NO. COA06-570

NORTH CAROLINA COURT OF APPEALS

Filed: 6 February 2007

STATE OF NORTH CAROLINA

v. Lincoln County
No. 04 CRS 50515

RANDALL EUGENE ANDERSON

On writ of certiorari to review judgment entered 2 December 2004 by Judge Forrest D. Bridges in Superior Court, Lincoln County. Heard in the Court of Appeals 16 January 2007.

Attorney General Roy Cooper, by Assistant Attorney General Alexandra M. Hightower, for the State.

Nora Henry Hargrove for Defendant-Appellant.

McGEE, Judge.

Defendant was found guilty of felonious child abuse by intentional infliction of serious bodily injury in violation of N.C. Gen. Stat. § 14-318.4(a3). Defendant stipulated to a Prior Record Level III and received an active prison sentence of 116-149 months. By order dated 14 July 2005, our Court issued a writ of certiorari for the purpose of reviewing the judgment of the trial court.

The State's evidence at trial tended to show that T.A., the daughter of Defendant and Bobbie Joe Anderson, sustained severe and

painful scald burns while in Defendant's care in their Denver, North Carolina home on 17 February 2004. T.A. was three years old at the time of Defendant's trial on 29 November 2004. As a result of her injuries, T.A. was hospitalized for six weeks and underwent a series of skin grafts which left her permanently scarred. She required months of medication for pain, was unable to walk normally for weeks after leaving the hospital, and continued to experience decreased flexibility at the time of the trial.

T.A.'s maternal grandmother, Wanda Potter (Potter), testified that she visited the Anderson's residence on the afternoon of 17 February 2004. After knocking on the door but receiving no answer, she pushed open the door and called out to Defendant. Defendant emerged from a bathroom holding a "pull-up" diaper and calmly told Potter that T.A. had "burned herself." Potter walked into the bathroom and saw T.A. lying on her back with burns on her "bottom area" and "all . . . down [the] inside of her legs." Burned skin was peeling from her legs.

Potter and Defendant drove T.A. to the emergency room. Defendant told a hospital social worker, David Rogers (Rogers), that he had left T.A. alone after giving her a bath because he had to use the bathroom. After hearing her scream, he ran back into T.A.'s bathroom and saw that the "shower head was squirting hot water on her legs and pelvic region." Defendant told Rogers that he ran cold water in the bathtub and placed T.A. in the water to soothe her burns.

Dr. Donovan Thompson (Dr. Thompson) examined T.A. in the

emergency room, dressed her wounds, and gave her morphine for pain. Dr. Thompson transferred T.A. by ambulance to the burn center at Wake Forest University's Baptist Medical Center in Winston-Salem, North Carolina "due to the nature of the burns and the extensive area of the burning, especially in her perineum region[.]" Dr. Thompson concluded that T.A.'s "burns were not consistent with the story [he] was given by [Defendant]" and explained:

> The story that I was given was that [Defendant] had left the room for five to ten minutes, had come back and the child had taken the shower sprayer and turned on the hot water . . . [while] standing in the tub. The nature of the burns showed her feet to not be burned. And I didn't really see any splash wounds, secondary to a sprayer. [The burns] seemed very demarcated and [left] a very definite line on her legs.

Jane Olmstead (Olmstead), a social worker from the Forsyth County Department of Social Services spoke to Defendant at Baptist Medical Center on the night of 17 February 2004. Olmstead also found T.A.'s injuries to be inconsistent with Defendant's explanation. She noted that the burns on T.A. did not appear to have come from a shower head because such a burn would leave "splash marks, wigglets where the water or hot water has run down[,]" rather than the "clear lines of demarcation" found on T.A.'s burns.

Dr. Charles Turner (Dr. Turner), who performed T.A.'s skin grafts at Baptist Medical Center, described her injuries as "deep partial thickness burns to the . . . inner aspect and posterior aspect of both legs and lower legs and the inner aspect of both thighs, the buttocks and the labia[.]" Dr. Turner concluded that

T.A.'s injuries "had to be intentional[,]" based upon the clear lines of demarcation between the burned and unburned area of her body. In support of his conclusion, Dr. Turner noted that "having accidental burns from something falling on you, you don't have these nice little cut-off lines; there's a lot of splash; there is run down." He noted that T.A. had no "splash type burns" that would be consistent with an accidental scalding with a shower head.

