NO. COA01-352

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2002

STATE OF NORTH CAROLINA

v. Cumberland County
No. 99 CRS 004685

RICHARD CHARLES THORNTON

Appeal by defendant from judgment dated 20 July 2000 by Judge Gregory A. Weeks in Superior Court, Cumberland County. Heard in the Court of Appeals 19 February 2002.

Attorney General Roy Cooper, by Assistant Attorney General, Sarah Ann Lannom, for the State.

Cooper, Davis & Cooper, by William R. Davis, for defendant.

McGEE, Judge.

Richard Charles Thornton (defendant) was charged in a juvenile petition with one count of first degree rape and one count of crime against nature on 7 September 1998. Defendant's case was transferred to superior court in an order dated 25 February 1999. Defendant was indicted for first degree statutory rape, crime against nature, and first degree statutory sexual offense on 21 June 1999.

The State presented evidence at trial that tended to show that the six-year-old victim was living with her mother and two friends in Fayetteville, North Carolina in 1998. The victim testified that

the babysitter who stayed with her when her mother was away was named Zack. She identified Zack as defendant. The victim testified that defendant made her suck on his "private part," which made her feel sick. She said that defendant did not touch her private part. She told her mother about defendant's actions but she did not remember just when she told her mother. The victim testified she drew a picture of defendant's body part and the picture was admitted into evidence to illustrate her testimony.

On cross-examination, the victim testified she did not remember what it meant to tell the truth. But she stated if you tell the truth you go up and if you tell a lie, you go down, but nobody punishes you if you tell a lie. She said she always tells the truth and never lies.

Crystal Lynn Barck (Barck), the victim's mother, testified that defendant, who lived next door to Barck and the victim, began to babysit for Barck in March 1998 and that he and the victim got along fine together. Barck testified that defendant babysat for her thirty-five to forty times. Defendant babysat with the victim alone on 4 September 1998 and 5 September 1998. When Barck and the victim were driving home from an outing on 6 September 1998, the victim asked her mother where they were going. Her mother said they were going home and defendant was coming over to babysit the victim. The victim began fidgeting and told her mother that she did not "want to do that again." The victim said defendant hurt her with "his thing." She said he pulled down his underwear and pulled out "his thing."

The following morning Barck again asked her daughter what had happened with defendant and the victim held her hand to her mouth and moved it back and forth. Barck called the Cumberland County Sheriff's Department and a deputy sheriff came to their home to investigate. Barck, the victim, and the deputy sheriff went to Cape Fear Valley Hospital to see a doctor. Detective Rick Greenwae met them at the hospital and he interviewed the victim. He showed the victim a drawing and she correctly identified parts of the body, including the area for "privates." The victim demonstrated with her hand in her mouth what defendant made her do and that defendant told her to "go faster." The victim told her mother that defendant hurt her in her genital area. The doctor was unable to examine the victim because the victim was screaming and trying to get off the examination table. The doctor referred the victim to a specialist.

A week later Dr. Sharon Cooper examined the victim, and Barck gave the doctor a medical history of the victim, telling her that the victim was having nightmares. Barck testified that during the week before the medical examination she did not see any scratches, redness, swelling or physical signs of injury to the victim when she bathed her.

Detective Greenwae interviewed defendant at his residence on 7 September 1998. Detective Greenwae told defendant's father that he was taking defendant into custody for allegations of sexual offenses and that the father could come to the Cumberland County Law Enforcement Center, where the detective was taking defendant.

At the Law Enforcement Center, Detective Greenwae advised defendant of his *Miranda* rights and defendant signed and initialed the rights form. The detective interviewed defendant for fifteen to twenty minutes.

Defendant testified that he was seventeen years old and lived with his parents in Fayetteville and went by the nickname "Chas." He testified that he had taken babysitting and CPR courses while living in Okinawa. Defendant testified that he met the victim in July 1997, when his family moved next door. Defendant stated that he began babysitting for the victim in early 1998 and babysat for the victim thirty to forty times. Defendant testified that he babysat the victim on 4 September 1998 and spent the night. The next night he again babysat so that the victim's mother could go out for the evening. He said the victim was acting kind of wild that night, climbing on his back and hitting his head.

Defendant testified that Detective Greenwae came to his house on 7 September 1998, handcuffed him, put him in a police car and took him to the law enforcement center. He testified he did not know what was going on and he felt confused. Detective Greenwae showed him a rights form but he did not understand all the questions. Defendant testified he told the detective that he did not do anything to the victim. Defendant was taking medication for attention deficit hyper disorder (ADHD), which helped him stay focused. He was taking three doses of Ritalin daily but had not been able to take his normal afternoon dose when he was at the police station. Defendant testified that he told the officer that

he never exposed his private parts to the victim, nor did he have or attempt to have any sexual contact with her. Defendant testified on cross-examination that he did not tell Detective Greenwae that he was taking medication. He stated he told the officer that he did not want his father at the law enforcement center.

