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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-314

Filed: 3 November 2015

Person County, Nos. 12 CRS 52110, 14 CRS 875

STATE OF NORTH CAROLINA

v.

NICHOLAS ADAM STONE

Appeal by Defendant from judgments entered 20 August 2014 by Judge W. Osmond Smith, III in Person County Superior Court. Heard in the Court of Appeals 23 September 2015.

Attorney General Roy Cooper, by Assistant Attorney General Caroline Farmer, for the State.

Jarvis John Edgerton, IV, for Defendant.

STEPHENS, Judge.

In this appeal, Defendant Nicholas Adam Stone contends the trial court erred in denying his motion to dismiss one of two felony child abuse charges against him and in reinstructing the jury in response to a question. Because Stone's appellate argument regarding the denial of his motion to dismiss differs from his argument in the trial court, we dismiss that issue as not being properly before us. We find no abuse of discretion in the trial court's reinstruction.

Factual and Procedural Background

On 10 December 2012, Stone was indicted for felony child abuse inflicting serious bodily injury pursuant to N.C. Gen. Stat. § 14-318.4(a3), and, on 6 February 2013, the State issued its notice of aggravating factors, including, *inter alia*, that the victim was very young, that the defendant took advantage of a position of trust, and that the defendant committed the offense while on probation. The alleged victim was Stone's son, "Jay,"¹ who was ten weeks old at the time of the offense. On 14 April 2014, a superseding indictment was issued charging Stone with felony child abuse inflicting serious bodily injury, to wit, a skull fracture Jay suffered on 15 November 2012. On 12 May 2014, Stone was indicted for a second count of felony child abuse inflicting serious physical injury pursuant to N.C. Gen. Stat. § 14-318.4(a). The May 2014 indictment alleged that Jay suffered a fractured arm as a result of Stone's abuse on 15 November 2012. The matter came on for trial at the 18 August 2014 criminal session of Person County Superior Court, the Honorable W. Osmond Smith, III, Judge presiding. The evidence at trial tended to show the following:

On the night of 15 November 2012, Jay suffered a traumatic injury which caused him to stop breathing. Jay was injured while at home alone with Stone. Stone reported that the family's 80-pound dog knocked Jay off a bed onto the floor and then jumped on top of Jay. Emergency medical workers transported Jay to the Duke

¹ We use a pseudonym to refer to the minor victim in an effort to protect his privacy.

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University Medical Center (“DUMC”) emergency room where Joseph Brian Borawski, M.D., performed a CAT scan and took chest X rays. The CAT scan revealed a skull fracture in one area and bleeding underneath the skull in a second area, while the X rays showed multiple healing rib fractures. Additional X rays taken a few days later showed several other fractures in various stages of healing, including, *inter alia*, fractures of Jay’s lower left leg, left big toe, and right arm. At trial, Borawski testified as an expert in emergency medicine and trauma and opined that neither falling off a bed nor being jumped on by a large dog could produce the force required to fracture the very pliable ribs and skull of a very young infant. Borawski testified that Jay’s skull and rib injuries were non-accidental.

Deehsa Mago Shah, M.D., an expert in pediatrics and pediatric intensive care, testified about her treatment of Jay after he was transferred from the emergency room and admitted to the DUMC Pediatric Intensive Care Unit. Shah testified that Stone told her that Jay’s injuries were the result of the family dog knocking the baby off a bed and then jumping on him. She also testified that further X rays revealed “[m]ultiple different fractures and broken bones He [Jay] had some on his left ribs, his left lower foot, his right arm.” In addition, Shah noted that Jay had bleeding in both eyes, suffered seizures, and experienced breathing difficulties.

Karen Sue St. Claire, M.D., medical director of the Duke Child Protection Team at DUMC, testified as a medical expert in pediatrics and child abuse about her

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investigation of possible causes for Jay's injuries. St. Claire summarized Jay's multiple extensive injuries as follows:

Initially, we knew that the baby had a broken skull back here in the back on the right. He had bleeding between his skull and his brain up in the front here. [A]n MRI . . . showed . . . some bleeding on the other side and along the little separation between the front part of the brain and the back part of the brain

. . . . He also has an actual injury to his brain where it looked like the brain had been deprived of oxygen in the . . . occipital lobes back here. . . .

