

NO. COA14-443

NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2014

STATE OF NORTH CAROLINA

v.

Buncombe County
No. 10 CRS 052714

ANDREW GRADY DAVIS

Appeal by defendant from judgment entered 10 June 2013 by Judge C. Phillip Ginn in Buncombe County Superior Court. Heard in the Court of Appeals 23 September 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General K. D. Sturgis, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for defendant-appellant.

HUNTER, Robert C., Judge.

Andrew Grady Davis ("defendant") appeals from judgment entered after a jury convicted him of assault with a deadly weapon, first degree burglary, and first degree rape. On appeal, defendant argues that the trial court erred by preventing him from presenting evidence as to: (1) the conditions of the Asheville Police Department ("APD") evidence refrigerator; (2) prior sexual behavior of the complaining

witness; and (3) the investigators' failure to comply with sexual assault evidence collection protocols. Additionally, defendant contends that the trial court erred by ordering him to register as a sex offender and enroll in satellite-based monitoring ("SBM") for the remainder of his life.

After careful review, we conclude that the trial court did not err in excluding evidence pertaining to the conditions of the APD refrigerator, did not commit prejudicial error by excluding evidence of the victim's prior sexual behavior, but did err by enrolling defendant in SBM under an inapplicable statute. Accordingly, we remand the case for resentencing.

Background

The following evidence was presented at trial: On the night of 22 September 2001, C.W.¹ was dropped off at her townhouse apartment in Asheville, North Carolina. After putting on her pajamas and watching television, she fell asleep on the downstairs couch; her roommate was asleep upstairs. C.W. awoke to the sound of someone coming through the unlocked sliding glass patio door. An individual shoved C.W.'s face onto the couch, put a knife to her neck, and threatened to kill her if she screamed. The assailant put a cloth or sock into C.W.'s

¹ A pseudonym will be used to protect the privacy of the alleged victim.

mouth, pulled off her shorts, and vaginally raped her with his penis. The assailant ran the knife over C.W.'s body, leaving scratches on her buttocks and arm. The attacker then stopped abruptly and covered C.W. with a blanket. C.W. testified that because it was dark and she was facing toward the couch, she could not see the assailant's face, but could tell from seeing his arm that he was Caucasian. After she was sure that the assailant had gone, C.W. ran to her neighbor Keith Bartell's ("Bartell's") house and called the police.

C.W. was taken to the hospital, where nurses treated her wounds and performed a sexual assault examination. Medical personnel collected clothing samples, oral swabs, pubic hair combings, and vaginal smears using the sexual assault kit. C.W. told the medical staff that she wasn't sure whether her attacker ejaculated or used a condom. However, she did say that Bartell was not the man who raped her.

During the time period leading up to the attack, Bartell was preparing to move to California and drive there with defendant, who had become Bartell's friend after working in a restaurant together. Three or four days after the rape occurred, defendant and Bartell drove to California, playing golf at various courses along the way. Defendant stayed with

Bartell for a few days in California then flew back to Asheville.

Frances Morris ("Morris") of the APD took custody of the sexual assault kit performed on C.W. and stored it in the APD evidence room. On 16 February 2005, the sexual assault kit was submitted to the North Carolina Crime Laboratory at the State Bureau of Investigation ("SBI"). On 28 April 2005, ReliaGene Technologies ("ReliaGene"), a private DNA testing company located in New Orleans, Louisiana, received the sexual assault kit from the SBI. For several weeks after Hurricane Katrina made landfall in the area, ReliaGene's building had intermittent power. Some of the refrigerators and freezers were moved to a temporary satellite facility in Baton Rouge. After testing the sexual assault kit ("the 2005 lab test"), ReliaGene identified a single profile of cells matching a known sample from C.W. as well as a profile of a single sperm donor. At the time, there was no known sample from defendant to compare to the sperm cell in the assault kit. An SBI employee took custody of the sexual assault kit and the DNA extracts produced by ReliaGene on 16 February 2007.