Defendant's mother testified that defendant was diagnosed with ADHD when he was nine years old and took medication three times a day. Without the medication, defendant could not concentrate and was constantly fidgeting. Defendant's father testified that he was at home when defendant returned from babysitting with the victim on 6 September 1998 and there was nothing unusual about his son's behavior. Detective Greenwae came to their home and told defendant's father that there were allegations that defendant had sexually molested the victim. Defendant's father asked defendant if he had done anything inappropriate to the victim and defendant said he had not. Defendant's father testified that Detective Greenwae handcuffed his son, said he was taking him to the sheriff's office for questioning, and that he could call in about an hour. Defendant's father testified he understood he could call the police station and defendant would be released.

The charges of first degree statutory rape and crime against nature were dismissed by the trial court prior to submission of the case to the jury. The jury convicted defendant of first degree statutory sexual offense. The trial court sentenced defendant to a minimum of 144 months to a maximum of 182 months in prison.

Defendant appeals.

I.

Defendant first argues that the trial court erred in finding that the minor victim was competent to testify at trial because the evidence did not support the trial court's finding that the minor victim understood the difference between the truth and a lie.

N.C. Gen. Stat. § 8C-1, Rule 601(b) (1999) states that

> A person is disqualified to testify as a witness when the court determines that he is (1) incapable of expressing himself concerning the matter as to be understood, either directly or through interpretation by one who can understand him, or (2) incapable of understanding the duty of a witness to tell the truth.

"'There is no age below which one is incompetent, as a matter of law, to testify.'" *State v. Ward*, 118 N.C. App. 389, 394, 455 S.E.2d 666, 668-69 (1995) (quoting *State v. Jenkins*, 83 N.C. App. 616, 621, 351 S.E.2d 299, 302 (1986), *cert. denied*, 319 N.C. 675, 356 S.E.2d 791 (1987)).

The determination as to whether a child is competent to testify is within the sound discretion of the trial court in light of the trial court's opportunity to personally observe the child's demeanor and responses to inquiry on *voir dire*. *Ward* at 394, 455 S.E.2d at 669 (citing *State v. Fearing*, 315 N.C. 167, 174, 337 S.E.2d 551, 555 (1985)). Absent a showing that the trial court's ruling as to the competency of the child could not have been the result of a reasoned decision, the ruling will be affirmed on appeal. *Id.* (citing *State v. Spaugh*, 321 N.C. 550, 554, 364 S.E.2d 368, 371 (1988)).

In this case, the trial court conducted a *voir dire* to determine whether the minor victim was competent to testify at trial. Relevant portions of the State's questioning of the minor victim are as follows:

> Q: [W]hen you go to church, what do you learn?
> A: About God.
> Q: Okay. And when you learn about God, do you learn about telling the truth and telling a lie?
> A: Telling the truth.
> Q: . . . Is it good or bad to tell the truth?
> A: Good.
> Q: Okay. Is it good or bad to tell a lie?
> A: Bad.
> Q: What happens if you tell a lie?
> A: I don't know.
>
> . . .
>
> Q: Okay. When you go to court, do you have to tell the truth or can you lie?
> A: Tell the truth.
> Q: And who do you have to tell the truth to?
> A: To the judge.
>
> . . .
>
> Q: . . . If you tell the truth and it's good, what happens?
> A: I can't remember.
> Q: Okay. What would happen to you if you told a lie?
> A: I can't remember either.
>
> . . .
>
> Q: Let me ask you this, if you come to court and you told me you had to tell the judge the truth, if you made a promise to the judge to tell the truth, would you be able to do that?
> A: Yes.
> Q: If we were to ask you things that happened, would you tell us the truth about what happened?
> A: Yes.
> Q: Okay. When you are talking to the judge,

is it important for you to tell the truth?
A: Yes.

. . .

Q: . . . do you remember talking about a place before -- Do you remember telling me about a place where there is fire?
A: If we have fire?
Q: No. Let me see. Do you remember talking to me before and telling me about a place where there is fire and a bad judge?
A: (Pointing.)
Q: I'm sorry. Where are you pointing?
A: Down.
Q: And why are you pointing down?
A: Because he is down there.
Q: What is down there?
A: The fire.
Q: The fire?
A: (Nodding.)
Q: And what else is down there?
A: The bad judge.
Q: The bad judge?
A: Um-hum.
Q: And what's up there?
A: The good judge.
Q: The good judge.
A: (Nodding.)
Q: What else is up there?
A: The good place.
Q: What?
A: The good place where there's no fires.

