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NO. COA14-413
NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

STATE OF NORTH CAROLINA

v.

Robeson County
Nos. 11 CRS 5511
11 CRS 56104

TIMOTHY PAUL BRITT

Appeal by defendant from judgment entered 17 July 2013 by Judge Claire V. Hill in Robeson County Superior Court. Heard in the Court of Appeals 23 September 2014.

Roy Cooper, Attorney General, by Angenette Stephenson, Assistant Attorney General, for the State.

Parish & Cooke, by James R. Parish, for defendant-appellant.

DAVIS, Judge.

Timothy Paul Britt ("Defendant") appeals from his convictions for first-degree sexual offense with a child, taking indecent liberties with a child, and contributing to the delinquency of a juvenile. On appeal, Defendant asserts that the trial court (1) violated his right to a public trial by temporarily closing the courtroom; and (2) impermissibly

expressed an opinion regarding the truthfulness of Defendant's testimony during its jury instructions. After careful review, we conclude that Defendant received a fair trial free from error.

Factual Background

The State presented evidence at trial tending to establish the following facts: In 2011, Tabitha,¹ who was ten years old, lived with her father, stepmother, and two brothers. Defendant was 37 years old and lived with his mother, who Tabitha considered to be her aunt because Tabitha's stepmother was the niece of Defendant's mother.

On 16 August 2011, Tabitha was with her family at a funeral home when she spotted Defendant and asked him if she could stay overnight at his house as she had done on prior occasions. Tabitha's parents gave her permission to do so, and after leaving the funeral home, they drove Tabitha home where she packed an overnight bag. Later that evening, Defendant picked Tabitha up at her house. Defendant then drove her to his friend's house where Defendant and his friend drank beer while Tabitha played with the son of Defendant's friend for approximately an hour.

¹ The pseudonym "Tabitha" is used throughout this opinion to protect the privacy of the minor child.

Defendant then drove Tabitha to his house. Defendant started a fire in the backyard, and as he and Tabitha stood around the fire, Defendant drank beer and smoked a cigarette. Defendant shared both his beer and his cigarette with Tabitha. Eventually, Tabitha went inside the house and changed into her pajamas. Tabitha then laid down on the living room couch and began watching a movie on television. Shortly thereafter, Defendant entered the living room and asked if he could sit next to her on the couch. They watched the movie together, and as Tabitha grew tired, she put her legs on Defendant's lap.

Once the movie had ended and Tabitha started to get up, Defendant began kissing her and "sticking his tongue in [her] mouth." Defendant then began rubbing the upper part of Tabitha's legs and stuck his hand down her pants, touching the outer portion of Tabitha's vagina. Defendant proceeded to pull up Tabitha's shirt and lick her breasts. Defendant asked if he could "lick down there[,] " and Tabitha refused. Defendant then placed Tabitha's hand on his penis and asked her if she wanted to "suck it" but Tabitha once again refused. Defendant invited Tabitha to accompany him to his room, but she stated that she was "getting tired." She subsequently fell asleep on the couch. When Tabitha awoke, "[Defendant] was under [her] . . . sitting up straight."

Before Defendant drove Tabitha home the next morning, he warned her not to tell anyone what had occurred. Three days later, Tabitha described the events of that evening to her stepmother, who promptly informed Deputy William Howell ("Deputy Howell") of the Robeson County Sheriff's Office of what Tabitha said had transpired.

Deputy Howell interviewed Tabitha and her stepmother at their house and requested that they come to the Sheriff's Office. Detectives Kevin Hickman ("Detective Hickman") and Butch Howell ("Detective Howell") interviewed Tabitha and her stepmother and took a written statement from Tabitha.

The next morning, Detectives Hickman and Howell located Defendant, who voluntarily accompanied them to the Sheriff's Office for questioning. The detectives informed Defendant of Tabitha's allegations but told him that he was not under arrest and was free to leave. However, because Defendant began making incriminating statements, the detectives read him his *Miranda* rights. Defendant continued answering the detectives' questions, and Detective Hickman ultimately typed up Defendant's statement and read it to him. He also provided Defendant with an opportunity to read over the statement, which Defendant declined. Defendant then signed the typed statement. In the statement, Defendant admitted to putting his hand down Tabitha's

pants, rubbing her vagina, kissing her on the lips, having Tabitha rub his penis, and placing his hand on her breast.

On 6 September 2011, Defendant was indicted on (1) two counts of first-degree sexual offense with a child; (2) taking indecent liberties with a child; and (3) contributing to the delinquency of a juvenile. A jury trial was held in Robeson County Superior Court on 15 July 2013.

By order of the trial court, the courtroom was closed during Tabitha's testimony. The courtroom was open for every other portion of the trial.

Defendant testified on his own behalf. He denied ever touching Tabitha inappropriately or providing her with alcohol or cigarettes. He stated that after Tabitha entered his home on 16 August 2011, she immediately fell asleep on the living room couch, and Defendant did not speak with her again until the following morning. Defendant further testified that when he spoke with the law enforcement officers, he denied any improper conduct. At trial, he also denied having read the written statement prepared by Detective Hickman but stated that he had signed it anyway because the detectives had frightened him into doing so.