. . . . [T]he full skeletal survey where we took pictures of all of the bones of his body, there were morbid fractures on the left. The[] 5th, 6th, 7th and probably the 8th ribs all had what we call subacute to chronic injuries; that means they're pretty old. They're at least a couple weeks old. They could be a month or two old. . . .

. . . .

. . . . We also found a fresh break in both wrist bones of the right arm. There's two bones that make up the forearm, the radius and the ulnar; and both of them had through and through fractures or breaks through both of those. They had no healing bone that was evident, so these were recent. By "recent," that could be anywhere from that day to a few days before that, because it takes probably about five days to start seeing healing bone on [X]ray. So I can't pinpoint the exact hour that this fracture occurred, but it was a recent injury and definitely a more recent injury than the ribs.

. . . .

He also had a[n] injury in his left lower leg. Just like the forearm has two bones, the lower legs have two bones, and

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the larger of those two bones is called the tibia. And that one had instead of a through and through fracture or break, it had an oblique. So it went up at an [angle] through the bone. It was right down by the left ankle. That was a subacute fracture. So that was kind of an age in between the oldest fractures and the newest fractures or broken bones. And so this looked to be something that was already starting to heal, but wasn't as far along healing as the rib fractures were.

....

The . . . first [X]rays that we did looked like there was a break in his left great toe. The toes have three bones. One's a long bone that[] makes up your foot, and there's two smaller bones that make up your toe. And the metatarsus is that long bone that makes up the first part of your foot.

And there was a break at the end of that bone So he actually had a break at the tip of his—his toe bone.

....

. . . [I]f you look at the spinal column . . . [a]t the L3 level—which is in the lumbar part of your spine, the part that starts to curve down here—he had a compression fracture And instead of having this nice, perfect little vertebra, there was a wedge to it, which shows that . . . there had been a compression fracture there. Compression fractures can't really be dated, so I—I don't know how old that particular fracture was.

St. Claire testified that nothing in her examination of Jay's medical records and history suggested any genetic predisposition to fragile bones. St. Claire noted that the bed from which Jay had fallen was actually a mattress and box springs set directly on the floor without any bed frame, such that the distance Jay allegedly had fallen

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on 15 November 2012 was only about 18 inches. She opined that such a “short fall” would be extremely unlikely to cause injuries like those Jay sustained. St. Claire particularly noted that the skull fracture and brain bleed were in different locations, suggesting that, although they occurred around the same time, the injuries had been caused by two different events. She further noted that Jay’s skull fracture and broken arm were the result of different types of force and could not have been caused by a single event.

Sergeant Ryan Weaver of the Person County Sheriff’s Department testified that Stone had given two different explanations for Jay’s injuries during interviews: that Jay had been knocked off the bed by the dog and that Stone had accidentally hit Jay’s head on a doorframe while holding the baby. Agent Justin Godwin of the State Bureau of Investigation also testified about his 26 November 2012 interview of Stone. Stone first told Godwin that the dog had caused Jay’s injuries, but, after being told that the evidence did not support that account, Stone stated that he had been angry at the dog and had tried to “fling[]” Jay into his crib, but missed, causing Jay to fall to the floor.

At the close of the State’s case, Stone moved to dismiss both charges, noting a special concern about the second child abuse charge:

I am particularly concerned as to the 2014 indictment that alleges the right arm injury as the injury to [Jay] as a separate charge. *That information in the light, even most favorable to the State, the doctor, although begrudgingly,*

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indicates that those injuries could not have happened at the same time. It's in the report. She read it. I read it to her.

And I have a real problem with the fact that *he is indicted on something that allegedly occurred on that date that even given the somewhat unprecise nature of what Dr. St. Claire testified to, that injury in that report, she says, couldn't have happened at the same time.* There were other forces she talked about.

