NO. COA01-1278

NORTH CAROLINA COURT OF APPEALS

Filed: 16 July 2002

STATE OF NORTH CAROLINA

v. Onslow County
No. 00 CRS 52330

GEORGE B. KUBRICHT

Appeal by defendant from judgment entered 3 May 2001 by Judge Ernest B. Fullwood in Onslow County Superior Court. Heard in the Court of Appeals 1 July 2002.

Attorney General Roy Cooper, by Assistant Attorney General Joyce S. Rutledge, for the State

Jeffrey S. Miller for defendant-appellant.

BRYANT, Judge.

On 15 August 2000, defendant was indicted on charges of first degree sexual offense, indecent liberties with a child and crime against nature. The case was tried at the 30 April 2001 Criminal Session of Onslow County Superior Court.

The State presented evidence at trial which tended to show the following: On 25 February 2000, the minor victim, Nicki, told Silva Towler, a teacher's assistant at Queen's Creek Elementary in Onslow County, North Carolina, that the defendant, her stepfather had: (1) "stuck his thing in her butt;" (2) "French kissed her;"

and (3) had put his thing in her mouth and white stuff came out of her mouth." Nicki told Towler that it had occurred about two years ago, but "about two weeks ago, he stuck it in my monkey (vagina)." The school's guidance counselor learned of the allegation and contacted the Department of Social Services ("DSS"), who then contacted the police.

Detective Pam Sanders, a juvenile detective with the Onslow County Sheriff's Department, interviewed Nicki the next day. Nicki initially told Detective Sanders "that her mom had told her that it was a lie; that she didn't need to say it; that it was a lie." However, after Detective Sanders told her she would not get in trouble if she told her the truth, Nicki told Detective Sanders that "he did put his thing in my butt." "[H]e poked me in the butt with his thing. I was sleeping, but I woke up." Angela Nobles, an Emergency Social Worker with DSS, corroborated Detective Sanders' testimony, testifying that Nicki originally said the story was a lie because she had gotten in trouble at home for the disclosure.

Nicki testified at trial regarding the sexual abuse. Nicki testified that defendant had: (1) "stuck his thing in my rectum;" (2) "stuck his monkey in my mouth;" (3) "stuck his thing in my vagina;" (4) had stuck his tongue in mouth; and (5) had touched her "boobies." Nicki explained that as referenced in the above stated testimony, both "thing" and "monkey" referred to defendant's penis. Nicki testified that defendant had started doing these things to her when she was about "eight or nine." Nicki also testified that what she told Ms. Towler was not a lie. Additionally, Nicki stated

that she was told to blame a friend for telling the story, that defendant told her he might go to jail, and she was afraid she would get into trouble.

Dr. Rebecca Coker, a pediatrician at the Teddy Bear Clinic, a center used in the evaluation of children suspected to be sexually abused, testified that she examined Nicki in March 2000. Dr. Coker testified that considering Nicki's history, the disclosure of the abuse, and her physical exam, there was a high probability of sexual abuse. Specifically, Dr. Coker testified that an exam of Nicki's anal area revealed physical changes consistent with prior penetration.

Defendant testified and denied the accusations. Additionally, defendant presented many character witnesses, who testified that he was an honest man and devoted parent and husband.

Defendant was convicted of second degree sexual offense, indecent liberties with a child, and crime against nature. The convictions were consolidated for judgment and defendant was sentenced to 65 to 87 months imprisonment. Defendant appeals.

Defendant's sole argument on appeal is that the trial court erred by failing to instruct the jury that it could consider the defendant's character traits of honesty, trustworthiness, being a hard worker and being a good father on the question of guilt or innocence. Defendant argues that this was a close case, noted that Nicki kept changing her story, and contends that "[c]ertainly a good father, which defendant was characterized as being by several

witnesses, would be less likely to sexually molest his stepdaughter than a defendant who was not a good father."

After careful review of the record, briefs and contentions of the parties, we find no error. This Court has stated:

> a criminal defendant will be entitled to [] an instruction [on a good character trait] when he satisfies the following four-part test. First, the evidence must be of a "trait of character" and not merely evidence of a fact . . . . Second, the evidence of the trait must be competent . . . . Third, the trait must be pertinent . . . . And fourth, the instruction must be requested by the defendant. In determining whether this test is satisfied, the trial court must view the facts of the case in the light most favorable to the defendant.

State v. Moreno, 98 N.C. App. 642, 645, 391 S.E.2d 860, 862 (1990) (citations omitted).

In the instant case, evidence that defendant was "a good father" was evidence of a fact at issue in the case. Thus, the first prong of the *Moreno* test was not satisfied and the trial court did not err in refusing to instruct the jury that it could consider evidence of such a character trait as substantive evidence of defendant's innocence. *See id.* Additionally, evidence that the defendant was hard working, honest or trustworthy were not pertinent to the criminal charges against defendant, because they do not bear "a special relationship" to the crimes charged here. *State v. Bogle*, 324 N.C. 190, 201, 376 S.E.2d 745, 751 (1989). Thus, the third prong of the *Moreno* test was also not satisfied and defendant was not entitled to an instruction on these character traits. Even assuming *arguendo* that honesty and trustworthiness

were pertinent character traits, the trial court instructed the jury that it could consider the defendant's character trait for honesty and truthfulness in it's determination of guilt. Thus, defendant received the benefit of an instruction on these traits. Accordingly, we find no error.

No error.

Judges MARTIN and HUNTER concur.

Report per Rule 30(e).