Dr. Sara Sinal (Dr. Sinal), an expert in child abuse evaluation and treatment at Wake Forest University School of Medicine, testified that T.A. was burned in a "very unusual pattern for a child who is scalded." Dr. Sinal observed that "it was just the inner surface of [T.A.'s] legs and her genital and anal area that were burned" and noted the "fairly sharp line of demarcation" between the burned and unburned areas. Dr. Sinal characterized the pattern of the burn as "a classic dunk scald pattern where children are put in hot water often as punishment for something, often a toileting accident in this age[d] child." She further explained how the unburned area on T.A.'s buttocks was consistent with an intentionally inflicted injury:

> [Y]ou have a child who has a line of burn and yet this area of the buttocks appears to be spared and that's been called a classic donut burn and it's felt to be compatible with the child being forced against porcelain surface such that the part of the surface of the buttocks that's touching the porcelain part of the tub or the surface of the tub doesn't get burned but the area around it does get burned.

Dr. Sinal opined that the location of T.A.'s burns was consistent with her having been forced into the tub with her legs behind her

so that the water reached only the affected areas. Based on the inconsistency between the burn pattern she observed on T.A. and Defendant's account of T.A. spraying herself with a shower head, Dr. Sinal concluded that the injury was intentionally inflicted.

Defendant testified that he left T.A. in the bathtub when he went to use the bathroom. He heard her scream and ran back to her as soon as he could. He found T.A. standing in the bathtub, screaming. She was holding the shower head, which had water trickling out it. The bathroom was full of steam. When he saw the skin peeling from T.A.'s legs, he put her back in the tub and ran what he thought was cold water onto her legs. However, he discovered that the hot water tap was still turned on. When he turned on the cold water, the hot water that remained in the shower head hose "was still gushing out" of the shower head between T.A.'s legs. Defendant attributed the pattern of T.A.'s burns to the hot water that was already in the tub and the hot water that remained in the shower head hose when he turned on the cold water. He presented a diagram depicting how he had positioned T.A. in the tub when he tried to cool her burns.

Defendant argues that the trial court committed plain error by allowing Dr. Sinal to testify about statements made by Dr. Turner and Dr. Lawless, expressing their concern that T.A. might have been sexually abused. The transcript reflects the following exchange between the prosecutor and Dr. Sinal regarding the circumstances of her examination of T.A. on 27 February 2004:

> Q. And what was it about what Dr. Turner had observed that caused him to contact you or get

> you involved in the case?
>
> A. Well, he told me that this was a scald burn and that the pattern of the burn was concerning to him for the possibility of child abuse.
>
> Q. And was there any aspect of his concern or your concern when you got involved that dealt with any type of sexual abuse?
>
> A. At some point in time, *there was a concern about sexual abuse raised, I don't know what exactly it was but he did ask me to come to the operating room.* I know he had asked Dr. Lawless . . . to go to the operating room and look at [T.A.'s] genital area and it was – *{T.A.] was so swollen then that Dr. Lawless couldn't really tell whether there might be sexual abuse or not.* So he had asked me to come to the operating room, that was on February 27th. So I think that was about 12 days after [T.A.] had been hospitalized . . . and so *he wanted me to come down and look at her genital area that day and I did that.*
>
> Q. *And basically as a result of that, there was a determination made that there was no indication of any type of sexual abuse*?
>
> A. *There was no physical evidence, in other words, her exam was normal.* Children can certainly be sexually abused without there being physical findings *but we didn't really have any indication of sexual abuse at that time.*

(emphasis added). Because Dr. Lawless did not testify and Dr. Turner had been released from his subpoena, Defendant claims Dr. Sinal's testimony referencing their hearsay statements violated his Sixth Amendment right to confrontation under *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004).

Defendant concedes that he failed to object to Dr. Sinal's testimony. Accordingly, our Court reviews the trial court's admission of this evidence only for plain error under N.C.R. App.