At the close of all the evidence, the jury returned a verdict finding Defendant guilty of (1) one count of first-degree sexual offense with a child; (2) taking indecent

liberties with a child; and (3) contributing to the delinquency of a juvenile. The remaining charge of first-degree sexual offense with a child was dismissed by the trial court. Defendant was sentenced to 300 to 369 months imprisonment. In addition, he was ordered to register as a sex offender for 30 years and to enroll in satellite-based monitoring for the remainder of his life. Defendant gave notice of appeal in open court.

Analysis

I. Courtroom Closure

Defendant first contends that the trial court erred in closing the courtroom during Tabitha's testimony. Specifically, Defendant argues that his constitutional right to a public trial was violated because (1) the State failed to advance an overriding interest establishing the necessity for the closure; and (2) the trial court's findings in support of the closure were inadequate.

The Sixth Amendment of the United States Constitution entitles criminal defendants to a "public trial." U.S. Const. amend. VI. This right has been articulated by the United States Supreme Court as follows:

The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers

keenly alive to a sense of their responsibility and to the importance of their functions. In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury.

Waller v. Georgia, 467 U.S. 39, 46, 81 L.Ed.2d 31, 38 (1984) (internal citations and quotation marks omitted). The strong presumption in favor of open trials, however, is not absolute. Trial courts may impose reasonable limitations on this right when there is "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* at 45, 81 L.Ed.2d at 38 (citation omitted). If a trial court determines that a courtroom closure is appropriate, "[t]he interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Id.* (citation and internal quotation marks omitted).

When deciding whether closure of the courtroom during a trial is appropriate, the trial court must: (1) determine whether the party seeking the closure has advanced an overriding interest that is likely to be prejudiced if the courtroom was not closed; (2) ensure that the closure is no broader than necessary to protect that interest; (3) consider reasonable alternatives to closing the proceeding; and (4) make findings adequate to support the closure.

State v. Williams, ___ N.C. App. ___, ___, 754 S.E.2d 418, 424 (2014) (citation and internal quotation marks omitted). "In

making its findings, the trial court's own observations can serve as the basis of a finding of fact as to facts which are readily ascertainable by the trial court's observations of its own courtroom." *State v. Godley*, ___ N.C. App. ___, ___, 760 S.E.2d 285, 288 (2014) (citation and internal quotation marks and brackets omitted). Trial courts "need not make exhaustive findings of fact, [but] must make findings sufficient for this Court to review the propriety of the trial court's decision to close the proceedings." *State v. Rollins*, ___ N.C. App. ___, ___, 729 S.E.2d 73, 79 (2012). This Court reviews the trial court's decision to close the courtroom *de novo*. *Williams*, ___ N.C. App. at ___, 754 S.E.2d at 424.

In the present case, the State moved to close the courtroom during Tabitha's testimony because "it is anticipated that the victim will have to testify in graphic terms to acts committed on her by the defendant [and that] the anticipated testimony will be sensitive and possibly embarrassing and humiliating to the victim." The trial court granted the State's motion, stating that

[t]he Court finds that the 12-year-old child, who was 10 at the time of the offenses, will be testifying with regards to graphic terms and body parts, and the Court does find that this testimony is sensitive and could be seen as embarrassing and humiliating. The Court will close the courtroom only during her testimony and won't be - courtroom will not be closed

during any other times at this point in time. The Court finds that this is necessary, that there is no – that this is limited in nature, and that there are no alternatives – no other alternatives or options.

The trial court subsequently entered an order providing, in pertinent part, as follows:

2. The victim in this matter is a 12 year old girl, [Tabitha], who will be testifying to the facts and circumstances surrounding the alleged sexual assault by the defendant. It is anticipated that the victim's testimony, at times, will be in graphic terms, including without limitation, sexual terms and anatomical parts of the body, and to acts done by the defendant;

3. The anticipated testimony will be sensitive and of a nature that may cause embarrassment and/or humiliation for the victim[.]

. . . .

7. Based upon the foregoing, this Court finds that due to the potentially graphic nature of the victim's testimony, to include sexual terms, anatomical parts of the body, and to acts done by the defendant, as well as the potential embarrassing and humiliating nature of the testimony, failure to close the courtroom during the victim's testimony will prejudice the overriding interest of minimizing the impact of the sensitive nature of the expected testimony of the victim.

8. Closing the courtroom only during the victim's testimony is no broader than necessary to protect that interest and there are no other reasonable alternatives available to closing the courtroom during her testimony.

9. Upon conclusion of the victim's testimony, the courtroom will be reopened to the public for the remainder of the trial.

Defendant contends that the first element of the *Waller* test was not met, claiming that the State never advanced any overriding interest that was likely to be prejudiced absent the closure of the courtroom and that finding of fact 7 is insufficient to satisfy this prong of *Waller*. We disagree.

