NO. COA06-754

NORTH CAROLINA COURT OF APPEALS

Filed: 1 May 2007

STATE OF NORTH CAROLINA

v.

LLOYD GRAHAM GRAY,
Defendant.

New Hanover County
Nos. 04 CRS 67069-73
04 CRS 67076-77
04 CRS 67082-84
04 CRS 67097
05 CRS 15025

Appeal by defendant from judgments entered 3 February 2006 by Judge John E. Nobles, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 16 April 2007.

Attorney General Roy Cooper, by Assistant Attorney General Anita LeVeaux, for the State.

Sofie W. Hosford for defendant-appellant.

GEER, Judge.

Defendant Lloyd Graham Gray appeals from his convictions on three counts of statutory rape, three counts of first degree rape of a child, five counts of incest, one count of second degree rape, and one count of first degree sexual offense against a child. Defendant argues that the trial court erred in three respects: (1) the court committed plain error in failing to declare a mistrial; (2) the court erred in denying his motion to suppress his inculpatory statements to detectives; and (3) the court abused its discretion in allowing a licensed clinical social worker to testify

as an expert witness regarding child abuse. We disagree with each of these contentions and, therefore, hold that defendant received a trial free of prejudicial error.

The State's evidence tended to show the following facts. When the victim, a female child, was 17 months old, defendant married her mother. The State offered evidence of sexual contact or sexual intercourse between defendant and the victim from the time that she was pre-school age through the summer of 2004. In the fall of 2004, the victim discovered she was 26 weeks pregnant. Upon this discovery, she disclosed to her mother that defendant had been having sexual intercourse with her. DNA testing of the victim, her baby, and defendant revealed that the probability of defendant's paternity was 99.99%.

On 8 November 2004, in the afternoon, officers with the New Hanover County Sheriff's Department arrested defendant at his place of work, transported him to the sheriff's office, and conducted a videotaped interview. After being advised of and then waiving his *Miranda* rights, defendant made admissions, both oral and in a written statement, that he had engaged in sex with the victim.

Defendant was indicted with one count of second degree rape; three counts of statutory rape of a person who is 13, 14, or 15 years old; three counts of first degree rape of a child; five counts of incest; and one count of first degree sexual offense. A jury convicted him of all the charges, and the trial court imposed

two consecutive sentences of 192 to 240 months imprisonment. Defendant timely appealed to this Court.

Discussion

We first address defendant's argument that the trial court erred by not declaring a mistrial *sua sponte*. At trial, the victim testified that her grandmother had once reported being raped by defendant. Upon defendant's objection, the trial judge struck the testimony and ordered the jury to disregard it. On appeal, defendant argues that the testimony, although struck, was so prejudicial as to require a mistrial. Recognizing that defense counsel did not move for a mistrial, defendant argues that the trial court's failure to declare a mistrial *sua sponte* amounted to plain error. *See* N.C.R. App. P. 10(c)(4).

It is, however, well established that review for plain error is limited to errors regarding a trial court's jury instructions or rulings on the admissibility of evidence. *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). This Court will not, therefore, apply the plain error doctrine to the question whether a mistrial should have been declared. *See State v. Verrier*, 173 N.C. App. 123, 129, 617 S.E.2d 675, 679 (2005) (rejecting argument that "trial court's failure to exercise its discretion *ex mero motu* on the question of a mistrial" is reviewable under plain error standard); *State v. McCall*, 162 N.C. App. 64, 70, 589 S.E.2d 896, 900 (2004) (holding that plain error review is unavailable to appellants contending that the trial court erred in failing to declare a mistrial). Accordingly, we do not address this issue.

Defendant next contends the trial court erred in denying his motion to suppress the inculpatory statements he made to the detectives. Defendant claims that these statements were involuntary because he had taken medications that "left him confused and caused anxiety."

We first note that the trial court, after conducting an evidentiary hearing on defendant's motion to suppress, summarily denied that motion without making findings of fact. N.C. Gen. Stat. § 15A-977(f) (2005) specifically provides that when a suppression hearing is held, "[t]he judge must set forth in the record his findings of facts and conclusions of law." North Carolina's appellate courts have, however, construed § 15A-977(f) as setting forth a general rule that the trial court *should*, as the better practice, make findings of fact to show the basis of its ruling if the evidence at the hearing is undisputed. *State v. Fisher*, 158 N.C. App. 133, 143, 580 S.E.2d 405, 414 (2003), *aff'd per curiam*, 358 N.C. 215, 593 S.E.2d 583 (2004). If, however, there is a *material* conflict in the evidence offered at the hearing, then findings of fact are *mandatory*. *Id.* at 149, 580 S.E.2d at 417 (holding that because the evidence was in conflict as to the defendant's competency, "specific findings on the issue of defendant's competency at the time he confessed were a prerequisite to the admission of defendant's statements").

In this case, defendant presented both his own testimony and that of his doctor in arguing that his oral and written statements were involuntary and, therefore, should have been excluded.

Defendant does not, however, challenge on appeal the trial court's failure to make findings of fact. Because, given defendant's argument on appeal, any conflict in the evidence was not "material," we do not address the trial court's failure. *See id.* ("[W]e conclude that the absence of findings here was harmless beyond a reasonable doubt.").

