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NO. COA10-1444
NORTH CAROLINA COURT OF APPEALS

Filed: 5 July 2011

STATE OF NORTH CAROLINA

v.

Cumberland County
Nos. 08 CRS 58541-42
08 CRS 58563

JOHN THOMAS NACKAB

Appeal by defendant from judgments entered 1 July 2010 by Judge James F. Ammons, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 28 April 2011.

Attorney General Roy Cooper, by Assistant Attorney General Anne M. Middleton, for the State.

Sue Genrich Berry, for defendant-appellant.

CALABRIA, Judge.

John Thomas Nackab ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of first degree rape of a child, first degree sex offense with a child, and three counts of taking indecent liberties with a child. We find no error.

I. Background

In July 2006, defendant met a woman named Martha¹ at an Alcoholics Anonymous meeting. Defendant and Martha began dating a few weeks later. At that time, Martha lived with her five minor children: two boys and three girls, Catherine, Barbara, and Amanda (collectively "the victims").

While defendant and Martha were dating, defendant would frequently spend the night at Martha's home. Catherine would sometimes sleep in the same bed with Martha and defendant. On several occasions while they were in bed together, defendant touched Catherine in her genital area over her clothing.

On 19 November 2006, defendant and Amanda were alone together at defendant's mother's home. Defendant called Amanda into his room and told her to take her clothes off and lie on his bed. Amanda laid on her stomach, and defendant inserted his penis into her anus. When Amanda cried out in pain, defendant had her turn over onto her back. He then inserted his penis into Amanda's vagina. Amanda again cried out in pain, and

¹ The three victims in the instant case are minor children. In order to protect their identities, the names of the children and their mother are replaced with pseudonyms.

defendant told her to put her clothes back on. After this incident, it was painful for Amanda to urinate and defecate.

Defendant and Martha subsequently terminated their relationship. In March 2008, Catherine disclosed to her mother that defendant had touched her genital area. Martha subsequently went to talk to Barbara, who also disclosed that defendant had touched her genital area over her clothing on one occasion when they were alone together. Martha then went to Amanda, who disclosed the incident that occurred on 19 November 2006.

Martha reported the victims' allegations to law enforcement. The victims were taken to be examined by Dr. Laura Gutman ("Dr. Gutman"), a physician at a child maltreatment clinic. Amanda used dolls to demonstrate to Dr. Gutman what had occurred between her and defendant. Dr. Gutman then performed a physical examination on Amanda. Amanda's anus exhibited evidence of trauma. This physical evidence, in conjunction with Amanda's statements, led Dr. Gutman to determine that there was very strong support for the conclusion that Amanda was a sexually assaulted child. Catherine and Barbara also repeated their disclosures that defendant had touched their genital areas to Dr. Gutman.

Defendant was arrested and subsequently indicted for first degree rape of a child, first degree sexual offense with a child, and three counts of taking indecent liberties with a child. Defendant was initially assigned Assistant Public Defender Debra Price as court appointed counsel. However, Ms. Price withdrew from the case on 31 July 2008 when defendant retained attorney D.W. Bray ("Bray") to represent him. Bray unsuccessfully sought to have defendant's bond reduced.

On 1 April 2009, defendant made a motion to have Bray removed from his case. The trial court granted the motion and appointed Assistant Public Defender David Smith, Jr. ("Smith") to represent defendant. On 11 August 2009, defendant made a motion to have Smith removed from his case. The trial court granted the motion, determined that defendant had forfeited his right to additional court appointed counsel, and appointed Smith as defendant's standby counsel.

Defendant was arraigned on 9 October 2009. At his arraignment, defendant made a motion to have Smith reappointed to represent him, and the court granted the motion. On 16 June 2010, Smith made a motion to withdraw as defendant's counsel, citing irreconcilable differences with defendant. Defendant then made a motion to represent himself and formally waived his

right to counsel. The trial court granted defendant's motion and Smith was reappointed as defendant's standby counsel.

