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NO. COA05-948

NORTH CAROLINA COURT OF APPEALS

Filed: 18 July 2006

STATE OF NORTH CAROLINA

v.

Polk County
No. 05 CRS 205

JANE BROCK WHALEY

Appeal by defendant from judgment entered 9 February 2005 by Judge Dennis J. Winner in Polk County Superior Court. Heard in the Court of Appeals 22 March 2006.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Elizabeth Leonard McKay, for the State.

Long, Parker, Warren & Jones, P.A., by Robert B. Long, Jr., for defendant-appellant.

JACKSON, Judge.

Jane Brock Whaley ("defendant") appeals from a guilty verdict of misdemeanor simple assault, rendered after a jury trial on 9 February 2005 in Polk County Superior Court.

The following facts were presented at defendant's trial in Polk County Superior Court: Eighteen-year-old Lacy Wien ("the victim") was a member of Word of Faith Fellowship ("Word of Faith"), and sixty-two-year-old defendant was the lead pastor of the Word of Faith. On 24 February 2002, the victim was in the fellowship hall at the Word of Faith, standing in a circle of people receiving "blasting," a form of loud prayer that is similar

to screaming. The group was praying that the victim's dating relationship with her boyfriend should terminate.

The victim asked the group to discontinue blasting. The victim's mother and Word of Faith member Lynn Millwood took defendant into another room and instructed her to bend over a table to be spanked with a paddle. Upon the victim's refusal to obey, Lynn Millwood summoned for defendant.

There is conflicting testimony about the events that followed when defendant entered the room. The victim testified that defendant entered the room where the victim was seated, put her hands around the victim's neck, pulled her out of the chair and seated her on the table. The victim stated that defendant beat the victim's head against the wall and squeezed the victim's neck while defendant yelled at the victim, accusing her of fornication. In contrast, the victim's mother and Lynn Millwood testified that defendant grabbed the victim by the shoulders, or defendant laid her hands on the victim's shoulders, and they began to pray, but that defendant did not push the victim or apply any kind of force. At trial, the State presented photographs that the victim described as bruises on her neck as a result of defendant's conduct.

On 19 December 2003, defendant was charged in Rutherford County for misdemeanor simple assault in violation of N.C. Gen. Stat., Section 14-33 (2005). The summons stated that defendant "unlawfully and willfully did assault and strike Lacy Wien by grabbing her neck, choking her and beating her head against a wall" on 24 February 2002. Rutherford County District Court conducted a

bench trial on 3 March 2004, and the trial court entered a guilty verdict. Defendant gave notice of appeal in open court on 3 March 2004. Prior to the Superior Court trial, defendant filed a motion to dismiss and a motion to change venue. The Superior Court denied defendant's motion to dismiss, and granted defendant's motion to change venue.

On 7 February 2005, the Honorable Dennis J. Winner presided over defendant's jury trial in Polk County Superior Court. The jury rendered a guilty verdict, and Judge Winner entered a judgment sentencing defendant to thirty days suspended for one year with unsupervised probation and a fine of \$468.00 and court costs. Defendant appealed to this Court.

On appeal, defendant argues four issues: (1) the Superior Court's retrial after *de facto* acquittal at the District court violated the prohibition against double jeopardy; (2) the Superior Court improperly excluded testimony and evidence regarding the victim's credibility and mental state; (3) the Superior Court erred in refusing to dismiss the charge because the trial court's conviction was a nullity and was entered without jurisdiction, and the Superior Court therefore had no power or jurisdiction over the charge; and (4) the Superior Court erred in denying defendant's motion to dismiss the charge because the conviction violated the First Amendment.

First, we address whether the Superior Court's retrial after an alleged *de facto* acquittal at the trial court violated the prohibition against double jeopardy. Specifically, defendant

argues that the District court found defendant guilty under common law assault and not as a result of the conduct specified in defendant's charge for misdemeanor simple assault. Defendant argues that this resulted in a *de facto* acquittal, because the trial court did not find defendant guilty of the conduct charged, and double jeopardy attached.

Defendant's argument is misplaced. Our General Assembly stated in North Carolina General Statutes, Section 15A-1431(b) that "a defendant convicted in the district court before the judge may appeal to the superior court for trial de novo with a jury as provided by law." N.C. Gen. Stat. § 15A-1431(b) (2005). Furthermore, because the district court is not a court of record, the superior court's review is *de novo*. See *State v. Ward*, 127 N.C. App. 115, 119, 487 S.E.2d 798, 801 (1997). Therefore, the trial court's basis for rendering defendant's guilty verdict is immaterial when defendant appeals to the Superior Court, and defendant's argument is without merit.

