NO. COA09-232

NORTH CAROLINA COURT OF APPEALS

Filed: 6 July 2010

STATE OF NORTH CAROLINA

v. McDowell County
No. 02 CRS 50619

TIMOTHY ALLEN JOHNSON,
Defendant.

Appeal by defendant from judgment entered 8 August 2002 by Judge Zoro J. Guice, Jr. in McDowell County Superior Court. Heard in the Court of Appeals 2 September 2009.

Attorney General Roy Cooper, by Assistant Attorney General Catherine F. Jordan, for the State.

Robert W. Ewing for defendant-appellant.

GEER, Judge.

Defendant Timothy Allen Johnson appeals his conviction of one count of felony child abuse inflicting serious bodily injury. The main issue on appeal is whether defendant was denied effective assistance of counsel *per se* under *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672, 106 S. Ct. 1992 (1986). We hold that *Harbison* does not apply to this case because all the challenged admissions by defendant's counsel were made outside the presence of the jury. Defendant was not, therefore, denied the right to have the issue of his guilt or innocence decided by the jury, and his counsel's statements to the

trial judge outside the presence of the jury did not *per se* deprive him of the right to effective assistance of counsel.

Facts

The State's evidence tended to show the following. On 3 March 2002, defendant's 18-month-old daughter "Kate"[1] was transported to McDowell County Hospital, where orthopedic surgeon Dr. James Wheeler examined the child and determined that she had a fractured femur. Dr. Wheeler observed that Kate was unable to move her leg and that she was suffering muscle spasms, significant pain, and anxiety. He treated the child for her injury, placing her leg in a pavlik harness.

Although the emergency room staff informed Dr. Wheeler that Kate's parents had reported that she injured herself by falling off a bed, he was immediately suspicious of that story. When he testified at trial, Dr. Wheeler explained that the femur is the strongest long bone in the human body, and that a femur fracture is "not a real common injury" because the femur requires such a "significant amount of force" to break. Thus, he thought the explanation for Kate's injury "didn't sound quite right," and he suspected child abuse. Dr. Wheeler reported his suspicions to a hospital social worker.

Afterwards, the McDowell County Department of Social Services ("DSS") received a referral based on the incident. On 5 March 2002, DSS sent Child Protective Services social worker Rob Farkas

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[1]The pseudonym of "Kate" is used throughout this opinion to protect the minor's privacy and for ease of reading.

to visit defendant's family at the hospital and investigate. Defendant told Farkas that he had left Kate on his bed when he went to retrieve a diaper from another room, and Kate fell about three feet from the bed to the floor while she was unattended. Farkas also spoke with Dr. Wheeler, who conveyed his doubts about defendant's story. Farkas' inquiry led him to believe that Kate "was definitely at risk."

The McDowell County Sheriff's Department was also contacted and began to investigate the incident. Investigator Sharon Carpenter went to the hospital and spoke to Farkas and defendant's wife, Lisa Johnson, who was also Kate's mother. Because defendant was not at the hospital when Investigator Carpenter arrived, she arranged for defendant to come to the Sheriff's Department on the following day.

Before defendant's interview at the Sheriff's Department, he was read and waived his *Miranda* rights. He then confessed to having caused Kate's injury. Defendant stated that on 3 March 2002, while his wife was away at work, he was alone with the couple's four-year-old son and Kate. After feeding Kate lunch, he decided to bathe her. Kate started crying when he put her in the bathtub, and she eventually vomited. Defendant became angry because he had to change the bath water and "because [Kate] would not calm down." While he was changing the bath water, he yelled at Kate, and her continued crying caused him to become even more upset.

Defendant told Investigator Carpenter that, after the bath, he carried Kate to his bedroom. By then he was "very angry because [Kate] wouldn't stop crying," and he "threw" her on the bed. He "saw her right leg go behind her, then her body bounced, and her right leg flipped out in front of her." He realized from the immediate swelling that the leg was broken.

On the day after his interview, 8 March 2002, DSS obtained a nonsecure custody order for Kate. The same day, Kate was released from the hospital, but her leg took time to heal. She had to wear the pavlik harness for about three more weeks after being discharged.