The United States Court of Appeals for the Fourth Circuit has held that "safeguarding the . . . psychological well-being of a minor victim of sex crimes, including protecting them from further trauma and embarrassment, is precisely the type of compelling interest that can overcome the presumption in favor of an open trial." *Bell v. Jarvis*, 236 F.3d 149, 167-68 (4th Cir. 2000) (citation and internal quotation marks omitted). In *Bell*, the Fourth Circuit upheld the trial court's decision to close the courtroom during the minor victim's testimony regarding repeated acts of sexual abuse by the defendant. The Fourth Circuit stated that it had "no difficulty in determining that the state advanced a compelling interest in closing the courtroom while [the minor victim] testified." *Id.* at 167.

Furthermore, our Supreme Court has noted the compelling interest in protecting child victims by means of a limited courtroom closure.

Obviously, rape and other sexual offense cases involve matters of the most sensitive and personal nature. These considerations are compounded when a child of tender years is involved and is called upon to testify in strange surroundings before unknown persons as to matters the child may not fully understand. 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.

State v. Burney, 302 N.C. 529, 538, 276 S.E.2d 693, 698 (1981) (internal citation omitted).

For these reasons, we conclude that the trial court's findings were sufficient to satisfy the first *Waller* factor. As this was the sole basis for Defendant's appeal on this issue, Defendant's argument is therefore overruled.

II. Jury Instructions

Defendant next argues that a portion of the trial court's jury instructions "amounted to an impermissible comment on the defendant's testimony." We disagree.

N.C. Gen. Stat. § 15A-1232 provides that "[i]n instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved[.]" N.C. Gen. Stat. § 15A-1232 (2013). Similarly, N.C. Gen. Stat. § 15A-1222 states that "[t]he judge may not express during any stage of the trial, any

opinion in the presence of the jury on any question of fact to be decided by the jury." N.C. Gen. Stat. § 15A-1222 (2013).

Despite both Defendant's and the State's assertions in their briefs that plain error review should be applied as to this issue given that Defendant failed to object to the jury instruction at trial, we have consistently held that "[a] trial judge's expression of opinion on a question of fact violates the statutory mandates of N.C. Gen. Stat. §§ 15A-1222 and 1232, and therefore is preserved for *de novo* appellate review as a matter of law." *State v. Berry*, __ N.C. App. __, __, 761 S.E.2d 700, 703 (2014); *see also State v. Young*, 324 N.C. 489, 494, 380 S.E.2d 94, 97 (1989) ("The statutory prohibitions against expressions of opinion by the trial court contained in N.C.G.S. § 15A-1222 and N.C.G.S. § 15A-1232 are mandatory. A defendant's failure to object to alleged expressions of opinion by the trial court in violation of those statutes does not preclude his raising the issue on appeal."). We therefore review Defendant's argument on this issue *de novo*.

In the present case, the trial court used the relevant sections of the North Carolina Pattern Jury Instructions – almost verbatim – regarding "Admissions"; "Impeachment or Corroboration by Prior Statement"; and "False, Contradictory, or Conflicting Statements of Defendant." The trial court's instructions stated, in pertinent part, as follows:

If you find from the evidence that the defendant has admitted a fact relating to the crime charged in this case, then you should consider all the circumstances under which it was made in determining whether it was a truthful admission and the weight you will give to it.

Evidence has been received tending to show that at an earlier time a witness made a statement which may conflict or be consistent with the testimony of the witness at this trial. You must not consider such earlier statement as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial. If you believe the earlier statement was made and that it conflicts or is consistent of the testimony of the witness at this trial, you may consider this and all other facts and circumstances bearing upon the witness's truthfulness in deciding whether you will believe or disbelieve the witness's testimony.

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 a circumstance 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 this case. However, if you find that the defendant made such statement, they do not create a presumption of guilt; and such evidence, standing alone, is not sufficient to establish guilt.

Based on our review of the record, we conclude that the challenged portions of the trial court's instructions do not constitute error. At trial, the State introduced a prior

written statement signed by Defendant during his interview with law enforcement officers on 20 August 2011. That written statement conflicted with Defendant's testimony at trial. Therefore, we believe the trial court's decision to give the challenged instructions was appropriate.

Furthermore, in our view, the trial court did not express an opinion as to the truth or falsity of Defendant's testimony by giving these instructions. Rather, the trial court merely summarized the contentions of the parties without impermissibly expressing its belief as to which were true. See *State v. Figured*, 116 N.C. App. 1, 14, 446 S.E.2d 838, 846 (1994) ("[N.C. Gen. Stat. § 15A-1232] does not prohibit the judge from setting out the parties' contentions."). Accordingly, because Defendant has failed to show any error, Defendant's argument is meritless.

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from error.

NO ERROR.

Judges HUNTER, Robert C., and DILLON concur.

Report per Rule 30(e).