.2d 656, 665 (2000) (quoting *State v. Hamilton*, 77 N.C. App. 506, 509, 335 S.E.2d 506, 508 (1985) (citations omitted)); see also *State v. Johnson*, 340 N.C. 32, 47, 455 S.E.2d 644, 651 (1995) (where defendant failed to object to admission of statements on basis of

inadmissible hearsay, defendant's objection did not preserve issue of hearsay for appellate review). Here, where there was a general objection, the objection was overruled, and the testimony was presented without further discussion, this issue was not preserved for appeal.

Similarly, defendant failed to properly preserve the issues asserted in his next three assignments of error. Defendant claims that the trial court erred in allowing Lesley Berenson, Dr. Guy Palmes, and Susan Vaughn, respectively, to testify that a victim displayed characteristics of sexual abuse. Defendant's objections at trial were general, and "a general objection, if overruled, is ordinarily not effective on appeal." *Parker*, 140 N.C. App. at 183, 539 S.E.2d at 665 (internal quotation omitted). Moreover, defendant's argument regarding Susan Vaughn's testimony does not focus on the testimony complained of in the assignment of error. Rather, defendant seems to base his argument on a subsequent remark by the witness, which was properly objected to and struck with an instruction to the jury to disregard it. "[T]he 'scope of appellate review is limited to the issues presented by assignments of error set out in the record on appeal; where the issue presented in the appellant's brief does not correspond to a proper assignment of error, the matter is not properly considered by the appellate court.'" *Walker*, \_\_\_ N.C. App. at \_\_\_, 624 S.E.2d at 641.

Defendant's next contention is that the trial court committed reversible error when it allowed Dr. Guy Palmes to use the word "rape" five times in his testimony concerning the report of S.R.'s



hospitalization. Though defendant claims in his assignment of error and argues in his brief that the testimony was allowed in over the objection of trial counsel, defendant in fact only objected to the first, third, and fourth recitations of the word "rape." "Where evidence is admitted over objection and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *State v. Alford*, 339 N.C. 562, 570, 453 S.E.2d 512, 516 (1995) (citing *State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984); *State v. Maccia*, 311 N.C. 222, 229, 316 S.E.2d 241, 245 (1984); and *State v. Chapman*, 294 N.C. 407, 412-13, 241 S.E.2d 667, 671 (1978)); see also *State v. O'Hanlan*, 153 N.C. App. 546, 553, 570 S.E.2d 751, 756 (2002), *cert. denied*, 358 N.C. 158, 593 S.E.2d 397 (2004). In this case, the use of the word "rape" was admitted without objection on two occasions. "Thus, defendant's contentions are reviewable only for plain error." *O'Hanlan*, 153 N.C. App. at 553, 570 S.E.2d at 756. "Defendant has further waived his opportunity for plain error review of this issue. Rule 10(c)(4) of the North Carolina Rules of Appellate Procedure requires that an assignment of error be 'specifically and distinctly contended to amount to plain error.'" *State v. Bell*, 359 N.C. 1, 27, 603 S.E.2d 93, 111 (2004) (quoting N.C.R. App. P. 10(c)(4)), *cert. denied*, 544 U.S. 1052, 161 L. Ed. 2d 1094 (2005). Because defendant failed to assign the error as plain error, it was not properly preserved, and will not now be considered.

Defendant next asserts that the trial court committed reversible error by admitting into evidence portions of a taped interview between defendant and law enforcement that defendant characterizes as "speculative and highly prejudicial." "The standard of review for this Court assessing evidentiary rulings is abuse of discretion." *State v. Boston*, 165 N.C. App. 214, 218, 598 S.E.2d 163, 166 (2004) (citing *State v. Meekins*, 326 N.C. 689, 696, 392 S.E.2d 346, 350 (1990)); see also *Hyatt*, 355 N.C. at 662, 566 S.E.2d at 74 (citing *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986), and quoting *State v. Syriani*, 333 N.C. 350, 379, 428 S.E.2d 118, 133, cert. denied, 510 U.S. 948, 126 L. Ed. 2d 341 (1993)), cert. denied, 537 U.S. 1133, 154 L. Ed. 2d 823 (2003) ("The exclusion of evidence under Rule 403 is a matter generally left to the sound discretion of the trial court . . . which we leave undisturbed unless the trial court's ruling is manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision[.]").

As the State points out in its brief, Rule of Evidence 602 is inapplicable to this case. Rule 602 reads, in part, "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." N.C. Gen. Stat. § 8C-1, Rule 602 (2005). In this case, Detective Israel, the witness, was testifying as to the subject matter of the taped interview, not as to the veracity of the statements contained therein. The fact that the question asked in the taped interview

may have been speculative does not aid defendant in excluding his subsequent statement against interest.

Defendant is therefore left with a Rule 403 argument. Rule 403 reads, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2005). Here, the statement was made by defendant himself. Though certainly prejudicial, the statement was probative as to defendant's credibility, and we cannot hold that the admission of the taped interview was "manifestly unsupported by reason" or "so arbitrary it could not have been the result of a reasoned decision." See *Hyatt*, 355 N.C. at 662, 566 S.E.2d at 74; see also *State v. Lambert*, 341 N.C. 36, 50, 460 S.E.2d 123, 131 (1995) (noting that "the fact that [evidence] is also very prejudicial does not make it unfairly so") (quoted in *State v. al-Bayyinah*, 359 N.C. 741, 748, 616 S.E.2d 500, 507 (2005)).

Finally, defendant challenges the trial court's ruling to allow defense witness Hazel Watson to testify to certain matters on cross-examination. Defendant contends this witness was permitted to testify broadly outside the scope of cross-examination over his objection. "It is within the trial court's sound discretion to ensure that all cross-examination questions are proper in scope and asked in good faith." *State v. Prevatte*, 356 N.C. 178, 237, 570 S.E.2d 440, 472 (2002) (citing *State v. Bronson*, 333 N.C. 67, 79-80, 423 S.E.2d 772, 779 (1992)). "A witness may be cross-examined on any matter relevant to any issue in the case, including

credibility.” N.C. Gen. Stat. § 8C-1, Rule 611(b) (2005).  
“‘Relevant evidence’ means 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. Gen. Stat. § 8C-1, Rule 401 (2005).  
“While ‘the trial court’s rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal.’” *State v. Corbett*, 168 N.C. App. 117, 124, 607 S.E.2d 281, 285 (2005) (quoting *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004)). The testimony in question dealt with various issues, including possible reasons that T.R.’s children would be hesitant to tell their mother about the abuse. This is an issue relating to the victims’ credibility, and as such it is relevant to the case. Accordingly, defendant’s assignment of error is without merit.

Defendant chose not to argue the remaining assignment of error. It is, therefore, deemed abandoned. N.C.R. App. P. 28(b)(6). For the reasons stated herein, we hold defendant’s assignments of error are without merit and affirm the judgment entered by the trial court.

No error.

Judges McGEE and STEELMAN concur.

Report per Rule 30(e).