Dr. Cindy Brown, medical director of the Child Maltreatment Evaluation program at Asheville's Mission Hospital, examined Kate on 28 March 2002. At trial, Dr. Brown testified that Kate was unlikely to have suffered her fracture as a result of falling off a bed or even being thrown onto a bed. Dr. Brown explained that such an injury required greater force and was more likely to have been caused by being struck with a hard object.

On 25 March 2002, defendant was indicted for felony child abuse inflicting serious bodily injury. A jury convicted him of that charge on 8 August 2002. The trial court found as an aggravating factor that Kate was very young, and the court sentenced defendant to an aggravated-range term of 145 to 183 months imprisonment. Defendant gave oral notice of appeal after the court entered judgment, but he failed to perfect his appeal.

On 24 September 2008, defendant filed a petition for writ of certiorari, which was allowed by this Court on 1 October 2008.

I

At trial, the jury was instructed on three possible verdicts: felony child abuse inflicting serious bodily injury, felony child abuse inflicting serious physical injury, and not guilty. Outside the presence of the jury, defendant's counsel repeatedly attempted to stipulate to the offense of felony child abuse inflicting serious physical injury, admitting to the court that defendant was Kate's father, that Kate was less than sixteen years of age when she suffered her injury, and that defendant intentionally inflicted the injury. Defendant contested whether he had inflicted serious bodily injury as opposed to serious physical injury.

Felony child abuse inflicting serious bodily injury occurs when "[a] parent or any other person providing care to or supervision of a child less than 16 years of age . . . intentionally inflicts any serious bodily injury to the child or . . . intentionally commits an assault upon the child which results in any serious bodily injury to the child, or which results in permanent or protracted loss or impairment of any mental or emotional function of the child . . . ." N.C. Gen. Stat. § 14-318.4(a3) (2009). Serious bodily injury is "[b]odily injury that creates a substantial risk of death or that causes serious permanent disfigurement, coma, a permanent or protracted condition

that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization." N.C. Gen. Stat. § 14-318.4(d)(1).

Felony child abuse inflicting serious physical injury is a lesser offense that occurs when "[a] parent or any other person providing care to or supervision of a child less than 16 years of age . . . intentionally inflicts any serious physical injury upon or to the child or . . . intentionally commits an assault upon the child which results in any serious physical injury to the child . . . ." N.C. Gen. Stat. § 14-318.4(a). Serious physical injury is "[p]hysical injury that causes great pain and suffering. . . includ[ing] serious mental injury." N.C. Gen. Stat. § 14-318.4(d)(2).

On appeal, defendant contends that he was denied effective assistance of counsel *per se* because his counsel, in violation of *Harbison*, stipulated to the lesser offense without first obtaining defendant's voluntary and knowing consent. Defendant further argues that the trial court erred in allowing his counsel to stipulate to defendant's guilt without conducting the necessary *Harbison* inquiry. Defendant's counsel made his concessions that defendant was guilty of felony child abuse inflicting serious physical injury (1) while the parties were arguing a motion *in limine* before the jury had been impaneled, (2) when the jury had been excused for a voir dire examination of Investigator Carpenter

and an evidentiary ruling, and (3) after the jury had already rendered its verdict and been dismissed by the court.

In *Harbison*, 315 N.C. at 177, 337 S.E.2d at 506, the defendant, charged with murder, maintained a theory of self-defense throughout the trial. During closing arguments, his counsel, without the defendant's consent, stated to the jury: "'Ladies and Gentlemen of the Jury, . . . I don't feel that [the defendant] should be found innocent. I think he should do some time to think about what he has done. I think you should find him guilty of manslaughter and not first degree.'" *Id.* at 177-78, 337 S.E.2d at 506.

The Supreme Court concluded that such a concession amounted to a *per se* violation of the constitutional right to assistance of counsel:

> [T]he gravity of the consequences [of a guilty plea] demands that the decision to plead guilty remain in the defendant's hands. When counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away. The practical effect is the same as if counsel had entered a plea of guilty without the client's consent. Counsel in such situations denies the client's right to have the issue of guilt or innocence decided *by a jury*.
>
> For the foregoing reasons, we conclude that ineffective assistance of counsel, per se in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt *to the jury* without the defendant's consent.

Id. at 180, 337 S.E.2d at 507-08 (emphasis added) (internal citation omitted). Accordingly, the defendant was granted a new trial. *Id.* at 181, 337 S.E.2d at 508.

