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NO. COA08-1267

NORTH CAROLINA COURT OF APPEALS

Filed: 1 September 2009

STATE OF NORTH CAROLINA

v.

Onslow County
Nos. 05 CRS 59296-97

ROBERT D. LONG

Appeal by defendant from judgments entered 7 March 2008 by Judge Thomas D. Haigwood in Onslow County Superior Court. Heard in the Court of Appeals 8 June 2009.

Attorney General Roy Cooper, by Associate Attorney General Oliver G. Wheeler, IV, for the State.

Reita P. Pendry for defendant-appellant.

HUNTER, JR., Robert N., Judge.

On 6 March 2008, a jury found Robert D. Long ("defendant") guilty of the following charges: statutory rape of a thirteen year old, statutory sex offense against a thirteen year old, incest with a child, indecent liberties with a child, crime against nature, and contributing to the delinquency of a minor. Defendant appeals his convictions, arguing that the trial court erred by excluding members of the public during the testimony of the minor victim and allowing a social worker to testify regarding the lack of physical evidence found on the victim during her medical examination. We find no error in part and dismiss in part.

I. Background

On 14 April 2005, the victim in this case (hereinafter referred to by the pseudonym "Annie" to protect the privacy of the minor), told her school guidance counselor that defendant, her stepfather, had sexually abused her on a couple occasions, one of which was within the last week. At the time, Annie was thirteen years old and was living in North Carolina with her mother, defendant, defendant's mother, and defendant's mother's boyfriend. Allison Nezbeth of the Onslow County Department of Social Services and another social worker interviewed Annie later that afternoon. Ms. Nezbeth made Annie an appointment with Dr. Gant for the following day, so that Annie could be evaluated for physical signs of sexual abuse.

That afternoon, Annie returned home from school and told her mother about her conversation with the social workers. In response, Annie's mother yelled at her and told her to say that defendant had not sexually abused her. That afternoon, Ms. Nezbeth arrived at Annie's house and told her that she needed to stay away from defendant. Ms. Nezbeth took Annie over to Annie's sister's house, where Annie stayed for one night before her sister's husband told her to leave. When Annie informed her mother she had nowhere to stay, her mother told her to go "sleep on the street." After spending one night at a friend's house, Annie went to live with her father and stepmother in New York, where she was still living at the time of trial.

On 14 March 2006, defendant was indicted on the following charges: statutory rape, sexual offense, incest, indecent liberties with a child, crime against nature, and contributing to the delinquency of a juvenile. On 6 March 2008, a jury found defendant guilty of all charges. Defendant was sentenced as follows: 255 to 315 months for statutory rape of a thirteen year old; 255 to 315 months for sexual offense against a thirteen year old; 255 to 315 months for incest with a child, to run concurrently with the sentence for statutory rape of a thirteen year old; 19 to 23 months for indecent liberties with a child; and a consecutive sentence of 6 to 8 months for crime against nature and contributing to the delinquency of a minor, which was suspended, and a period of 36 months supervised probation imposed.

II. Closing of Courtroom During Victim Testimony

Defendant seeks a new trial on the basis that the trial court violated his constitutional right to a public trial by partially closing the courtroom during Annie's testimony. However, defendant failed to raise any arguments at trial that excluding bystanders violated his constitutional rights; therefore, we will not address such arguments on appeal. *See State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001) (holding that constitutional issues not raised at the trial court will not be considered for the first time on appeal).

Defendant also argues that the trial court erred in granting the State's motion, pursuant to N.C. Gen. Stat. § 15-166, to exclude all but certain persons from the courtroom while Annie

testified, because the State failed to make the proper showing of necessity. Prior to trial, the State moved under N.C. Gen. Stat. § 15-166, "to exclude from the courtroom during the testimony of [Annie], all persons except the officers of the court, the defendant, and those engaged in the trial of the case." The State informed the trial court that Annie, who was 16 years old at the time, was developmentally delayed and had emotional problems. The State asserted that it would be detrimental for Annie's relatives to be present during her testimony, because she had not had any contact with them since she left North Carolina. Defendant replied that it was important for the defense witnesses to hear Annie's testimony, take notes, and provide defense counsel with "whatever they feel is the conflict of interest."

The State requested that Annie's father and stepmother be allowed to remain in the courtroom. The trial court permitted each side to have one person present and ordered the courtroom be cleared of all persons except defendant, Annie's father, officers of the court, and the media.