In March 2010, defendant was charged with offenses relating to the 2001 attack on C.W. Morris, the APD evidence

technician, took two oral swabs from defendant and submitted them to the SBI for analysis ("the 2010 lab test"). The SBI Crime Laboratory conducted an additional analysis of the oral and vaginal swabs contained in C.W.'s sexual assault kit. Like ReliaGene, the SBI developed a profile of a single sperm donor in the vaginal swabs. After comparing the sperm profile with the known sample from defendant's oral swab, the SBI found that the sperm matched defendant's DNA. On 15 October 2010, the vaginal and oral swabs in the sexual assault kit, the oral swabs taken from defendant, the DNA extracts generated by ReliaGene, and the DNA extracts generated by the SBI were all mailed back to the APD in one envelope.

On 14 March 2012, APD investigators met to examine the physical evidence collected in the case. The oral swabs taken from defendant were readily located but the swabs from C.W. in the sexual assault kit and the DNA extracts produced by ReliaGene and the SBI could not be found. On 21 March 2012, the APD located the DNA extracts created by ReliaGene and the SBI in a sealed envelope in the APD refrigerator, and on 18 April 2012, the APD located the vaginal and oral swabs in the sexual assault kit in an envelope on a shelf in the property room.

In October 2012, Cellmark Forensics ("Cellmark"), another private DNA testing facility, received the sexual assault kit and the swabs taken from defendant to conduct additional testing ("the 2012 lab test"). They did not conduct their analysis using the DNA extracts produced by ReliaGene or the SBI, which were found in the APD refrigerator. Once again, the sperm cell fraction from the vaginal swabs in the sexual assault kit was found to match defendant's DNA. Additionally, two socks found at the scene of the crime produced partial DNA results of at least two people, including at least one male, with profiles that could not exclude C.W. and defendant as contributors.

Defendant was tried during the 3 June 2013 criminal session in Buncombe County Superior Court. The jury convicted defendant of first degree rape, first degree burglary, and assault with a deadly weapon, but acquitted him of first degree kidnapping. Defendant was sentenced to consecutive terms of 285 to 351 months and 75 to 99 months imprisonment and was ordered into lifetime enrollment in SBM. Defendant filed timely written notice of appeal.

Discussion

I. Evidentiary Rulings on APD Evidence Room Conditions

Defendant first argues that the trial court erred by preventing him from presenting evidence regarding the conditions of the APD evidence room refrigerators, namely, that the refrigerators were moldy and that evidence was kept in a disorganized and non-sterile environment. The trial court excluded this evidence as irrelevant under Rule 401 of the North Carolina Rules of Evidence and because its probative value was substantially outweighed by the risk of unfair prejudice pursuant to Rule 403. After careful review, we find no error in the trial court's rulings.

Standard of Review

"Whether or not to exclude evidence under Rule 403 of the Rules of Evidence is a matter within the sound discretion of the trial court and its decision will not be disturbed on appeal absent a showing of an abuse of discretion." *State v. McCray*, 342 N.C. 123, 131, 463 S.E.2d 176, 181 (1995). "A trial court's ruling on relevant evidence is not discretionary and therefore is not reviewed under the abuse of discretion standard." *State v. Moctezuma*, 141 N.C. App. 90, 94, 539 S.E.2d 52, 55 (2000).

Although the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal. Because the trial

court is better situated to evaluate whether a particular piece of evidence tends to make the existence of a fact of consequence more or less probable, the appropriate standard of review for a trial court's ruling on relevancy pursuant to Rule 401 is not as deferential as the "abuse of discretion" standard which applies to rulings made pursuant to Rule 403.

State v. Blackney, __ N.C. App. __, __, 756 S.E.2d 844, 847 (2014) (citation omitted).

A. Rule 401

Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2013); *Moctezuma*, 141 N.C. App. at 93, 539 S.E.2d at 55. Generally, any evidence that is relevant is admissible. N.C. Gen. Stat. § 8C-1, Rule 402 (2013).

Here, defendant sought to introduce evidence regarding an investigation into the APD evidence room in April 2011 after narcotics stored for drug trafficking cases had gone missing. Specifically, defendant proffered photographs taken during that investigation depicting the conditions of the evidence room refrigerators. Based on our *in camera* review of the sealed documents, we agree with defendant that the photographs show

substandard conditions. The photographs reveal what appears to be a mold-like substance growing in one of the refrigerators. A caption included on one of the photographs contained the notation that "[t]he refrigerated storage was not inventoried to date." Multiple envelopes and bags containing DNA evidence were kept in various cardboard liquor bottle boxes with no discernable organization. Defendant argues that because the DNA testing linking him to the semen found inside C.W.'s vagina was crucial to his conviction, the evidence pertaining to the conditions of the APD evidence refrigerators was relevant and crucial to his defense. Although we find the conditions of the APD evidence room refrigerator disturbing, we disagree with defendant's contention.