The question presented in this appeal is whether *Harbison* applies to concessions made outside the presence of the jury, as they were in this case. Defendant has cited no authority, and we have found none, in which our courts have applied *Harbison* to statements made outside the presence of the jury. *Harbison* itself says that it applies to statements made "to the jury." *Id.* at 180, 337 S.E.2d at 508. Although defendant notes that an admission of guilt by counsel "denies the client's right to have the issue of guilt or innocence decided by a jury," defendant does not explain in what way admissions outside the presence of the jury would implicate this "practical effect" relied upon by *Harbison*.

To date, cases applying *Harbison* have only done so with respect to statements made in the presence of the jury. *See, e.g.*, *State v. Wiley*, 355 N.C. 592, 619, 565 S.E.2d 22, 42 (2002) (paraphrasing *Harbison* as holding that "an admission *to the jury* of defendant's guilt by defense counsel without the consent of the defendant constitutes ineffective assistance of counsel and a *per se* violation of the Sixth Amendment to the United States Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution" (emphasis added)), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795, 123 S. Ct. 882 (2003); *State v. Fisher*, 318 N.C. 512, 532, 350 S.E.2d 334, 346 (1986) (paraphrasing *Harbison* as holding that "ineffective assistance of counsel is

established in every criminal case in which the defendant's counsel admits the defendant's guilt *to the jury* without his consent" (emphasis added)). Further, in *State v. Walls*, 342 N.C. 1, 57, 463 S.E.2d 738, 768 (1995), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 794, 116 S. Ct. 1694 (1996), the Supreme Court declined to extend *Harbison* to statements made before the jury in the sentencing phase of a capital trial as opposed to the guilt/innocence phase.

The holding and rationale of *Harbison* and its progeny limit *Harbison*'s applicability to admissions made to the jury that implicate a defendant's right to have a jury decide guilt or innocence. Defendant has provided no justification or authority for extending *Harbison* to the type of statements made in this case. Accordingly, we conclude that defendant's counsel's statements to the trial court outside the presence of the jury did not deprive defendant of the right to effective assistance of counsel. Moreover, because *Harbison* did not apply, the trial court did not err in allowing defense counsel to make the concessions to the court without inquiring into whether defendant had consented to the concessions.

II

Defendant next contends that the trial court committed reversible error by admitting (1) evidence of defendant's prior conviction for involuntary manslaughter in the death of his son Steven, as well as the facts giving rise to this conviction ("manslaughter evidence"), and (2) evidence that Kate suffered an occipital hematoma when she was four months old ("hematoma

evidence"). Defendant argues that, because of his counsel's admissions, the only issue for the jury to decide was whether Kate's injury was bodily or physical. According to defendant, the manslaughter and hematoma evidence were not probative of that remaining issue.

At trial, pursuant to Rule 404(b) of the Rules of Evidence, the State introduced the manslaughter evidence through the testimony of State Bureau of Investigation Special Agent Jeff Eddins, who had interviewed defendant in 1993 after Steven's death, and through Investigator Carpenter's reading aloud the statement given by defendant at the Sheriff's Department on 7 March 2002. The trial court admitted the manslaughter evidence over defendant's objection, noting the many similarities between the 1993 and 2002 events, the relevance of the evidence, and the jury's ability to determine the weight such evidence should receive.

According to this evidence, in 1993, defendant had been home alone with six-week-old Steven, who was crying. Defendant admitted to having "picked him up fast and rough," shaking him "sideways, roughly, as well as squeezing him . . . like the octopus ride at the fair." Steven's head flopped back and forth and his crying persisted. Defendant was preparing Steven for a bath when Steven "slipped and fell into the tub." After the bath, defendant dropped Steven about three feet onto the bed. Steven died from the injuries he received that day with the official cause of death identified as a subdural hematoma.

The State introduced the hematoma evidence relating to Kate through the testimony of Dr. Brown, who reviewed Kate's medical records when she treated Kate. Dr. Brown testified she learned from the records that Kate had sustained an occipital hematoma when she was about four months old. For a child of that age, Dr. Brown explained, such an injury was "suspicious." Later, defendant's wife, who was defendant's sole witness, testified on cross-examination that, although she had told DSS otherwise in 1993, Kate was not in her care when Kate suffered the hematoma. Defendant's wife said she had lied to DSS because she "was afraid because of [defendant's] prior conviction that the child would be taken away." The trial court found this evidence admissible under Rule 404(b) and ruled that its prejudicial value did not unfairly outweigh its probative value.