N.C. Gen. Stat. § 15-166, provides that:

In the trial of cases for rape or sex offense or attempt to commit rape or attempt to commit a sex offense, the trial judge *may*, during the taking of the testimony of the prosecutrix, exclude from the courtroom all persons except the officers of the court, the defendant and those engaged in the trial of the case.

N.C. Gen. Stat. § 15-166 (2007) (emphasis added). Whether to exclude persons from the courtroom under N.C. Gen. Stat. § 15-166 is a matter within the trial court's discretion. See *State v.*

Burney, 302 N.C. 529, 533, 276 S.E.2d 693, 696 (1981). "It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). An abuse of discretion occurs only where a trial court's ruling was "'manifestly unsupported by reason or [was] so arbitrary that it could not have been the result of a reasoned decision.'" *State v. White*, 349 N.C. 535, 552, 508 S.E.2d 253, 264 (1998) (citation omitted), *cert. denied*, 527 U.S. 1026, 144 L. Ed. 2d 779 (1999).

In reaching a determination to close the courtroom under N.C. Gen. Stat. § 15-166, the court may not rely solely on the statute but must address the following factors:

[1] if the party seeking closure has advanced an overriding interest that is likely to be prejudiced, [2] order closure no broader than necessary to protect that interest, [3] consider reasonable alternatives to closing the procedure, and [4] make findings adequate to support the closure.

State v. Jenkins, 115 N.C. App. 520, 525, 445 S.E.2d 622, 625, *disc. review denied*, 337 N.C. 804, 449 S.E.2d 752 (1994).

Here, the State advanced an overriding interest justifying partial closure of the courtroom during Annie's testimony. "This court has historically recognized the delicate sensitivities which are inherent in prosecutions of sexual offenses. It is this delicacy, as well as the age of the child, which makes out a showing of an overriding interest to justify closure." *Burney*, 302 N.C. at 538, 276 S.E.2d at 698 (citations omitted). The court has

a compelling interest in safeguarding the physical and psychological well-being of a minor victim. *Bell v. Jarvis*, 236 F.3d 149, 167-68 (4th Cir. 2000), *cert. denied*, 534 U.S. 830, 151 L. Ed. 2d 39 (2001) (finding that the State demonstrated an overriding, compelling interest in "protecting a child victim from the embarrassment and trauma associated with relating the details of multiple rapes and sexual molestation by a family member").

When determining if closing of the courtroom is necessary, the trial court should consider factors such as the minor victim's age, psychological maturity and understanding, the nature of the crime, and the desires of the victim. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 608, 73 L. Ed. 2d 248, 258 (1982). Before closing the courtroom, the trial court relied on facts provided by the State including Annie's age, her psychological and developmental problems, and "any further potential injury or damage to this child."

The trial court ordered closure no broader than necessary. In this case, some of Annie's relatives, including Annie's mother, were testifying on behalf of the defense. Annie had not had contact with any of those relatives since she left North Carolina, and the trial court acted within its discretion in excluding them to prevent further emotional damage. Given Annie's painful history dealing with her mother in this matter, both being told to lie to social workers and being told "to sleep on the street," the trial court acted reasonably in excluding her relatives from the courtroom.

As a reasonable alternative, the trial court did not exclude all persons, but allowed Annie's father and defendant to remain, so that both the prosecution and defense could have one person present. Furthermore, the trial court specifically stated that any members of the media could stay.

Although the trial court did not enter written findings of fact, it sufficiently stated its reasons to support excluding people from the courtroom when it said:

State's attorney says this young lady has emotional, developmental problems, and she's 16 years of age . . . it's my impression that . . . she's concerned of any further potential injury or damage to this child.

The trial court did not abuse its discretion by closing the courtroom during Annie's testimony. The assignment of error is overruled.

III. Ms. Nezbeth's Testimony

Defendant argues that the trial court improperly allowed social worker Ms. Nezbeth to testify that it was not unusual for child victims of alleged sexual abuse to show no physical signs of abuse. In his brief, defendant contends that Ms. Nezbeth was not qualified as a medical expert to give such testimony, and her testimony did not constitute proper lay opinion.

However, defendant's argument before our Court differs from the basis of his objection at trial. During trial, the following exchange occurred during Ms. Nezbeth's testimony:

Q. Now, you have access to the files in this case; is that correct?

A. Yes.

Q. Did [Annie] follow up and see Dr. Gant on that Friday?

A. Yes, she did.

Q. Have you reviewed the record of that evaluation?

A. Yes, I did.

Q. What were the results of [Dr. Gant's] evaluation?

A. It's difficult to read, but I did -- what I saw was that there were no physical signs of sexual abuse at that time.

Q. You've been a child abuse investigator for five years and have investigated hundreds of cases. Approximately, of those cases, how many were sexual abuse, if you recall?

