NO. COA12-1529
NORTH CAROLINA COURT OF APPEALS

Filed: 17 September 2013

STATE OF NORTH CAROLINA

v. Cumberland County
Nos. 08 CRS 52185-86, 52639, 52641

MARSHALL FONTANA WIGGS

Appeal by Defendant from judgments entered 18 May 2012 by Judge James G. Bell in Cumberland County Superior Court. Heard in the Court of Appeals 25 April 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Belinda A. Smith, for the State.

Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for the Defendant.

DILLON, Judge.

Marshall Fontana Wiggs (Defendant) appeals from judgments entered 18 May 2012 convicting him of three counts each of indecent liberties with a child, sexual offense of a child, and crime against nature; and two counts of first degree kidnapping. We find no error.

Sally[1] was born on 26 January 1999. Defendant is Sally's great-uncle. On 9 February 2008, Sally, who was nine years old, was visiting the home of her maternal great-grandparents in Wade, North Carolina. Defendant was also visiting the same home that day. At some point during the day, Sally was walking down a hallway in the home when Defendant grabbed her by the arm and pulled her into a bedroom. Defendant closed the door and locked it; then, Defendant took Sally's clothes off, placed her on the bed, and "molested" her. Defendant also took his clothes off, sat next to her, and touched her private area. Defendant made her touch him. Sally said, "he put his mouth down there," and he "lick[ed] the outside and then all around it."

While Defendant and Sally were in the bedroom, Sally's great-grandmother yelled that Sally's grandmother was coming. Defendant hurriedly got dressed and then got Sally dressed. Defendant then opened the door, and Sally's grandmother asked why Sally was in there. Sally's grandmother then called Sally's mother. Sally got on the phone with her mother, walked to the bathroom, and told her mother what had happened. Sally's mother called the police and traveled to the home to take Sally to the hospital. Defendant left the home in his car as Sally's mother

[1] "Sally" is a pseudonym used in this opinion to protect the identity of the juvenile victim.

arrived. At some point, Sally disclosed that the "same thing" had happened "a week or a couple days beforehand" and "[m]aybe the month before that," but that Defendant had not touched her with his mouth before the 9 February 2008 incident.

That same day, Defendant was stopped by two deputy sheriffs from the Cumberland County Sheriff's Office. During this stop, one of the deputies asked if Defendant would come to the sheriff's office to respond to allegations made against him. Defendant agreed and drove to the sheriff's office in his car. After the interview, Defendant left.

Later, deputies went to Defendant's residence, but Defendant was not there. However, a vehicle driven by Defendant, approached and stopped approximately 300 yards away from the residence. Defendant was apprehended and taken into custody.

Defendant was indicted on three counts of first degree statutory sexual offense, first degree kidnapping, crime against nature, and indecent liberties with a child. Defendant's case came on for trial at the 18 May 2012 criminal session of Cumberland County Superior Court.

Dr. Howard Loughlin testified at trial for the State as an expert in pediatrics, noting that Sally told him that it "had

hurt her when his mouth was in her private," and that the discomfort Sally described "was indicative . . . that it was something that she was experiencing or had experienced," rather than a story based on "something [she] could have walked in and seen[,]" such as "adults having sex or . . . pornography."

The jury returned guilty verdicts on all charges except for one of the first degree kidnapping charges. The court entered judgments consistent with the jury's verdicts sentencing Defendant to 288 to 355 months imprisonment on the consolidated convictions of first degree sex offense, first degree kidnapping, indecent liberties with a child, and crime against nature; and two terms of 19 to 23 months imprisonment on two additional indecent liberties with a child convictions, to be served consecutively. From these judgments, Defendant appeals.

I: Jury Instructions

In Defendant's first two arguments on appeal, he contends the trial court erred by instructing the jury on contradictory statements and on flight because the instructions were not supported by the evidence. We address each argument in turn.

"It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988).

"Failure to instruct upon all substantive or material features of the crime charged is error." *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989).

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973), *cert. denied*, 418 U.S. 905, 41 L. Ed. 2d 1153 (1974). "[A] trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *Id.* "Where jury instructions are given without supporting evidence, a new trial is required." *State v. Porter*, 340 N.C. 320, 331, 457 S.E.2d 716, 721 (1995).

A: Contradictory or Conflicting Statements

In Defendant's first argument on appeal, he contends the trial court erred by instructing the jury on false, contradictory, or conflicting statements of Defendant when the two sentences at issue did not warrant the instruction because,

according to Defendant, they were not contradictory. We disagree.

"It is established by our decisions that false, contradictory or conflicting statements made by an accused concerning the commission of a crime may be considered as a circumstance tending to reflect the mental processes of a person possessed of a guilty conscience seeking to divert suspicion and to exculpate [himself]." *State v. Walker*, 332 N.C. 520, 537, 422 S.E.2d 716, 726 (1992), *cert. denied*, 508 U.S. 919, 124 L. Ed. 2d 271 (1993) (citation and quotation marks omitted). An instruction on contradictory or conflicting statements "is proper not only where defendant's own statements contradict each other but also where defendant's statements flatly contradict the relevant evidence." *Id.* at 538, 422 S.E.2d at 726.