Defendant does not contend that the manslaughter or hematoma evidence was inadmissible under Rule 404(b). Instead, defendant argues that "since defense counsel stipulated that the defendant committed the lesser offense of Felony Child Abuse Inflicting Serious Physical Injury and stipulated that the defendant in fact assaulted his child, the Rule 404(b) evidence proffered by the State was irrelevant."

Notwithstanding the purported stipulation, defendant pled not guilty. "It is well settled that when a defendant pleads not guilty the burden is on the State to prove every element of the offense beyond a reasonable doubt." *State v. Billinger*, 9 N.C. App. 573, 575, 176 S.E.2d 901, 903 (1970). Although defendant

essentially contends that his attempted stipulation removed the State's burden of proving any element other than serious bodily injury, "the State is not required to accept a stipulation in lieu of an element." *State v. Little*, 191 N.C. App. 655, 661, 664 S.E.2d 432, 437, *disc. review denied*, 362 N.C. 685, 671 S.E.2d 326 (2008). In *Little*, we held that the trial court did not err in allowing the State to enter evidence of the defendant's prior manslaughter conviction instead of requiring the State to accept his stipulation that he had committed a felony. *Id.* at 662, 664 S.E.2d at 437.

Likewise, here, the trial court's decision to allow the State to present evidence regarding all the elements of the crime was not inherently in error. The mere fact that defendant offered to stipulate to some of the elements did not remove the State's burden of proving them. All of the elements remained in issue before the jury, as was evidenced by the court's instructing the jury on each element. Defendant's argument, however, hinges entirely on the premise that his attempted stipulations negated the relevance of the manslaughter and hematoma evidence, and he fails to address whether the evidence was probative as to any other element of the crime.

The manslaughter evidence had strong probative value as to defendant's knowledge and absence of mistake under Rule 404(b). Since defendant had already caused Steven's death by dropping him on a bed, defendant fully knew the harm that could result from throwing Kate on a bed, as he claimed he did. *See, e.g.*, *State v.*

Morgan, 359 N.C. 131, 159, 604 S.E.2d 886, 903 (2004) (holding that "evidence of defendant's attacks on [first victim with beer bottle] demonstrate[d] that defendant was aware that the act of striking another individual with a beer bottle was a reckless and dangerous act that could cause serious injury," and court "properly admitted this evidence under Rule 404(b) to show intent" in murder trial for second victim who "suffered forty-eight wounds caused by a 'sharp object such as something made out of glass that has a broken, sharp edge'"), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 79, 126 S. Ct. 47 (2005); *State v. Anderson*, 350 N.C. 152, 174, 513 S.E.2d 296, 310 (holding that where "State offered evidence that defendant had previously punished her children through her use of a belt and biting," evidence was admitted for permissible purpose because it "tended to establish [*inter alia*] absence of accident"), *cert. denied*, 528 U.S. 973, 145 L. Ed. 2d 326, 120 S. Ct. 417 (1999).

Turning to the hematoma evidence, we note that "[o]ur courts have consistently held that past incidents of mistreatment are admissible to show intent in a child abuse case." *State v. West*, 103 N.C. App. 1, 9, 404 S.E.2d 191, 197 (1991). Thus, like the manslaughter evidence, the hematoma evidence was probative of defendant's intent to injure Kate. *See id.* at 10, 404 S.E.2d at 198 (holding "[e]vidence of the way defendant had treated the child in the past was certainly relevant" to intent); *see also State v. Pierce*, 346 N.C. 471, 490, 488 S.E.2d 576, 587 (1997) (holding evidence that "defendant shook and threw a four-year-old boy on a prior occasion" was admissible because it was "sufficiently similar

to defendant's conduct in this case to contradict" defendant's account of accident and was "thus relevant to establish defendant's motive and intent in shaking [victim] and to show absence of mistake on defendant's part"); *State v. Hitchcock*, 75 N.C. App. 65, 69, 330 S.E.2d 237, 240 (holding, where victim was battered child who died as result of injuries which could have been caused by defendant's physical abuse, "evidence of prior acts of physical abuse [were] relevant and admissible to show the defendant's intent and to show that the defendant acted with malice"), *disc. review denied*, 314 N.C. 334, 333 S.E.2d 493 (1985).

