NO. COA08-559

NORTH CAROLINA COURT OF APPEALS

Filed: 17 February 2009

STATE OF NORTH CAROLINA

v. Wake County
No. 05 CRS 062018

JEROME TRACEY SMITH

On writ of *certiorari* to review the judgment entered 22 June 2006 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 19 November 2008.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Philip A. Telfer, for the State.

Vincent R. Kahl, for defendant-appellant.

JACKSON, Judge.

Jerome Tracey Smith ("defendant") appeals his 22 June 2006 conviction of assault with a deadly weapon inflicting serious injury. For the reasons stated below, we hold no error.

On 6 July 2005, William Stancil ("Stancil") was in Raleigh where he ran into his nephew, defendant. Defendant asked Stancil to buy him some cigarettes, and then asked for a ride in his car. Stancil drove to his cousin's house, where he and defendant stayed for approximately three or four hours. They then returned to where they had met, as Stancil needed to talk to a friend in that part of

town. Stancil left defendant sitting in the car. As Stancil was crossing the street, he heard his car start up and drive away.

After waiting approximately forty minutes for defendant to return, Stancil walked four to five blocks to the boarding house where defendant stayed. He saw his car parked there. He went into the house and started talking to another resident. Defendant came downstairs and gave Stancil his car keys. He then suggested that Stancil spend the night. It was approximately three o'clock in the morning.

Stancil lay down on the bed, while defendant sat in a rocking chair. After sleeping on his stomach for at least an hour, Stancil was awakened by a "lick" to the back of his head. He tried to push himself up, but he felt another "lick" to his head which knocked him back down onto the bed. The blows to the back of his head "burned." Stancil was then lifted from the bed by the back of his shirt collar. When he was turned around, Stancil saw that it was defendant who was hitting him.

Defendant told him to "give it up" and proceeded to rifle through Stancil's pockets. Stancil had $600 with him that day. Defendant took Stancil's money and bank card from his pockets. He then struck Stancil again in the forehead between the eyes. Stancil saw that defendant was hitting him with a hatchet. Stancil then fell to the floor and defendant "took off and went running."

After lying in the floor for a short time, Stancil tried to leave defendant's room and go downstairs. He managed to find his way to another room, where a fan was running. He could tell that

he was bleeding and that he was losing strength. A man entered the room and asked what had happened, then called 911. Stancil awakened eighteen hours later in the hospital. He suffered nine lacerations to his scalp, a skull fracture, and a fracture of the bones around his eye.

Defendant was arrested on 9 July 2005. He was indicted on 25 July 2005 for assault with a deadly weapon with intent to kill inflicting serious injury, attempted first degree murder, and robbery with a dangerous weapon. On 22 June 2006, he was acquitted of robbery with a dangerous weapon and attempted first degree murder, but found guilty of assault with a deadly weapon inflicting serious injury, a lesser included offense of assault with a deadly weapon with intent to kill inflicting serious injury. He was sentenced in the presumptive range to a term of forty-six to sixty-five months in the custody of the Department of Correction. On 15 June 2007, defendant filed a petition for writ of *certiorari* which was granted by this Court on 11 July 2007.

Defendant first argues that the trial court erred in allowing Stancil's treating physician – Dr. Jeff Abrams ("Dr. Abrams") – to testify as a "fact witness" to expert opinions not disclosed in discovery. We disagree.

Pursuant to North Carolina General Statutes, section 15A-903, the State is required to

> [g]ive notice to the defendant of any expert witnesses that the State reasonably expects to call as a witness at trial. Each such witness shall prepare, and the State shall furnish to the defendant, a report of the results of any examinations or tests conducted by the expert.

> The State shall also furnish to the defendant the expert's curriculum vitae, the expert's opinion, and the underlying basis for that opinion. The State shall give the notice and furnish the materials required by this subsection within a reasonable time prior to trial, as specified by the court.

N.C. Gen. Stat. § 15A-903(a)(2) (2005). "The determination of whether a witness' testimony constitutes expert testimony is one within the trial court's discretion, and will not be reversed on appeal absent an abuse of discretion." *State v. Blankenship*, 178 N.C. App. 351, 354-55, 631 S.E.2d 208, 211 (2006) (citing *State v. Morgan*, 359 N.C. 131, 160, 604 S.E.2d 886, 904 (2004), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 79 (2005)).

"Although, by general definition, all doctors may be considered experts in that they possess a specialized knowledge of medicine beyond that of the layman, not every role of a doctor as a witness in a legal controversy is in the capacity of an 'expert' witness." *Turner v. Duke University*, 325 N.C. 152, 167-68, 381 S.E.2d 706, 715 (1989). "Where a doctor is or was the [patient's] treating physician and is called to testify not about the standard of the [patient's] care but rather about the [patient's] treatment and the doctor's choice of surgical procedures, he is not an expert witness." *Id.* at 168, 381 S.E.2d at 716 (citing *Sheahan v. Dexter*, 483 N.E.2d 402 (Ill. App. Ct. 1985)).

