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NO. COA03-1452

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2004

STATE OF NORTH CAROLINA

v.

MICHAEL CREVEST WILLIAMS

Guilford County
Nos. 01 CRS 103482-
90, 01 CRS 103492

Appeal by defendant from judgments entered 15 November 2002 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 31 August 2004.

Attorney General Roy Cooper, by Assistant Attorney General Anita Leveaux for the State.

Marlet L. Massey for defendant appellant.

McCULLOUGH, Judge.

Defendant Michael Crevest Williams appeals after being found guilty of ten counts of indecent liberties with a child, two counts of first-degree sexual offense with a child, and two counts of attempted first-degree rape of a child. The State's evidence tended to show that S.M., who was fourteen years old at trial, lived with her mother. The pair also lived with S.M.'s sister and her sister's four children. Defendant also resided in the household.

The oldest child, M.M., testified that just before she entered the seventh grade, defendant touched her inappropriately while her mother was at work. Defendant would ask her to sit on his lap and

then rub her chest. The victim asked defendant to stop, but he refused. Defendant would also touch M.M. around her vagina and try to force his hand into the vaginal area through her underwear. This happened about five times. Two of the other children told M.M. that defendant did similar things to them. The girls did not tell their mother because they were afraid of defendant.

S.M. testified that when she was twelve years old, defendant would stare at her with a funny look. One day, when S.M. was alone in the home, defendant told her to come to his bedroom and sit on his lap. Defendant started kissing her and putting his tongue in her mouth. When S.M. turned thirteen, defendant tried to have sex with her in his bed. S.M. noted all of this in her diary.

S.M.'s sister became aware of the situation after reading S.M.'s diary. When defendant came home, he insisted that S.M. was telling a lie. He also proceeded to beat S.M. through every room of the house with his hands and a belt.

In addition to beating S.M., defendant tried to have sex with her on more than five occasions. S.M. also stated that defendant would try to put his fingers, hand, and penis into her vagina.

S.M. met with a physician at Moses Cone Hospital, Dr. Angela Stanley, and a counselor, Kim Madden. At the time, S.M. was afraid and initially lied about the sexual abuse. M.M. also met with Kim Madden. M.M. explained that her mother told the girls they could go shopping and get their nails done if they did not say anything to Dr. Stanley.

L.W. testified that when she was ten years old, defendant would call her into his room. He would tell her to sit on his lap and proceed to touch her chest and private area. On more than five occasions, defendant put his finger into her vagina.

When L.W. went to the hospital, she did not mention the abuse because her mother and defendant instructed her not to say anything. The first person L.W. told was her foster parent.

Dr. Stanley examined the alleged victims and testified that S.M.'s vaginal wall had a huge hymenal tear consistent with S.M.'s allegations of sexual abuse. L.W. had no tears in her vagina.

Defendant took the stand and denied sexually abusing the girls.

On 15 November 2002, the jury found defendant guilty of ten counts of indecent liberties with a child, two counts of first-degree sexual offense with a child, and two counts of attempted first-degree rape of a child. The trial court imposed a sentence of 480-585 months in the North Carolina Department of Corrections. Defendant appeals.

On appeal, defendant argues that the trial court erred by (1) failing to rule on a motion to sequester, (2) excluding evidence of another perpetrator, (3) allowing evidence in violation of the best evidence rule, (4) excluding evidence showing that defendant's wife was served with a petition to terminate parental rights, (5) interrupting defendant while he was testifying, and (6) failing to thoroughly investigate allegations of juror misconduct. We

disagree and conclude that defendant received a fair trial free from reversible error.

I. Failing to Rule on the Motion to Sequester

Defendant argues that the trial court erred by failing to rule on a motion to sequester the guardian ad litem. To preserve a question for appellate review, a party must make an objection and *obtain a ruling* from the trial court. N.C.R. App. P. 10(b)(1) (2004). In the present case, defendant did request that the guardian ad litem be sequestered while the girls testified, and the trial judge indicated that she would consider the issue during the lunch break. The record shows that the judge did take a lunch recess at 12:41 p.m., but there is no evidence that defendant obtained a ruling when court reconvened at 2:06 p.m. From there, the record fails to show that the issue was discussed at any other point during the trial. Because defendant failed to obtain a ruling on the motion to sequester, this issue has not been preserved for appellate review. This assignment of error is overruled.