Second, defendant contends the Superior Court improperly excluded testimony and evidence regarding the victim's credibility and mental state. Defendant argues the trial court's exclusion of evidence violated North Carolina Rules of Evidence, Rule 611, and the Confrontation Clause.

North Carolina General Statutes, Section 8C-1, Rule 611(b) states that "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). The standard of review concerning the

exclusion of such testimony on cross-examination is abuse of discretion. *Old Chief v. United States*, 519 U.S. 172, 177, 136 L. Ed. 2d 574, 586 (1997).

"While specific instances of . . . mental instability are not directly probative of truthfulness, they may bear upon credibility in other ways, such as to 'cast doubt upon the capacity of a witness to observe, recollect, and recount, and if so they are properly the subject not only of cross-examination but of extrinsic evidence.'" *State v. Williams*, 330 N.C. 711, 719, 412 S.E.2d 359, 364 (1992) (quoting 3 *Federal Evidence* § 305, at 236). Juries may evaluate not only the effect of mental illness or addiction, "but also of the passage of time, on a witness' ability to perceive, retain, and recount." *Id.* at 721, 412 S.E.2d at 365-66. See *State v. Newman*, 308 N.C. 231, 254, 302 S.E.2d 174, 187 (1983) (the trial court admitted evidence of a witness' past mental impairment to weigh credibility), see also *State v. Parker*, 45 N.C. App. 276, 278, 262 S.E.2d 686, 688 (1980) (the trial court admitted evidence of a witness' past psychiatric treatment to weigh credibility).

Our jurisdiction has admitted specific instances of mental illness with testimony of: the witness' drug habits, suicide attempts, and psychiatric counseling; the witness' committal to a hospital, psychiatric therapy and counseling, and diagnosis of paranoid schizophrenia; and the witness' psychiatric treatment. *State v. Williams*, 330 N.C. at 724, 412 S.E.2d at 367; *State v. Newman*, 308 N.C. at 254, 302 S.E.2d at 187; *State v. Parker*, 45 N.C. App. at 278, 302 S.E.2d at 187.

In the present case, the trial court allowed the jury to hear testimony from the victim that she visited "a place called Wellspring," that "[i]t wasn't mental treatment; it was an educational place," and she spoke with "some form of counselor." Thereafter, defense counsel cross-examined the victim outside the presence of the jury about the questionnaire she completed at Wellspring that she had verified in a deposition for her civil case against defendant. During that *voir dire*, the victim stated that (1) she experienced the feeling that she actually saw herself as if she were looking at another person approximately fifty percent of the time, (2) she was not sure whether things she remembered really happened or whether she dreamed them approximately twenty percent of the time, (3) she heard voices inside her head to tell her to do things or comment on things approximately thirty percent of the time; and (4) she had seen a lady dressed in white in her apartment, possibly a ghost, supposedly in a cemetery talking to her about her aura. Outside the presence of the jury, the following colloquy ensued:

Court: Do you have some evidence that this witness suffered a mental defect at any time? You haven't asked her that; all you've asked her is her answers to questions and whether she saw this vision. Have you got some expert or something that says that means she had some mental defect?

Defense: I am asking her about her answers that were given at a place called Wellspring Retreat Resort. . . .

Court: Well, was there some diagnosis that there was something mentally wrong with her? I mean, all you've asked - you've asked her to

answer the questions that she gave those people . . .

Defense: As to her mental state as given by her.

Court: You're putting the jury in the position of making some diagnosis from that. They don't have the expertise to make the diagnosis from that. Neither do you or I.

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Court: . . . But how is the jury, if you've got no psychiatric expert, how is the jury supposed to deal with that? What does that mean?

Defense: They're supposed to deal with it in terms of common human experience as to whether somebody that says those things about themselves is credible in the context of this case, because our evidence will be that what she has testified to on this occasion did not occur. . . . And I think this material goes, definitely, to credibility.

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Court: Well, the Court of Appeals may decide that I'm wrong, although I never related this to Rule 403 [sic]; but the Court finds it more prejudicial to the State than it is probative, and I'm still going to exclude it all.

Here, the trial court did not abuse its discretion by excluding the victim's testimony. The victim's testimony did not rise to the level of testimony regarding psychiatric treatment and counseling, suicide attempts, psychiatric diagnosis, or a drug habit. Although we do not find that this list is exclusive for admitting impeachment evidence of specific instances of mental illness, we conclude that the trial court did not abuse its discretion in excluding the victim's testimony because it would require the jury to conclude that the victim suffered from mental

illness. Defense counsel failed to present evidence of the victim's psychiatric treatment or counseling to allow the jury to conclude the victim suffered from a mental health problem that affected her credibility as a witness. Therefore, the trial court did not abuse its discretion in excluding the victim's testimony of her questionnaire answers or her visionary experience.