Defendant's case was called for trial on 28 June 2010. The trial court had defendant again formally waive his right to counsel. Defendant made a motion for the appointment of an independent expert to examine the victims, which was denied by the trial court. The case then proceeded to trial, with defendant representing himself and Smith acting as defendant's standby counsel.

At trial, Catherine, Barbara, and Amanda each testified against defendant. Prior to their respective testimonies, the trial court conducted a brief colloquy with each victim in front of the jury to determine whether they were competent to testify. On 1 July 2010, the jury returned verdicts of guilty to all charges. For the first degree rape of a child conviction, defendant was sentenced to a minimum term of 336 months to a maximum term of 413 months. For the first degree sexual offense conviction, defendant was sentenced to a minimum term of 336 months to a maximum term of 413 months. These sentences were to be served consecutively in the North Carolina Department of Correction. The three convictions for taking indecent liberties with a child were consolidated for judgment and defendant was

sentenced to a minimum term of 25 months to a maximum term of 30 months. This active sentence was to run consecutively with defendant's other sentences. Defendant appeals.

II. Self-representation

Defendant argues that the trial court erred by allowing him to represent himself at trial. Specifically, defendant contends that he fell into a "gray area," in which he was competent to stand trial, but he was not competent to represent himself. We disagree.

"A criminal defendant has the right to represent himself provided he makes this decision knowingly and intelligently." *State v. Rich*, 346 N.C. 50, 62, 484 S.E.2d 394, 402 (1997).

[B]efore a defendant may be permitted to waive appointed counsel, the trial court is constitutionally required to determine two things. First, the court must determine that defendant "clearly and unequivocally" waived his right to counsel and elected to proceed *pro se*. Second, it must determine whether defendant knowingly, intelligently, and voluntarily waived his right to in-court representation.

Id. (internal citation omitted). Defendant argues that although he was competent to stand trial, the trial court erred in allowing him to waive counsel and represent himself because the United States Supreme Court has held that "the Constitution permits a State to limit [a] defendant's self-representation

right by insisting upon representation by counsel at trial – on the ground that the defendant lacks the mental capacity to conduct his trial defense unless represented.” *Indiana v. Edwards*, 554 U.S. 164, 174, 171 L.Ed. 2d 345, 355 (2008).

Our Supreme Court recently addressed this issue in *State v. Lane*, 365 N.C. 7, 707 S.E.2d 210 (2011). According to the *Lane* Court, *Edwards* is only applicable when the trial court denies a defendant the right to proceed *pro se* because the defendant falls within the “gray area” of competence in which he is competent to stand trial, but not competent to represent himself. *Id.* at 22-23, 707 S.E.2d at 220. Since the trial court in the instant case granted defendant’s motion to represent himself, *Edwards* is not applicable. *See id.* Thus, we must only determine if “the trial court properly conducted a thorough inquiry and determined that defendant’s waiver of his constitutional right to counsel was knowing and voluntary.” *Id.* at 23, 707 S.E.2d at 220.

“N.C.G.S. § 15A-1242 sets forth the duties of the trial court in determining the validity of a defendant’s waiver of his right to counsel and decision to proceed *pro se.*” *Rich*, 346 N.C. at 62, 484 S.E.2d at 402. This statute states:

A defendant may be permitted at his election to proceed in the trial of his case without

the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:

(1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;

(2) Understands and appreciates the consequences of this decision; and

(3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242 (2009). In the instant case, the trial court's colloquy with defendant prior to trial fully complied with N.C. Gen. Stat. § 15A-1242, as defendant acknowledged (1) that he was advised of his right to counsel; (2) that he was aware of the consequences of his decision; and (3) that he comprehended the nature of the charges and proceedings as well as the range of permissible punishments. Thus, the trial court appropriately allowed defendant to represent himself. This argument is overruled.

III. Defendant's Request for an Expert

Defendant argues that the trial court erred by denying his motion to appoint a defense expert immediately prior to trial. We disagree.