The evidence in this case shows that the following potentially contradictory statements are at issue: During direct examination, Defendant stated that Sally told him, "Uncle Marshall, I'm sorry. . . . They made me say this. . . . They made me say that you touched me and stuff." Also, when Defendant was asked about the same occurrence on cross-examination, Defendant testified, "What I meant to say is – and this is exactly the truth – is that [Sally] said that her mother

made her say things – I mean she – she apologized to me for – she thought she might have gotten me in trouble, I guess, or something. I don't know. She apologized to me, okay? Why would she apologize to me?" Defendant was cross-examined further regarding this occurrence as follows: "That's not what you told the police, did you? [Sally] came in and said she told – she had to tell her mother something, not her mother made her say something." Defendant responded, "Well, the actual truth of the matter is that's what she did say. I got it wrong here when I talked to [Detective] Brown, but what's – what she said – and my understanding of it was that her mother made her say this. I mean, she said, I'm sorry. I mean, she came outside and said that she was sorry, that her mother made her say – make this statement." [2]

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[2] Defendant also contends that the contradictory statement he made to police was never introduced into evidence. However, Defendant did not object at trial to the prosecutor's reference to Defendant's earlier statement to police, *State v. Lucas*, 302 N.C. 342, 349, 275 S.E.2d 433, 438 (1981) (stating that "[f]ailure to object to the introduction of evidence is a waiver of the right to do so"), and, on appeal, Defendant does not argue that the reference constituted plain error, *State v. Scercy*, 159 N.C. App. 344, 354, 583 S.E.2d 339, 345, *appeal dismissed and disc. review denied*, 357 N.C. 581, 589 S.E.2d 363 (2003) (holding that the defendant's failure to argue plain error in his brief constituted a waiver of appellate review of that issue).

Based on the foregoing evidence, the trial court gave the following instruction to the jury:

> The State contends and the defendant denies that the defendant made false, contradictory, or conflicting statements. If you find that the defendant made such statements, they may be considered by you as circumstances tending to reflect the mental process of a person possessed of a guilty conscience seeking to divert suspicion or to exculpate the person, and you should consider that evidence along with all the other believable evidence in the case. However, if you find that the defendant made such statements, they do not create a presumption of guilt, and such evidence, standing alone, is not sufficient to establish guilt.

We believe, in this case, the discrepancy between Defendant's two statements is apparent. Defendant admitted on cross-examination that he told Detective Brown that Sally "had to tell Mama something[,]" but later Defendant said that "her mother made her say this[.]" The discrepancy was further illuminated by Defendant's own acknowledgment of the discrepancy, by saying, "[w]hat I actually said or meant to say[,]" "[w]ell, the actual truth of the matter[,]" and "I got it wrong here[.]" Based on the foregoing, we believe the trial court did not err in instructing the jury on contradictory or inconsistent statements. *See Walker*, 332 N.C. at 538, 422 S.E.2d at 726.

B: Flight

In Defendant's second argument on appeal, he contends the trial court erred by instructing the jury on flight when the instruction was not supported by the evidence at trial. We disagree.

"[E]vidence of a defendant's flight following the commission of a crime may properly be considered by a jury as evidence of guilt or consciousness of guilt." *State v. Lloyd*, 354 N.C. 76, 119, 552 S.E.2d 596, 625 (2001) (citation and quotation marks omitted). "A trial court may properly instruct on flight where there is some evidence in the record reasonably supporting the theory that the defendant fled after the commission of the crime charged." *Id.* (citation and quotation marks omitted). However, "[m]ere evidence that defendant left the scene of the crime is not enough to support an instruction on flight[;] [t]here must also be some evidence that defendant took steps to avoid apprehension." *State v. Thompson*, 328 N.C. 477, 490, 402 S.E.2d 386, 392 (1991) (citation and quotation marks omitted). "So long as there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged, the instruction is properly given[;] [t]he fact that there may be other reasonable explanations for defendant's conduct does not render the

instruction improper." *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977) (citation omitted).

The evidence in this case shows the following with respect to flight: First, there is testimony in the record that when the deputies arrived at Defendant's residence to take him into custody, they saw a vehicle driven by Defendant approach, stop, turn around, and drive in the opposite direction. Second, there is testimony that after Defendant was apprehended and while he was handcuffed and seat-belted in the front seat of the patrol car, he unbuckled the seat belt, opened the door, and attempted to jump out. A deputy stopped Defendant from jumping and testified at trial, "After I grabbed him and brought him back towards me in a headlock to secure him and requested assistance, [Defendant] said, ['']My life was over; just kill me, or I wish I would just die.['] And he repeated that twice."