Defendant relies solely upon his medication in arguing that his statements were involuntary. In *State v. Cheek*, 351 N.C. 48, 63, 520 S.E.2d 545, 554 (1999) (internal quotation marks omitted), *cert. denied*, 530 U.S. 1245, 147 L. Ed. 2d 965, 120 S. Ct. 2694 (2000), our Supreme Court observed: "[T]he United States Supreme Court has declined to create a constitutional requirement that defendants must confess their crimes only when totally rational and properly motivated, in the absence of any official coercion by the State." Further, "while they are factors to be considered, intoxication and subnormal mentality do not of themselves necessarily cause a confession to be inadmissible because of involuntariness or the ineffectiveness of a waiver." *State v. Barnes*, 345 N.C. 184, 245, 481 S.E.2d 44, 78 (1997), *cert. denied*, 523 U.S. 1024, 140 L. Ed. 2d 473, 118 S. Ct. 1309 (1998). Instead, "the confession 'is admissible unless the defendant is so intoxicated that he is unconscious of the meaning of his words.'" *State v. Tuck*, 173 N.C. App. 61, 72, 618 S.E.2d 265, 273 (2005) (quoting *State v. Oxendine*, 303 N.C. 235, 243, 278 S.E.2d 200, 205 (1981), *superseded by statute on other grounds as stated in State v. Covington*, 315 N.C. 352, 338 S.E.2d 310 (1986)). *See also State*

v. McKoy, 323 N.C. 1, 22, 372 S.E.2d 12, 23 (1988) ("While intoxication is a circumstance critical to the issue of voluntariness, intoxication at the time of a confession does not necessarily render it involuntary. . . . The confession is admissible unless the defendant is so intoxicated that he is unconscious of the meaning of his words." (internal quotation marks omitted)), *vacated on other grounds*, 494 U.S. 433, 108 L. Ed. 2d 369, 110 S. Ct. 1227 (1990).

Here, defendant makes no argument in his brief that his statements were obtained through coercion, but rather that the medications that he took — including antibiotics, Lipitor, Effexor, and Ambien — "impaired his judgment," "left him confused," and "caused anxiety." He points to (1) his own testimony regarding the effect of the medications on him, (2) testimony of a detective that defendant appeared to have difficulty finding the words to use, and (3) testimony from his doctor that Ambien had a known side effect of amnesia.

In the evidentiary hearing, defendant testified that the medications "blocked" his mind so that he could not remember, at times, what words to use and that they caused him to experience "confusion," depression, and ongoing anxiety. Defendant conceded, however, that although he had taken Ambien the night before and his other medications at about 6:00 a.m., he had driven his car to work that day and performed his job as a press operator until arrested in the afternoon without any problems. His treating physician testified at trial that amnesia was a rare side effect of Ambien,

but that none of his patients had experienced that problem. Defendant's physician also testified that defendant had never complained to him about the medications.

Defendant does not argue how this evidence reaches the standard set forth in *Tuck*, *McCoy*, or *Oxendine*. Although defendant states in his appellate brief that the medications "impaired his judgment," defendant points to no evidence in support of that assertion. Neither defendant's own testimony nor that of his physician addresses the exercise of "judgment." Further, he does not explain how difficulties in recalling what words to use, depression, confusion, and anxiety transform an otherwise voluntary statement into an involuntary statement. Instead, these conditions were circumstances relating to the credibility of the statements and, therefore, were issues for the jury:

> "Unless a defendant's intoxication amounts to mania — that is, unless he is so [intoxicated] as to be unconscious of the meaning of his words — his intoxication does not render inadmissible his confession of facts tending to incriminate him. The extent of his intoxication when the confession was made, however, is a relevant circumstance bearing upon its credibility, a question exclusively for the jury's determination."

State v. Fisher, 171 N.C. App. 201, 209, 614 S.E.2d 428, 433-34 (2005) (quoting *State v. Logner*, 266 N.C. 238, 243, 145 S.E.2d 867, 871, *cert. denied*, 384 U.S. 1013, 16 L. Ed. 2d 1032, 86 S. Ct. 1983 (1966)), *cert. denied*, 361 N.C. 223, __ S.E.2d __ (2007). We hold, therefore, that the trial court did not err in denying defendant's motion to suppress.

Lastly, we address defendant's argument that the trial court erred in allowing Shelly Chambers, a licensed clinical social worker, to testify as an expert in the dynamics of child abuse. Defendant asserts that Ms. Chambers "did not possess the requisite qualifications to offer her opinions in this matter." It is established that "[w]here a judge finds a witness qualified as an expert, that finding will not be reversed unless there was no competent evidence to support the finding or unless the judge abused his discretion." *State v. Young*, 312 N.C. 669, 679, 325 S.E.2d 181, 188 (1985).

As Ms. Chambers explained at trial, she holds a masters degree in social work from East Carolina University and is also a licensed clinical social worker. She interned for a year in the child psychiatry program at East Carolina University's School of Medicine. To maintain her license, she participates in 20 hours of professional training per year. In the course of her daily work, she provides therapy to children and families, and most of her patients are children under the age of 18. During her career, she has been involved in several hundred cases involving child sexual assault.

Based on Ms. Chambers' education and professional experience, the trial judge allowed her to provide expert testimony on the general behavioral characteristics of a child who had endured long-term abuse. Given Ms. Chambers' education and experience, we cannot conclude that the trial judge's decision to allow her to testify as an expert witness was manifestly unreasonable.

Accordingly, we hold that the trial judge did not abuse his discretion, and this assignment of error is overruled.

No error.

Judges WYNN and ELMORE concur.

Report per Rule 30(e).