"In order to receive state-funded expert assistance, an indigent defendant must make a particularized showing that: (1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that it would materially assist him in the preparation of his case." *State v. McNeill*, 349 N.C. 634, 650, 509 S.E.2d 415, 424 (1998) (internal quotations and citation omitted). "[W]hether an expert should be appointed at the expense of the State to assist an indigent defendant is within the sound discretion of the trial judge and his decision thereon will not be reversed on appeal absent a showing of abuse of that discretion." *State v. Massey*, 316 N.C. 558, 562, 342 S.E.2d 811, 814 (1986) (citation omitted). "Abuse of discretion occurs when a trial court's ruling was manifestly unsupported by reason and thus could not have been the result of a reasoned decision." *State v. Jordan*, 149 N.C. App. 838, 842, 562 S.E.2d 465, 467-68 (2002) (citation omitted).

In the instant case, immediately prior to trial, defendant made "[a] motion for defense expert to review the complaining witness[es], or, in [the] alternative, [to] allow him to be in the courtroom during testimony." When the trial court asked defendant why he had waited until immediately prior to trial to

request an expert, defendant responded, "[b]ecause, Your Honor, I have for the lack of a better way to try to explain it to you, I feel like I have -- I have one leg amputated and then someone's invited me to a behind kicking contest. I just got this information."

Initially, we note that a criminal defendant does not have the right to make a prosecuting witness submit to either a psychological or physical examination. *State v. Joyce*, 97 N.C. App. 464, 467, 389 S.E.2d 136, 138-39 (1990). Moreover, in his discussion of his motion with the trial court, defendant made no particularized showing that he would be deprived of a fair trial without expert assistance and did not explain what assistance he expected from the requested expert. Under these circumstances, the trial court did not abuse its discretion in denying defendant's request for an expert. This argument is overruled.

IV. Capacity of the Victims

Defendant argues that the trial court erred by conducting a *voir dire* examination to determine the capacity of the victims to testify in the presence of the jury. Specifically, defendant contends that the trial court's questions to the victims could have been interpreted by the jury as disclosing the trial court's opinion of the victims' credibility. We disagree.

"Every person is competent to be a witness except . . . when the [trial] court determines that he is . . . incapable of understanding the duty of a witness to tell the truth." N.C. Gen. Stat. § 8C-1, Rule 601(a)-(b) (2009). "Rule 104(c) of the North Carolina Rules of Evidence requires *voir dire* inquiry into the competency of a witness to be conducted outside the presence of the jury *only when the interests of justice require.*" *State v. Hensley*, 120 N.C. App. 313, 321, 462 S.E.2d 550, 555 (1995) (emphasis added and internal quotations omitted).

Initially, we note that defendant did not object to the trial court's questioning of the victims in the presence of the jury. Therefore, he has failed to preserve this issue for appellate review. See N.C.R. App. P. 10(a)(1) (2010). However, even assuming, *arguendo*, that defendant had preserved this argument, it is without merit.

In the instant case, the trial court conducted, in the presence of the jury, a brief *voir dire* examination of each of the victims to determine whether they knew what it meant to tell the truth. The trial court's questions were limited to a determination of the competency of the victims to testify pursuant to Rules 104 and 601 and did not constitute an erroneous expression of opinion by the trial court. See

Hensley, 120 N.C. App. at 321, 462 S.E.2d at 555; see also *State v. Baker*, 320 N.C. 104, 112, 357 S.E.2d 340, 344-45 (1987) (trial court's *voir dire* examination of child victim's understanding of duty to tell the truth in the presence of the jury not error, particularly when defendant made no request that the hearing be held outside the presence of the jury). This argument is overruled.

V. Conclusion

The trial court did not err by allowing defendant to represent himself when defendant knowingly and intelligently waived his right to counsel. In addition, the trial court did not abuse its discretion in denying defendant's request for an expert immediately prior to trial. Finally, the trial court did not err by conducting a brief *voir dire* examination into the competency of the child victims in the presence of the jury. Defendant received a fair trial, free from error.

No error.

Judges ERVIN and THIGPEN concur.

Report per Rule 30(e).