II. Exclusion of Evidence

Defendant argues that the trial court erred in excluding evidence of another perpetrator. We disagree.

First, although the trial court did exclude some testimony regarding the possibility that another person, S.M.'s cousin, could have been the perpetrator, some of this evidence did reach the jury. Kim Madden testified that S.M. told her that her cousin

touched her inappropriately. Madden also mentioned that S.M. claimed to mix up her cousin with defendant. S.M. testified that she did not remember telling Madden that her cousin had sexually abused her. By questioning these witnesses, defendant's attorney raised the possibility that S.M.'s cousin was the perpetrator, rather than defendant.

Even if we assume *arguendo* that additional evidence was excluded improperly, "[n]ot every erroneous ruling on the admissibility of evidence will result in a new trial." *State v. Knox*, 78 N.C. App. 493, 496, 337 S.E.2d 154, 157 (1985). Defendant is only entitled to a new trial if "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2003). "The burden of showing such prejudice under this subsection is upon the defendant." *Id.*

In this case, there is not a reasonable possibility that a different result would have been reached, even if additional evidence of another perpetrator had been admitted. Here, the evidence of *this defendant's* guilt was overwhelming. The State's evidence tended to show a pattern of abusive behavior in which defendant harmed multiple victims on multiple occasions. Ultimately, the jury convicted defendant of *ten* counts of indecent liberties with a child, *two* counts of first-degree sexual offense with a child, and *two* counts of attempted first-degree rape of a child. If this case had involved mistaken identity and a single

act with a single victim, competent evidence of another perpetrator may have been compelling. Here, however, that is not the case. Three different victims testified that this defendant was guilty of the crimes charged, and the jury rejected defendant's claims to the contrary. Because the evidence of defendant's guilt was overwhelming and a different result would not have been reached if the challenged evidence had been admitted, this assignment of error is rejected.

III. Best Evidence Rule

Defendant suggests that the trial court violated the best evidence rule by failing to have S.M.'s diary entered into evidence. We disagree.

"To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." N.C. Gen. Stat. § 8C-1, Rule 1002 (2003). "The best evidence rule applies only when the 'content' of a writing, recording, or photograph is in question." 2 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 254 (6th ed. 2004). "However, if the fact exists independently of such content, it may be proved by other competent evidence, such as oral testimony by one with knowledge, without producing or accounting for nonproduction of the original[.]" *Id.*

In the present case, the contents of a writing were not in question. In her testimony, S.M. offered a firsthand account of defendant's alleged abuse. Since a witness with personal knowledge

testified to facts that exist independently of the diary which recorded those same facts, the best evidence rule does not apply. This assignment of error is overruled.

IV. Rule 403 Evidence

Defendant argues that the trial judge erred by excluding evidence that defendant's wife was served with a petition to terminate parental rights. Defendant contends that this was a witness intimidation tactic that infringed upon defendant's ability to present witnesses to establish his defense. This argument is meritless.

Pursuant to N.C. Gen. Stat. § 8C-1, Rule 403 (2003):

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Defendant cites *State v. Mackey*, 58 N.C. App. 385, 387-88, 293 S.E.2d 617, 619, *disc. review denied, appeal dismissed*, 306 N.C. 748, 295 S.E.2d 761 (1982) for the following proposition: "Substantial government interference with the voluntariness of a witness's choice of whether or not to testify and with the content of that testimony infringes on a defendant's constitutional right to present witnesses to establish his defense." In *Mackey*, this Court ordered a new trial after a prosecutor pressured a defense witness into changing his testimony. *Id.* at 387, 293 S.E.2d at 618.