P. 10(c)(4). "In order to prevail under the plain error rule, [the] defendant must convince this Court that there was error and that absent the error, the jury probably would have reached a different verdict." *State v. Thomas*, 350 N.C. 315, 348, 514 S.E.2d 486, 506, *cert. denied*, *Thomas v. North Carolina*, 528 U.S. 1006, 145 L. Ed. 2d 388 (1999). Where a defendant offers no objection to evidence at trial, he must show "there was no proper purpose for which the evidence could be admitted." *State v. Golphin*, 352 N.C. 364, 440, 533 S.E.2d 168, 219 (2000), *cert. denied*, *Golphin v. North Carolina*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001).

Defendant first claims a violation of his constitutional right to confrontation under *Crawford*. As noted above, however, Defendant did not raise his constitutional claim at trial. "Constitutional error will not be considered for the first time on appeal." *State v. Chapman*, 359 N.C. 328, 366, 611 S.E.2d 794, 822 (2005). Even assuming this claim is properly before us on plain error review under N.C.R. App. P. 10(c)(4), it is without merit.

In *Crawford*, the Supreme Court held "[w]here testimonial evidence is at issue, . . . the Sixth Amendment demands . . . unavailability and a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 68, 158 L. Ed. 2d at 1374. In *Davis v. Washington*, 547 U.S. __, __, 165 L. Ed. 2d. 224, 237 (2006), the Supreme Court stated that statements are "testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later

criminal prosecution." Statements that are non-testimonial are governed by the standard rules for admissibility under our Rules of Evidence. *See Crawford*, 541 U.S. at 68, 158 L. Ed. 2d at 203; *see also State v. Ferebee*, __ N.C. App. __, __, 630 S.E.2d 460, 462 (2006).

The statements exchanged by T.A.'s doctors were neither elicited by police interrogation nor made in anticipation of a criminal prosecution. Thus, the statements are non-testimonial and do not implicate *Crawford*. *See Ferebee*, __ N.C. App. at __, 630 S.E.2d at 463 (holding that the exclamation "campus police officer, stop" was non-testimonial); *State v. Lawson*, 173 N.C. App. 270, 275-76, 619 S.E.2d 410, 413-14 (2005), *disc. review denied*, 360 N.C. 293, 629 S.E.2d 276 (2006) (holding that statements made during a private conversation outside the presence of any police officers were non-testimonial). Defendant's constitutional claim is without merit.

Equally without merit is Defendant's objection to Dr. Sinal's testimony as inadmissible hearsay. It is well established that "[o]ut-of-court statements that are offered for purposes other than to prove the truth of the matter asserted are not considered hearsay." *State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473, *cert. denied*, *Gainey v. North Carolina*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002). "Specifically, statements are not hearsay if they are made to explain the subsequent conduct of the person to whom the statement was directed." *Id.* In this case, the statements of Drs. Turner and Lawless were admissible to explain Dr. Sinal's

subsequent act of examining T.A. for signs of abuse. Inasmuch as neither Dr. Turner nor Dr. Lawless asserted that sexual abuse had occurred, their statements cannot be said to have been offered for the truth of any such assertion. *See* N.C. Gen. Stat. § 8C-1, Rule 801(c).

To the extent Defendant challenges the admission of the doctors' statements as an abuse of the trial court's broad discretion under N.C. Gen. Stat. § 8C-1, Rule 403, we find no likelihood that the alleged error affected the outcome at trial. Neither Dr. Turner nor Dr. Lawless opined that sexual abuse had occurred. Dr. Sinal explained that T.A.'s injuries prevented her fellow doctors from making an assessment, and that her own examination revealed no indication of sexual abuse. Our review of the trial transcript reveals that the State did not proceed on the theory that Defendant had sexually abused T.A. The State's limited evidence on the issue of Defendant's motive raised the possibility that he scalded T.A. in response to a toileting accident. Dr. Sinal characterized the pattern of T.A.'s burn as consistent with those inflicted on children as punishment for such accidents. T.A.'s mother testified that Defendant would sometimes "get upset" and "[f]uss" at T.A. when she had an accident. She further testified that Defendant "really had a physical aversion" to changing dirty diapers which caused him to gag or vomit. Therefore, we overrule this assignment of error.

The record on appeal includes additional assignments of error not addressed by Defendant in his brief to this Court. We deem them abandoned. N.C.R. App. P. 28(b)(6).

No error.

Chief Judge MARTIN and Judge HUNTER concur.

Report per Rule 30(e).