He's not charged with any of that, as I've indicated with the other matters that are also included on the other indictment. But as to that one specifically, I think she has indicated, again, *in the light most favorable to the State that she doesn't believe from her report that those two injuries occurred at the same time.* It's highly unlikely, she says, in that report.

And for that reason, *I would ask the Court specifically as to that charge to dismiss that particular charge, because I don't believe the State, even through their expert witness, who I think testified truthfully, cannot establish when that happened. And we don't believe, at least based on what she said, that it could have happened on the same day; and that was her own testimony.*

(Emphasis added). The trial court denied that motion, and Stone elected to present no evidence. At the close of all evidence, Stone renewed his motion to dismiss, which the trial court denied.

The jury returned guilty verdicts on each charge, and Stone admitted the alleged aggravating factors. On 20 August 2014, the trial court imposed consecutive sentences totaling 150-204 months in prison. Stone gave notice of appeal in open court.

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Discussion

On appeal, Stone argues that the trial court (1) erred in denying his motion to dismiss the second count of child abuse and (2) plainly erred in reinstructing the jury. We dismiss Stone's first argument and find no error, let alone plain error, in the trial court's jury instructions.

I. Motion to dismiss

Stone first argues that the trial court erred in denying his motion to dismiss the second child abuse charge. Specifically, Stone contends that "the State failed to tender any evidence of a second assault as required to support a second conviction for child abuse[.]" We dismiss this argument as not properly preserved for appellate review.

"In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991). Our State's appellate courts "will not consider arguments based upon matters not presented to or adjudicated by the trial court. Even alleged errors arising under the Constitution of the United States are waived if [the] defendant does not raise them in the trial court." *State v. Haselden*, 357 N.C. 1, 10, 577 S.E.2d 594, 600 (citations and internal quotation marks omitted), *cert. denied*, 540 U.S. 988, 157 L. Ed. 2d 382 (2003); *see also Weil v. Herring*,

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207 N.C. 6, 10, 175 S.E. 836, 838 (1934) (holding that where the theory argued on appeal was not raised before the trial court, “the law does not permit parties to swap horses between courts in order to get a better mount” before an appellate court).

As noted *supra*, in the trial court, Stone explicitly argued that the second child abuse charge should be dismissed because, while the indictments listed both the skull fracture and broken arm as having occurred on 15 November 2012, the State failed to present any evidence to “establish when that happened”—Jay’s arm being broken—in light of St. Claire’s testimony that the skull fracture and broken arm “couldn’t have happened at the same time.” In other words, the argument Stone presented to the trial court was that the evidence was insufficient regarding the date on which the second charged incident of child abuse occurred, a date he argued was different from the date of the skull fracture. On appeal, Stone makes the opposite argument: that the evidence at trial was insufficient to show anything other than a single assault on 15 November 2012 which resulted in both Jay’s skull fracture and his broken arm. Because Stone’s appellate argument regarding his motion to dismiss the second child abuse charge was “not presented to or adjudicated by the trial court[,]” *see Haselden*, 357 N.C. at 10, 577 S.E.2d at 600, we cannot consider it on appeal. This argument is dismissed.

II. Jury instructions

Stone next argues that the trial court committed plain error in re-instructing the jury in response to a question submitted during deliberations. We first note that plain error is not the proper standard of review for this issue. A defendant need not object at trial to preserve his right to appeal clarifying instructions given by the trial court in response to questions from the jury. *See State v. Tucker*, 91 N.C. App. 511, 516, 372 S.E.2d 328, 331 (1988). Where a trial court clarifies its original instructions in response to a question from the jury, we review only for an abuse of discretion. *State v. Prevette*, 317 N.C. 148, 164, 345 S.E.2d 159, 169 (1986) (noting that “the trial court is in the best position to determine whether further additional instruction will aid or confuse the jury in its deliberations, or if further instruction will prevent or cause in itself an undue emphasis being placed on a particular portion of the court’s instructions”). “A trial court abuses its discretion if its determination is manifestly unsupported by reason and is so arbitrary that it could not have been the result of a reasoned decision.” *State v. Cummings*, 361 N.C. 438, 447, 648 S.E.2d 788, 794 (2007) (citations and internal quotation marks omitted), *cert. denied*, 552 U.S. 1319, 170 L. Ed. 2d 760 (2008). We see no abuse of discretion by the trial court here.