Defendant further argues that any probative value was outweighed by extreme prejudice under Rule 403 of the Rules of Evidence. Rule 403 permits a trial court to exclude otherwise relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." We review a trial court's rulings under Rule 403 for abuse of discretion. *State v. Theer*, 181 N.C. App. 349, 359, 639 S.E.2d 655, 662, *appeal dismissed*, 361 N.C. 702, 653 S.E.2d 159 (2007), *cert. denied*, 553 U.S. 1055, 171 L. Ed. 2d 769, 128 S. Ct. 2473 (2008).

Defendant insists that the manslaughter and hematoma evidence was unduly prejudicial because it "added a strong additional jolt of horror, fear, and anger to the State's case, portraying defendant as even more dangerous and culpable" and it "unfairly bolstered the State's proof that [Kate] suffered serious bodily injury in this case." Defendant then argues that because the Rule

404(b) evidence had no probative value, its prejudicial effect necessarily outweighed its probative value. Since we have determined that the manslaughter and hematoma evidence had strong probative value, and we cannot conclude that the prejudicial effect of this evidence would be *unfair* given the bases on which it was admitted, we hold that the trial court did not abuse its discretion under Rule 403 in admitting the evidence.

Lastly, we note that even if we were to conclude that the trial court erred in admitting either the manslaughter or hematoma evidence, defendant has not met his burden of showing a "reasonable possibility that, had the error in question not been committed, a different result would have been reached." N.C. Gen. Stat. § 15A-1443(a) (2009). As defendant has emphasized, the only issue seriously in dispute at trial was whether Kate suffered a serious bodily injury. Defendant has not, however, demonstrated that a jury would have been unlikely to find a serious bodily injury based on the State's evidence on that issue standing alone, in the absence of the manslaughter and hematoma evidence.

At trial, Dr. Wheeler testified that breaking the femur — the injury Kate sustained — would have required a significant amount of force. Dr. Wheeler observed that Kate was unable to move her leg and was in significant pain. Dr. Brown testified that it was unlikely the injury occurred from Kate being thrown on the bed, but rather was more likely the result of the 18-month-old child being hit by a hard object. Dr. Brown further testified that Kate's injury would have taken "weeks, four, five, six weeks" to heal.

When asked how long Kate "would have been in extreme pain" due to the injury, Dr. Brown responded, "Days to weeks." Dr. Brown further testified that Kate's leg was impaired because she was temporarily immobilized while wearing a harness for three weeks. This kind of immobilization in a child of Kate's age, Dr. Brown explained, "kind of interfer[es] with . . . the normal development — developmental things she would be doing at that age," and "it takes awhile [sic] to catch up." Even after the harness was removed, Kate appeared uncomfortable and resisted moving her leg.

In light of the expert testimony, we do not believe that defendant has demonstrated that had the Rule 404(b) evidence been excluded, there is a reasonable possibility that the jury would have convicted him of felony child abuse inflicting serious physical injury rather than serious bodily injury. We, therefore, hold that any error was harmless.

No error.

Judge STROUD concurs.

Judge ERVIN concurs in a separate opinion.

Report per Rule 30(e).

NO. COA09-232

NORTH CAROLINA COURT OF APPEALS

Filed: 6 July 2010

STATE OF NORTH CAROLINA

v. McDowell County
No. 02 CRS 050619

TIMOTHY ALLEN JOHNSON,
Defendant

ERVIN, Judge, concurring.

Although I concur in the Court's opinion, I do so without receding from the positions expressed in my separate opinion in *State v. Maready* (No. COA09-171-2) (6 July 2010), which discusses the impact of the decision of the United States Supreme Court in *Florida v. Nixon*, 543 U.S. 175, 160 L. Ed. 2d 565 (2004), on the continued validity of *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), *cert. denied*, 476 U.S. 1123, 106 S. Ct. 1992, 90 L. Ed. 2d 672 (1986). Since the Court in this case holds that *Harbison* does not apply to the facts of this case, in which no concessions of guilt were made in the presence of the jury; since the Court holds in *Maready* that *Harbison* remains binding on this Court despite *Nixon*, *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (holding that "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court"); and since the State had not advanced any argument in this case based on *Nixon*, I concur in the Court's opinion.