A. At least a quarter of them. Twenty-five percent -- thirty percent.

Q. Okay. And were medical exams usually conducted in those cases?

A. Yes.

Q. Evidence of no physical signs of sexual abuse, in your experience, is that unusual?

[DEFENDANT'S COUNSEL]: Objection.

THE COURT: Overruled.

THE WITNESS: No, it's not.

Q. Why not?

A. To get physical signs of sexual abuse --

[DEFENDANT'S COUNSEL]: Your Honor, I would like to be heard.

At that point, the trial court dismissed the jury and the following exchange occurred between defendant's counsel and the trial court:

[DEFENDANT'S COUNSEL]: Your Honor, what I contend is that for Ms. Nezbeth to testify as

to what she -- her opinion as to what happens to a child that's been examined has said that they have been abused, *she should be considered an expert, and that testimony should not be allowed in court, especially when there's no physical evidence.*

THE COURT: I don't know that that's what she's testified about. She -- as I understood . . . she indicated that she had been involved in a number of cases involving investigations of child abuse. And that the State's inquiry, was it unusual in the course of those investigations to -- not to be -- not to find physical evidence of sexual abuse. And then she was answering that question. That's what I understood her to be asking.

[DEFENDANT'S COUNSEL]: Which is a conclusion.

THE COURT: Well, I mean it's based on her experience.

[PROSECUTOR]: That's correct, Your Honor.

[DEFENDANT'S COUNSEL]: Which *I consider her an expert and her testimony to not be admissible without physical evidence.*

THE COURT: Well, I'm not going to -- well, I'm respectfully going to disagree, and I'm going to overrule your objection. And I'm going to allow [Ms. Nezbeth] to testify about her experience.

[DEFENDANT'S COUNSEL]: All right.

(Emphasis added.) Ms. Nezbeth subsequently testified that, in her experience, it was not unusual for child sexual abuse victims to have no physical signs of abuse because the physical evidence is usually lost within twenty-four to seventy-two hours. She stated that Annie's examination with Dr. Gant occurred about four to five days after the last alleged incident of sexual abuse occurred.

Defendant's argument before our Court differs from the basis of his objection at trial. At trial, defendant's counsel's interposed objection to Ms. Nezbeth's testimony was not based upon Ms. Nezbeth's qualifications as a "medical expert" but based upon the contention that given the lack of physical evidence, her testimony impermissibly vouched for Annie's credibility regarding the abuse allegations against defendant. The trial court overruled this objection on the grounds that Ms. Nezbeth was testifying based on her experience as a social worker trained in child abuse cases and not her expert medical knowledge. Defense counsel's further objection was that no expert testimony could be given that a child can be abused absent physical findings of abuse. Based upon *State v. Stancil*, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002), the trial court properly overruled this objection and we find no error. See *id.* ("[A]n expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith.").

When Ms. Nezbeth was reading from Dr. Gant's report regarding the results of his medical examination of Annie, no objection was interposed by defense counsel. Defendant likely wanted the benefit of Dr. Gant's opinion that no evidence of physical abuse was present. Allowing medical evidence to come into evidence for his benefit, defendant may not later object to inferences which other experienced witnesses may draw for the prosecution's benefit.

Whether or not it is proper for a social worker to read to the jury the results of the examination of a doctor is not the question that was raised at trial. Therefore, we do not answer it now. "[T]o preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, 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) (2009). "[W]here a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount [on appeal].'" *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (citation omitted), *cert. denied*, 350 N.C. 848, 539 S.E.2d 647 (1999). Ms. Nezbeth was never presented by the State or qualified as a "medical expert." The trial court allowed her testimony based only on her experience in investigating child abuse. Her testimony was not based upon "medical" training.

Since this issue was not raised before the trial court, it is not properly before this Court. Accordingly, we dismiss this assignment of error.

IV. Conclusion

For the above-mentioned reasons, we find no error in the trial court's partial closure of the courtroom during Annie's testimony. We dismiss defendant's assignment of error regarding Ms. Nezbeth's testimony, as the issue was not properly preserved for our review.

No error in part; dismissed in part.

Chief Judge MARTIN and Judge STEPHENS concur.

Report per Rule 30(e).