NO. COA07-1470

NORTH CAROLINA COURT OF APPEALS

Filed: 19 August 2008

STATE OF NORTH CAROLINA

v. Durham County
Nos. 05 CRS 54382;
05 CRS 54384

ROBERT LANCE RANDALL

Appeal by defendant from judgment entered 28 March 2007 by Judge Orlando F. Hudson in Durham County Superior Court. Heard in the Court of Appeals 14 May 2008.

Attorney General Roy A. Cooper, III, by Assistant Attorney General R. Kirk Randleman, for the State.

Cheshire, Parker, Schneider, Bryan & Vitale, by John Keating Wiles, for defendant-appellant.

JACKSON, Judge.

Robert Lance Randall ("defendant") appeals his conviction for two counts of taking indecent liberties with a child and one count of first degree statutory sexual offense. For the reasons stated below, we hold defendant is entitled to a new trial.

Defendant had lived with Tonya D. and her two children, B.B. (11 years old) and B.D. (five years old), for approximately three months before she asked him to move out. In the early morning hours of 5 June 2005, defendant returned to the home to retrieve some of his belongings. About two hours after his arrival, the

children awoke and he and Tonya D. sat in her room with the children and watched television until Tonya D. went downstairs to cook.

While Tonya D. was downstairs cooking, defendant asked B.B. to perform fellatio on him and then tried to force her head to his crotch. After she refused, defendant took away her toy. B.B. went downstairs, and with tears in her eyes told her mother that defendant had taken her toy. Tonya D. told B.B. to tell defendant to return her toy and that breakfast was ready, so B.B. went back upstairs to get the others. When she returned upstairs, she saw defendant and B.D. in B.D.'s bedroom. B.D. was "laying down and his butt was up in the air." B.B. went back downstairs, but after a few minutes had to go upstairs again because defendant and B.D. had not come downstairs.

When she returned upstairs, defendant and B.D. both were in the bathroom with the door shut. B.D. opened the bathroom door and B.B. saw that both B.D. and defendant were urinating. B.D.'s pants were pulled all the way down. Two days later, B.D. said something that B.B. understood to mean that defendant had engaged in fellatio with him in the bathroom. That same day, B.D. told his mother that defendant "sucked [his] pee-pee and licked [his] crack."

Tonya D. reported the incident to the police on 7 June 2005. Following an investigation, arrest warrants were issued for defendant's arrest on 11 October 2005. Because defendant could not be located, the warrants were not served until 2 June 2006. Defendant's jury trial began 19 March 2007. On 27 March 2007, a

jury returned guilty verdicts on two counts of indecent liberties with a child and one count of first degree statutory sexual offense. Due to defendant's prior criminal record, he was sentenced with a prior record level VI to a term of imprisonment of 480 to 585 months confinement in the Department of Correction. Defendant gave notice of appeal in open court.

Defendant's second argument, which we address first, is that the trial court erred in admitting evidence of the credibility of one of the prosecuting witnesses. We agree.

"To establish that a trial court's exercise of discretion is reversible error, a defendant 'must show harmful prejudice as well as clear abuse of discretion.'" *State v. Williams*, 361 N.C. 78, 80, 637 S.E.2d 523, 525 (2006) (quoting *State v. Goode*, 300 N.C. 726, 729, 268 S.E.2d 82, 84 (1980)). Prejudice exists "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2007).

It is improper for an expert to testify that a child victim of abuse "is believable, credible, or telling the truth" because this violates Rules 405 and 608(a) of the North Carolina Rules of Evidence. *State v. O'Connor*, 150 N.C. App. 710, 712, 564 S.E.2d 296, 297 (2002) (citations omitted).

This Court repeatedly has held that when the State's case depends largely on the credibility of the prosecuting witness, it is plain error to admit an expert's opinion with respect to the

victim's credibility. *See id.*; *State v. Hannon*, 118 N.C. App. 448, 451, 455 S.E.2d 494, 496 (1995); *State v. Holloway*, 82 N.C. App. 586, 587-88, 347 S.E.2d 72, 74 (1986). "A 'plain error' is 'a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done."'" *Holloway*, 82 N.C. App. at 586, 347 S.E.2d at 73 (emphasis in original) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982) (citation omitted)).

"[T]he credibility of a witness's testimony and the weight to be given that testimony is a matter for the jury, not for the court, to decide." *State v. Jackson*, 161 N.C. App. 118, 122, 588 S.E.2d 11, 14 (2003) (citations omitted). This is why rules 405 and 608 exist. Together, these rules "forbid an expert's opinion as to the credibility of a witness." *State v. Heath*, 316 N.C. 337, 342, 341 S.E.2d 565, 568 (1986) (citation omitted). This is so because "[f]or a jury trial to be fair it is fundamental that the credibility of witnesses must be determined by [the jury], unaided by anyone . . . ." *Holloway*, 82 N.C. App. at 587, 347 S.E.2d at 73-74.

In the instant case, Scott Snider ("Snider"), a clinical social worker, testified as an expert in clinical social work and diagnostic interviewing. Snider interviewed both children, videotaped the interviews, and included the videotapes in the medical records. The medical and interview components of the

diagnostic interviews were then compiled in medical evaluation reports, which were admitted into evidence.

On direct examination, Snider was asked to what conclusions the diagnostic team came with respect to B.D. and B.B. Snider responded that B.D. "had provided a clear disclosure of sexual assault by [defendant]." He further testified that B.B. "provided a clear and *credible* disclosure of sexual assault by [defendant]." (Emphasis added). It is Snider's remark with respect to B.B. that defendant challenges. By failing to sustain defendant's objections to this remark, the trial court committed error. We now must determine whether this error was so prejudicial that it warrants a new trial.