Defendant also argues that the Superior Court's exclusion of the victim's testimony on cross-examination regarding her mental illness constituted a violation of the Confrontation Clause. North Carolina Constitution Article I, Section 23 provides that a defendant has the right to cross-examine adverse witnesses through the constitutional guarantee of the right of confrontation. N.C. Const. Art. I, § 23; see *State v. Watson*, 281 N.C. 221, 229-30, 188 S.E.2d 289, 294 (1972), cert. denied, 409 U.S. 1043, 34 L. Ed. 2d 493 (1972). However, our Supreme Court, in interpreting Article I, Section 23 has followed the United States Supreme Court in holding that, "[t]he right to effectively cross-examine a witness, however, does not guarantee a defendant a 'cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *State v. Thorne*, ___ N.C. App. ___, ___, 618 S.E.2d 790, 794 (2005) (citing *Delaware v. Fensterer*, 474 U.S. 15, 20, 88 L. Ed. 2d 15, 19 (1985) (*per curiam*)).

Here, defendant had the opportunity to cross-examine the victim because the victim testified at trial. The trial court's exclusion of the victim's testimony about her Wellspring questionnaire and her visionary experience did not constitute a

constitutional violation because the trial court afforded defendant the opportunity to cross-examine the victim. Specifically, defense counsel elicited testimony that the victim attended Wellspring, and that she spoke with a counselor. Therefore, defendant's assignment of error is overruled.

Defendant argues the Superior Court erred in refusing to dismiss the charge because the trial court's conviction was a nullity and was entered without jurisdiction, and the Superior Court therefore had no power or jurisdiction over the charge. Defendant contends the trial court did not enter a judgment against defendant based upon defendant's conduct charged, and, therefore, the Superior Court has no jurisdiction.

As stated *supra*, "a defendant convicted in the district court before the judge may appeal to the superior court for trial de novo with a jury as provided by law." N.C. Gen. Stat. § 15A-1431(b) (2005). Therefore, defendant's Superior Court trial was a trial *de novo*, and defendant's argument is without merit.

We now turn to whether the Superior Court erred in denying defendant's motion to dismiss the charge because the trial court's conviction violated the First Amendment. The test for deciding a motion to dismiss is as follows: When determining the sufficiency of the evidence to support a charged offense, "we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). A defendant's motion to dismiss must be denied if the evidence considered in the light most

favorable to the State permits a rational jury to find beyond a reasonable doubt the existence of each element of the charged crime and that defendant was the perpetrator. See *State v. Williams*, 334 N.C. 440, 447, 434 S.E.2d 588, 592 (1993). If the evidence supports a reasonable inference of defendant's guilt based on the circumstances, then "it is for the [jurors] to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965).

In the light most favorable to the State, the evidence tended to show that the victim was present at the Word of Faith and was receiving blasting from other church members. The victim asked the members to cease blasting, and the victim was taken into a room. When the victim was in the room and refused demands to bend over a table for a spanking, defendant was summoned. Defendant entered the room, put her hands around the victim's neck, lifted the victim out of her chair, and yelled at the victim. The victim testified that defendant beat the victim's head against the wall while she squeezed the victim's neck, and choked the victim.

These facts showed that defendant's conduct satisfied the charge of misdemeanor simple assault because defendant grabbed the victim's neck, choked her, and beat her head against the wall. Therefore, the Superior Court did not err when it denied defendant's motion to dismiss.

Defendant further argues that the Superior Court's error violated her constitutional rights. Defendant did not raise this

First Amendment constitutional issue at trial; consequently, the Superior Court did not have the opportunity to consider or rule on this issue. N.C. R. App. P., Rule 10(b)(1) (2006). Defendant accordingly has failed to preserve this assignment of error for appellate review. See *State v. Fullwood*, 343 N.C. 725, 733, 472 S.E.2d 883, 887 (1996), cert. denied, 520 U.S. 1122, 137 L. Ed. 2d 339 (1997) (holding that defendant failed to raise a constitutional issue at trial and thus failed to preserve the issue for appellate review). This assignment of error is overruled.

Accordingly, we find no error.

NO ERROR.

Judges ELMORE and STEELMAN concur.

Report per 30(e).