The trial court instructed the jury as follows:

In this case *regarding the alleged head injury*, in File No. 12-CRS-52110, the Defendant has been charged with felonious child abuse resulting in serious bodily injury to the alleged victim

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For you to find the Defendant guilty of this offense, the State must prove three things beyond a reasonable doubt:

First, that the Defendant was the parent of the child

Second, that at that time, the child had not yet reached his 16th birthday.

And, third, that the Defendant intentionally assaulted the child which proximately resulted in serious bodily injury to the child. A serious bodily injury is defined as a bodily 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.

. . . .

In this case *regarding the alleged arm injury* in File No. 14-CRS-875, the Defendant has been charged with felonious child abuse resulting in serious physical injury to the alleged victim For you to find the Defendant guilty of this offense, the State must prove three things beyond a reasonable doubt[:]

First, that the Defendant was a parent of the child

Second, that at that time, the child had not yet reached his 16th birthday.

And, third, that the Defendant intentionally assaulted the child which proximately resulted in serious physical injury to the child. A serious physical injury is such physical injury as causes great pain and suffering.

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Defendant did not object to these instructions at trial and has not asserted error as to the instructions on appeal.

During its deliberations, the jury submitted a note to the trial court which read: “Can you clarify why there are two separate charges please? Thanks.” In response to this inquiry, the trial court instructed the jury:

Defendant is charged with two separate counts of felonious child abuse. In one count, which is 12-CRS-52110, it is in reference to the alleged head injury. In that case, . . . *Defendant is accused of intentionally assaulting the child that resulted in serious bodily injury to the child.* And the definition of a “serious bodily injury” is in your instructions. That’s with regard to the alleged head injury.

In the other case, the other count, . . . Defendant—which is 14-CRS-875— . . . *Defendant is accused of child abuse resulting in serious physical injury to the child by intentionally assaulting the child resulting in serious physical injury,* and you will refer to your instruction as to the definition of “serious physical injury.” That’s with regard to the alleged arm injury.

So one charge is in reference to the alleged head injury. The other charge is in reference to the alleged arm injury. And you will note that there’s a definition of “serious physical injury” regarding the alleged arm injury count, and there’s a definition of “serious bodily injury” regarding the alleged head injury count.

Trusting that is clarified why there are two separate charges, in essence, the State has alleged that . . . Defendant has committed two separate crimes, and those are the allegations. You are to decide whether he is guilty or not guilty in each respective case based on the evidence and the facts that you find from the evidence.

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Stone contends that this re-instruction was erroneous because it authorized the jury to convict him on both child abuse counts on the basis of evidence of only one assault and “improperly emphasized the requirement of separate harms while not clearly articulating the requirement of separate assaults.”

As revealed by the transcript portions quoted *supra*, the court’s reinstruction is virtually identical to the original jury instruction, except that the trial court did not reinstruct on the first two elements of felonious child abuse—that Stone was Jay’s parent and that Jay was under the age of 16 years. Those elements were neither contested at trial nor pertinent to the jury’s question, and thus the trial court’s decision not to repeat them was entirely appropriate. *See State v. Dawson*, 278 N.C. 351, 365, 180 S.E.2d 140, 149 (1971) (“[N]eedless repetition is undesirable and has been held erroneous on occasion.”). We conclude that that the trial court did not abuse its discretion in giving the reinstruction in response to the jury’s question, and accordingly, we overrule this argument.

DISMISSED IN PART; NO ERROR IN PART.

Judges MCCULLOUGH and ZACHARY concur.

Report per Rule 30(e).