Based on the foregoing evidence, the trial court gave the following instruction to the jury:

> Flight. The State contends and the defendant denies that the defendant fled. Evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show a consciousness of guilt; however, proof of this circumstance is not sufficient in itself to establish the defendant's guilt.

We believe the evidence here was sufficient to warrant an instruction on flight. *See State v. Reeves*, 343 N.C. 111, 113, 468 S.E.2d 53, 55 (1996) (stating that evidence that "after shooting the victim, [the defendant] ran from the scene of the crime, got in a car waiting nearby, and drove away" was sufficient evidence to warrant a flight instruction); *compare State v. Thompson*, 328 N.C. 477, 490, 402 S.E.2d 386, 393 (1991) (stating that evidence that the defendant merely "dr[ove] away" was "not enough to warrant an instruction on flight").

II: Expert Testimony

In Defendant's final argument, he contends that the trial court committed plain error[3] by admitting Dr. Loughlin's expert testimony that Sally "had experienced" sexual abuse when Sally's medical examination did not provide physical evidentiary support of a diagnosis of sexual abuse. We find this argument unconvincing.

Review for plain error is limited to (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence. *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996), *cert. denied*, 525 U.S. 952, 142 L. Ed.

[3] Defendant did not object to Dr. Loughlin's testimony at trial; therefore, our review is limited to whether there was plain error in its admission.

2d 315 (1998). "In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008).

"In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has in fact occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility." *State v. Stancil*, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002). "However, an 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." *Id.*

In this case, the parties do not dispute that there was no physical evidence supporting a diagnosis of sexual abuse. Defendant contends that a certain portion of testimony by Dr. Loughlin was impermissible opinion testimony. Dr. Loughlin

testified that he asked Sally to describe what Defendant had done, using "standard diagrams" depicting a young girl and an adult male. Dr. Loughlin testified that Sally described various inappropriate physical contact that Defendant had made with her. He then testified as follows regarding his conversation with Sally:

> A: . . . And I said, Anything else? And she pointed to the mouth on the male diagram and said that his mouth had been in her private as well, and she spontaneously said that that had hurt her when his mouth was in her private.
>
> Q. And was that significant to you, the fact that it had hurt her?
>
> A. It is – it is one of the things that I consider in terms of trying to understand what's happened to a child and trying to figure out if this is something that they've really experienced or if it's something they could have walked in and seen adults having sex or seen pornography or something of that sort. So the fact that she was describing the discomfort – the pain was indicative to me that *it was something that she was experiencing or had experienced*.
>
> Q. So the sensory issue . . . the sensory description was a significant factor for you?
>
> A. Yes.

Defendant contends that the portion of Dr. Loughlin's testimony that "the pain was indicative to me that it was something that

she was experiencing or *had experienced*[,]" was plain error. We find this argument without merit. This case is distinguishable from those in which an expert has testified that sexual abuse had in fact occurred. *See Stancil*, 355 N.C. at 267, 559 S.E.2d at 789 (finding error when "a thorough examination and a series of tests revealed no physical evidence of sexual abuse," but "the trial court allowed Dr. Prakash, a pediatrician, to testify that the victim was 'sexually assaulted and [that there was] also maltreatment, emotionally, physically, and sexually'"); *State v. Trent*, 320 N.C. 610, 613, 359 S.E.2d 463, 465 (1987) (finding error when "[t]he exam showed no lesions, tears, abrasions, bleeding or otherwise abnormal conditions[;]" however, an expert was allowed to testify that "[t]he diagnosis was that of sexual abuse"); *see also State v. Parker*, 111 N.C. App. 359, 366, 432 S.E.2d 705, 709 (1993); *State v. Ewell*, 168 N.C. App. 98, 100, 606 S.E.2d 914, 916, *disc. review denied*, 359 N.C. 412, 612 S.E.2d 326 (2005). Dr. Loughlin's testimony in this case was similar to permissible testimony of experts concerning an exhibition of characteristics consistent with that of an abused child. *See State v. Grover*, 142 N.C. App. 411, 419, 543 S.E.2d 179, 184, *aff'd*, 354 N.C. 354, 553 S.E.2d 679 (2001) (stating that "while it is impermissible for an expert,

in the absence of physical evidence, to testify that a child has been sexually abused, it is permissible for an expert to testify that a child exhibits 'characteristics [consistent with] abused children'"). Further, given other incriminating evidence in the record, we cannot say that "the jury *probably* would have returned a different verdict" if this portion of Dr. Loughlin's testimony had been excluded. *State v. Lawrence*, 365 N.C. 506, 507, 723 S.E.2d 326, 327 (2012). Therefore, the admission of Dr. Loughlin's testimony did not constitute plain error.

NO ERROR.

Judge ELMORE and Judge GEER concur.

Report per Rule 30(e).