The situation in the present case is not comparable to the factual scenario in *Mackey*. Here, defendant's wife had prior knowledge that her parental rights were going to be terminated. More importantly, defendant's wife could not explain how her testimony would have been different if she had not received the petition to terminate parental rights. Finally, unlike the witness in *Mackey*, defendant's wife was never intimidated or encouraged to modify her testimony in any way.

Under these circumstances, we cannot conclude that the exclusion of this evidence prejudiced defendant. We believe that the trial judge was correct in excluding the evidence under Rule 403. This assignment of error is overruled.

V. Limiting the Scope of Examination

Defendant contends that the trial judge erred by limiting the scope of his testimony. In particular, defendant's attorney asked, "Mr. Williams, is there anything else that you would like this Court to know about this case?" At that point, the trial judge instructed defendant's attorney to ask "specific questions." Defendant's attorney proceeded to ask another general question about whether defendant had anything else to say about the victims. Once again, the trial judge told defendant's attorney that this was not satisfactory. At that point, defendant's attorney asked no further questions.

Pursuant to N.C. Gen. Stat. § 8C-1, Rule 611(a) (2003):

The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1)

make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

One legal expert has described the court's authority in this way: "Although there is no rigid rule against permitting a witness to tell what he knows about the case in his own way, it is customary to ask more specific questions, designed to develop his testimony more logically, to keep it within proper bounds, and to give opposing counsel an opportunity to object to inadmissible evidence before the jury has heard it." 1 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 168 (6th ed. 2004). "The conduct of the examination is largely in the control of the trial judge." *Id.* (emphasis added).

We believe that the trial judge acted reasonably in limiting the scope of defendant's testimony. By encouraging defendant's attorney to ask more specific questions, the trial judge complied with Rule 611(a). The judge's purpose was to make the interrogation effective for the ascertainment of the truth, rather than to prevent defendant from asserting his defense. Accordingly, this assignment of error is rejected.

VI. Juror Misconduct

Defendant argues that the trial court erred by allowing jurors to continue to deliberate after an allegation of possible juror misconduct. Defendant suggests that the trial court did not conduct a thorough and careful investigation to determine if there was any misconduct.

Under N.C. Gen. Stat. § 15A-1061 (2003), "[t]he judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." "Whether a motion for mistrial should be granted is a matter which rests in the sound discretion of the trial judge." *State v. Harris*, 145 N.C. App. 570, 576, 551 S.E.2d 499, 503 (2001), *disc. review denied, appeal dismissed*, 355 N.C. 218, 560 S.E.2d 146-47 (2002). "The decision to grant or deny such a motion will not be disturbed on appeal unless it is so clearly erroneous as to amount to a manifest abuse of discretion." *Id.* The rationale behind this deferential standard is that the trial judge is in a better position to conduct this kind of investigation. *Id.*

In the present case, two individuals overheard a few jurors discussing the case in the bathroom. The trial court made an inquiry and asked the men what they heard. Both men revealed that the jurors were inquiring about whether they needed to be at court for the sentencing phase of the case. Ultimately, the judge decided not to take action because the conversation was about a scheduling matter, rather than the substance or merits of the case. The judge also noted that at least one of the jurors had a scheduling conflict and had inquired about whether the jury would have to stay after 5:00 p.m.

We believe that the trial judge did not abuse her discretion in this case. There is no question that the trial judge conducted

an investigation as soon as she was aware of potential misconduct. The judge listened to the men who overheard the conversation and determined that the jurors were talking about a scheduling matter, rather than the merits of the case. We acknowledge that, if possible, the better practice would have been to conduct a *voir dire* of the jurors themselves. However, it is unclear from the record whether the men who overheard the conversation actually saw which jurors were speaking. In any event, defendant has failed to show that an abuse of discretion has occurred. Therefore, this assignment of error is overruled.

After a careful review of the transcript, record, briefs, and arguments of the parties, we conclude that defendant received a fair trial free from reversible error.

No error.

Judges TIMMONS-GOODSON and HUNTER concur.

Report per Rule 30(e).