Here, Dr. Abrams testified only with respect to his treatment of Stancil. As with any lay witness, he testified to that which he saw and heard while treating Stancil. He testified about the information available to him through his treatment of Stancil. He

was not employed for purposes of litigation and gave no opinion as to the standard of care, future disability, or other opinion for which an "expert" would be employed. We discern no abuse of discretion in deeming him a "fact witness" for which the State was not required to submit discovery.

Defendant also argues that the trial court erred in allowing testimony based upon hospital records in violation of the rule against hearsay and the Confrontation Clause of the United States Constitution. We disagree.

In general, we review evidentiary rulings for abuse of discretion. *State v. Petrick*, 186 N.C. App. 597, 601, 652 S.E.2d 688, 691 (2007) (citing *State v. Boston*, 165 N.C. App. 214, 218, 598 S.E.2d 163, 166 (2004)), *disc. rev. denied*, 362 N.C. 242, 660 S.E.2d 540 (2008). However, when constitutional rights are implicated, we review the matter *de novo*. *State v. Thorne*, 173 N.C. App. 393, 396, 618 S.E.2d 790, 793 (2005) (citing *Piedmont Triad Airport Auth. v. Urbine*, 354 N.C. 336, 338, 554 S.E.2d 331, 332 (2001), *cert. denied*, 535 U.S. 971, 152 L. Ed. 2d 381 (2002)).

Defendant contends that Dr. Abrams testified to the results of tests that he did not perform himself. He alleges that these results are inadmissible hearsay. Further, because those who had performed the tests were not available for cross-examination, he contends his right to confront the witnesses against him was denied.

Pursuant to *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004), "[w]here *testimonial* evidence is at issue, . . . the

Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 68, 158 L. Ed. 2d at 203 (emphasis added). However, "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." *Id.* Therefore, we must determine whether the evidence at issue – the results of various medical tests and procedures – is testimonial in nature.

In *Crawford*, the United States Supreme Court recognized that most of the exceptions to the hearsay rule cover statements that by their nature are not testimonial, and therefore do not present a Confrontation Clause problem. *Id.* at 56, 158 L. Ed. 2d at 195. *Crawford* specifically listed business records as an example of such an exception. *Id.* at 56, 158 L. Ed. 2d at 195-96. Pursuant to the North Carolina Rules of Evidence, the records of regularly conducted business activities are not excluded by the hearsay rule, even though the declarant is available as a witness. N.C. Gen. Stat. § 8C-1, Rule 803(6) (2005). A business record is:

> [a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation . . . .

Id. "Records made in the usual course of business, made contemporaneously with the occurrences, acts and events, recorded by one authorized to make them and before litigation has arisen, are admissible upon proper identification and authentication." *State v. Miller*, 80 N.C. App. 425, 428, 342 S.E.2d 553, 555 (citing *Sims v. Insurance Co.*, 257 N.C. 32, 35, 125 S.E.2d 326, 329 (1962)), *disc. rev. denied*, 317 N.C. 711, 347 S.E.2d 448 (1986). "Business records are defined to include the records of hospitals." *Id.* (citing Rule 803(6) Commentary, N.C. Rules of Evidence).

In *Miller*, the defendant challenged testimony regarding the results of blood tests. Here, defendant challenges testimony regarding the results of (1) CAT scans, MRIs, and X-rays; (2) toxicology screens and alcohol levels; and (3) mental impairments, trauma assessments, and Glacow Coma Scores. Defendant asserts that pursuant to *State v. Cao*, 175 N.C. App. 434, 626 S.E.2d 301, *disc. rev. denied*, 360 N.C. 538, 634 S.E.2d 537 (2006), such testimony is testimonial because the results require "interpretation" and "analysis" by the one reporting on them. However, *Cao* was discussing the laboratory reports or notes of a laboratory technician prepared for use in a criminal prosecution. *Id.* at 440, 626 S.E.2d at 305. The reports or notes at issue here were prepared for purposes of treating the patient. Although they are being used in a criminal prosecution, they were not prepared for that purpose.

Although Dr. Abrams referenced the hospital records in his testimony, because these records are business records, they are

exempted from the rule against hearsay. *Crawford* acknowledges that business records are not testimonial, posing no *per se* Confrontation Clause problem.

Finally, defendant argues that the trial court erred in denying his written request for jury instructions on expert testimony. As noted *supra*, because Dr. Abram was not admitted as an expert witness, this argument is without merit.

Based upon the foregoing, we hold no error.

NO ERROR.

Judges HUNTER and ELMORE concur.

Report per Rule 30(e).