Independent lab tests on the swabs included in the sexual assault kit were conducted on three separate occasions - in 2005, 2010, and 2012. It is undisputed that the sexual assault kit was either at ReliaGene or the SBI from April 2005 to June 2010, when the first two tests were conducted. Therefore, the conditions of the APD evidence room refrigerator have no bearing on the chain of custody or reliability of those tests. Accordingly, this evidence is clearly irrelevant to the extent that it pertains to the 2005 and 2010 tests, the latter being

the first to conclude that defendant's DNA matched the sperm profile taken from C.W.'s vagina.

Additionally, the only pieces of physical evidence found in an APD evidence room refrigerator were the physical DNA extracts produced by ReliaGene and the SBI during the 2005 and 2010 tests. The 2012 lab test was done "from scratch," meaning that the original swabs in the sexual assault kit and swabs taken from defendant's mouth were used to conduct the analysis. Defendant concedes that this evidence was located on 18 April 2012 on a shelf in the APD's evidence room, not in a refrigerator.

Although defendant argues that the trial court's refusal to admit the proffered evidence regarding the APD evidence room "denied [defendant] a meaningful opportunity to present a complete defense," he fails to adequately demonstrate the connection between his defense and the APD evidence room refrigerator conditions in 2011. It is undisputed that no pieces of physical evidence were in APD custody from 2005 to 2010, when two tests were conducted confirming the presence of one semen profile in C.W.'s vagina, with the latter test matching defendant's DNA to that profile. Further, there is no indication that any pieces of physical evidence used to conduct

further DNA analysis were stored in the APD refrigerators. Given that the conditions of the APD refrigerators had no tendency to "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," *Moctezuma*, 141 N.C. App. at 93, 539 S.E.2d at 55, and keeping in mind the "great deference" we give to a trial court's rulings in this context, *Blakney*, __ N.C. App. at __, 756 S.E.2d at 847, we find no error in the trial court's ruling that evidence pertaining to the condition of the APD refrigerator in 2011 was irrelevant under Rule 401.

B. Rule 403

Although the State does not offer argument in support of the trial court's conclusion that this evidence was also inadmissible under Rule 403, we also find no error in that determination. "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." N.C. Gen. Stat. § 8C-1, Rule 403 (2013). As noted above, because defendant's proffered evidence regarding the state of the APD refrigerator

is irrelevant to any issue in this case, its probative value is necessarily minimal. In contrast, the photographs of the APD refrigerators may have confused the issues and misled the jury into discounting the quality or reliability of the DNA analyses linking defendant to the crime, despite there being no connection among them. Therefore, we find no abuse of discretion in the trial court's 403 ruling. See *McCray*, 342 N.C. at 131, 463 S.E.2d at 181.

II. Rule 412 Evidence

Defendant next argues that the trial court erred by preventing him from presenting evidence that C.W. had a consensual sexual encounter with Bartell within 72 hours of the rape and the investigators failed to follow their protocol for collecting physical evidence. We find no prejudicial error.

Rule 412 of the North Carolina Rules of Evidence is also known as the "rape shield law." See *State v. Edmonds*, 212 N.C. App. 575, 578, 713 S.E.2d 111, 114 (2011). In relevant part, Rule 412 provides that the sexual behavior of a complainant is irrelevant and therefore inadmissible unless such behavior "[i]s evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant[.]" N.C. Gen. Stat. § 8C-1, Rule

412(b)(2) (2013). "We review the trial court's rulings as to relevance with great deference. . . . We believe that the same deferential standard of review should apply to the trial court's determination of admissibility under Rule 412." *State v. Khouri*, 214 N.C. App. 389, 406, 716 S.E.2d 1, 12-13 (2011).