The State's case with respect to the charge involving B.B. was based primarily on B.B.'s credibility, as there was no physical evidence presented. We reasonably conclude that a jury would be influenced by an expert in the field's opinion as to the credibility of B.B. Thus, there is a reasonable possibility that without the expert's statement, the jury would have reached a different conclusion. Therefore, the trial court committed plain error, and defendant is entitled to a new trial.

Although defendant's next two arguments do not affect the outcome of this appeal, we will discuss them because they likely will be addressed in the lower court. Defendant argues that the trial court erroneously admitted evidence that he had a prior conviction and erroneously denied his motion for a mistrial based thereon. We disagree.

"The standard of review for this Court assessing evidentiary rulings is abuse of discretion. A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Hagans*, 177 N.C. App. 17, 23, 628 S.E.2d 776, 781 (2006) (internal quotation marks and citations omitted).

During her testimony, Tonya D. stated that she had attempted to serve a protection order on defendant but that she was unable to because "[t]he probation officer never knew where he was." The trial court overruled defendant's objection. Defendant argues that evidence that he had a probation officer violates Rules 402, 403, 404, and 609 of the North Carolina Rules of Evidence because it was evidence that he had a prior conviction.

Pursuant to Rule 404(b) of the North Carolina Rules of Evidence, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2007). However, such evidence is admissible for many other purposes. The Rule is

> a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.

State v. Coffey, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (emphasis in original), *cert. denied*, 421 S.E.2d 360 (1992). "The list of permissible purposes for admission of 'other crimes'

evidence is not exclusive, and such evidence is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime." *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 852-53, *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 436 (1995) (citing *State v. Bagley*, 321 N.C. 201, 206, 362 S.E.2d 244, 247 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988)).

In the instant case, the fact that defendant had a probation officer had no probative value with respect to whether he had a propensity to commit a sex crime against children. Its probative value was as an explanation as to why Tonya D. had not served defendant with a protection order with respect to herself. As the trial court noted, there was no evidence presented that defendant had committed any particular crime. There was no abuse of discretion. As the trial court did not abuse its discretion in admitting the challenged testimony, there was no abuse of discretion in denying defendant's motion for a mistrial in relation to Tonya D's testimony.

Finally, defendant argues that the trial court erred in granting the State's request to give the jury an instruction regarding flight as evidence of guilt because the evidence did not support the instruction. We disagree.

The standard of review for the choice of jury instruction is whether the court abused its discretion. *State v. Nicholson*, 355 N.C. 1, 66, 558 S.E.2d 109, 152, *cert. denied*, 537 U.S. 845, 154 L. Ed. 2d 71 (2002) (citing *State v. Steen*, 352 N.C. 227, 249-50,

536 S.E.2d 1, 15 (2000), *cert. denied,* 531 U.S. 1167, 148 L. E. 2d 997 (2001)). A jury instruction on flight of the accused is proper when "some evidence in the record reasonably support[s] the theory that defendant fled after commission of the crime charged." *State v. Levan*, 326 N.C. 155, 164-65, 388 S.E.2d 429, 433-34 (1990) (citations omitted). "'The fact that there may be other reasonable explanations for defendant's conduct does not render the instruction improper.'" *State v. Pendleton*, 175 N.C. App. 230, 233, 622 S.E.2d 708, 710 (2005) (quoting *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977)).

Flight by an accused may be admitted as some evidence of guilt, but this evidence does not create a presumption of guilt. *State v. Lampkins*, 283 N.C. 520, 523, 196 S.E.2d 697, 698 (1973). Instead, flight by an accused "may be considered with other facts and circumstances in determining whether all the circumstances amount to an admission of guilt or reflect a consciousness of guilt." *Id.* Evidence is viewed in the light most favorable to the State when the state requests the flight instruction. *See State v. Grooms*, 353 N.C. 50, 80, 540 S.E.2d 713, 732 (2000), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001) ("These facts, *taken in the light most favorable to the State*, permit an inference that defendant had a consciousness of guilt and took steps, albeit unsuccessful, to avoid apprehension." (Emphasis added)).

Our Supreme Court has stated that "most jurisdictions recognize that testimony of a law enforcement officer to the effect that he searched for the accused without success after the

commission of the crime is competent" to support an inference of flight. *Lampkins*, 283 N.C. at 523, 196 S.E.2d at 699. When such a search is of the nature and extent to which it is "reasonably likely" that the accused will be located, the failure to locate him is evidence supporting flight of the accused. *State v. Lee*, 287 N.C. 536, 539, 215 S.E.2d 146, 148 (1975).

In this case, the warrant for defendant's arrest was issued on 11 October 2005, but defendant was not served until 2 June 2006. Officer Antonio Gill ("Officer Gill") testified that he attempted to serve the warrants for defendant's arrest at several locations: defendant's residence, the temporary employment agency that had employed defendant, and at "other addresses." When asked if it was fair to say that he had made a concerted effort to locate defendant, Officer Gill replied, "Yes." This is some evidence that reasonably supports the inference that defendant fled after the commission of the alleged charge. There was no abuse of discretion and therefore no error.

We further note that defendant stated 41 assignments of error in the record on appeal. However, only 7 were brought forward in his brief. "Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned." N.C. R. App. P. 28(a) (2007). Therefore, we deem defendant's remaining 34 assignments of error abandoned.

New trial.

Judges McGEE and ELMORE concur.

Report per Rule 30(e).