Here, defendant sought to offer evidence tending to show that C.W. and her neighbor, Bartell, had a consensual sexual encounter the day before the rape occurred. Defendant also sought to admit into evidence a form containing the applicable protocol for collecting physical evidence. It provided in relevant part that "[i]n sexual assault cases, known blood must also be submitted from any consensual sexual partners of the victim within seventy-two hours of the assault, if DNA typing is requested." It is undisputed that no biological sample was taken from Bartell or anyone else besides C.W. and defendant. Therefore, defendant argues that the investigators' failure to obtain a DNA sample from Bartell meant that "he was never excluded as the source of the semen" found in C.W.'s vagina during the sexual assault examination.

We agree with defendant that evidence pertaining to C.W.'s prior sexual encounter with Bartell was relevant under Rule 412 and was improperly excluded. In *State v. Fortney*, 301 N.C. 31,

41, 269 S.E.2d 110, 115 (1980), our Supreme Court held that evidence of specific instances of sexual conduct "offered for the purpose of showing that the act or acts charged were not committed by the defendant" was "clearly intended, inter alia, to allow evidence showing the source of sperm, injuries or pregnancy to be someone or something other than the defendant." The Court included a footnote observing that the original draft of the rape shield law expressly provided for evidencing showing "an origin of semen other than the alleged defendant." *Id.* at 41, n.2, 269 S.E.2d at 116, n.2. As indicated by the protocol with which the investigators failed to comply, evidence of C.W.'s prior sexual encounter with Bartell the day before the rape was relevant insofar as it may have provided an alternative explanation for the existence of semen in C.W.'s vagina. Therefore, because the trial court excluded relevant evidence under Rule 412(b)(2), it committed error.

However, we review errors committed by the trial court in excluding relevant evidence under Rule 412 for prejudice. See *State v. Ollis*, 318 N.C. 370, 377, 348 S.E.2d 777, 782 (1986) (citing N.C. Gen. Stat. § 15A-1443 in support of its conclusion that a defendant was prejudiced by the exclusion of evidence under Rule 412(b)(2)). In order to establish prejudice,

defendant bears the burden of showing 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) (2013). Defendant has failed to carry that burden here. Although Bartell was not specifically excluded as the source of the sperm in C.W.'s vagina, there is no reasonable possibility that a different result would have been reached at trial had defendant been able to admit evidence of C.W.'s prior sexual encounter with Bartell. First, C.W. told the hospital staff during her sexual assault evaluation that Bartell used a condom during their consensual sexual encounter the day before the rape, and she was certain that her attacker was not Bartell. Second, multiple independent tests showed that defendant's DNA matched the sperm found in C.W.'s vagina. An expert in DNA analysis testified that "the probability of randomly selecting an unrelated individual with a DNA profile that matches [the sample found in C.W.'s vagina] is one in greater than one trillion, which is more than the Caucasian, Black, Lumbee Indian and Hispanic populations." Thus, Bartell was effectively excluded as a source for the semen in C.W.'s vagina, despite the fact that his DNA was not specifically analyzed.

Because defendant has failed to demonstrate a reasonable possibility that the verdict would have been different had the evidence of C.W.'s sexual encounter with Bartell been admitted, the trial court did not commit prejudicial error.

III. SBM and Sentencing

In his final argument on appeal, defendant contends that the trial court erred by submitting him to lifetime sex offender registration and SBM. The State concedes that the trial court erred and that this matter should be remanded for resentencing. We agree. The trial court imposed SBM based on its determination that defendant's conviction for first degree rape constituted an "aggravated offense" as defined by N.C. Gen. Stat. § 14-208.6(1a). However, this statute became effective on 1 October 2001 and applies only to offenses committed on or after that date. See 2001 N.C. Sess. Law 373, Sec. 12. Because the date of the offense in this case was 22 September 2001, it cannot be considered an "aggravated offense" for the purposes of section 14-208.6(1a). Thus, we conclude that the trial court erred by utilizing an inapplicable statutory provision in its determination. Accordingly, we remand for resentencing.

Conclusion

For the foregoing reasons, we conclude that the trial court did not err in its evidentiary ruling regarding the photographs of the APD refrigerator, and it did not commit prejudicial error in excluding evidence under Rule 412. However, because the trial court erroneously ordered defendant into SBM enrollment under an inapplicable statute, we remand for resentencing.

NO ERROR IN PART; NO PREJUDICIAL ERROR IN PART; REMANDED FOR RESENTENCING.

Judges DILLON and DAVIS concur.