. . .

Q: Now, if you tell the truth, where -- what would happen to you?
A: You stay up here.

. . .

Q: If you tell a lie, what happens to you?
A: You go down there.
Q: You go down there?
A: (Nodding.)
Q: Okay. Is that why it's bad?
A: Yes.
Q: Now, do you see that Bible there in front of you?
A: (Nodding.)
Q: If somebody asks you to promise to tell

> the truth, do you think you'd be able to do that?
>
> . . .
>
> A: Yes.

Following *voir dire*, the trial court found that

> the [minor victim] understands what it means to tell the truth. That she has attended church and understands from her attendance at church that to tell the truth is good and to tell a lie is bad. She understands that those who lie face punishment, in quotes, going down there to where the fire is to face the bad judge, and those who tell the truth quote stay up here, close quotes.

The trial court determined the minor victim was capable of understanding that a witness has a duty to tell the truth.

In *State v. McNeely*, 314 N.C. 451, 333 S.E.2d 738 (1985), our Supreme Court found that the child witness in that case gave answers that were "somewhat vague and self-contradictory, just as might be expected of a little child of such tender years." *Id.* at 457, 333 S.E.2d at 742 (citing *State v. Robinson*, 310 N.C. 530, 313 S.E.2d 571 (1984)). Despite this fact, the Court stated that "[n]evertheless, at points in her testimony she said quite clearly that she knew what it meant to tell the truth and to tell a lie and that it was bad to tell a lie." *McNeely*, 314 N.C. at 457-58, 333 S.E.2d at 742. Our Supreme Court determined that "[s]ince the trial judge's discretionary ruling was supported by such evidence, the defendant has failed to show that the ruling could not have been the result of a reasoned decision. Therefore, we leave the ruling undisturbed." *Id.* at 458, 333 S.E.2d at 742.

As in *McNeely*, the minor victim in this case, although giving

vague and conflicting answers at times, clearly stated at other times that she knew the difference between the truth and a lie, that if you lie you go "down" to the "bad judge" where the "fires" are, and that it is bad to lie. Conflicts in statements given by a witness affect that witness' credibility, not the competency of the testimony of the witness. *State v. Cooke*, 278 N.C. 288, 291, 179 S.E.2d 365, 368 (1971). Defendant failed to show that allowing the minor victim to testify was not the result of a reasoned decision such that it was an abuse of discretion. Defendant's first assignment of error is overruled.

II.

Defendant contends by his second assignment of error that the trial court erred in allowing Barck to testify as to statements made to her by her daughter, the minor victim, because the statements are hearsay.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (1999). "Hearsay is not admissible except as provided by statute or by [the] Rules of Evidence." N.C. Gen. Stat. § 8C-1, Rule 802 (1999).

In this case, defendant argues that two statements made by Barck during her testimony were inadmissible hearsay.

A.

First, Barck testified that on 6 September 1998, the day following the sexual assault, Barck and the minor victim went to a

friend's house. As they were driving home, Barck told the minor victim that defendant was going to come over to their home to babysit. The minor victim's demeanor changed and "[s]he started fidgeting, moving around in her seat, playing with her seat belt. She wouldn't sit still." Barck stated that she found this kind of demeanor by the minor victim "unusual."

Defendant objected to Barck's testimony. The trial court overruled defendant's objection. Barck then testified that

> [the minor victim] told me that she did not want to do that any more. And I asked her what she meant. And she said, 'you know.' And then I said, 'No, . . . I don't.' She said, 'His thing.' And I said, ' . . . , what do you mean?' She said, 'His thing, mama.' She said that he hurt her with his thing. And I asked her where he hurt her; and she pointed to her genital area.

Barck testified that the minor victim then said "that he pulled down his underwear and pulled out his thing."

The trial court conducted a *voir dire* hearing prior to Barck's testimony and determined that the above statements were admissible as an excited utterance. Generally, an excited utterance is not excluded by the hearsay rule, even if the declarant is available as a witness. N.C. Gen. Stat. § 8C-1, Rule 803 (1999). An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." N.C. Gen. Stat. § 8C-1, Rule 803(2) (1999). Our Supreme Court has held that "[i]n order to fall within this hearsay exception, there must be (1) a sufficiently startling experience suspending reflective thought and

(2) a spontaneous reaction, not one resulting from reflection or fabrication." *State v. Smith*, 315 N.C. 76, 86, 337 S.E.2d 833, 841 (1985).

Defendant does not argue that the sexual assault was not a startling experience, but argues that when the minor victim made the statements to her mother, she was no longer under the excitement of the event. Further, defendant argues that the minor victim's statement was elicited from questioning by her mother and therefore was not spontaneous.

First, we note that

> [w]hen considering the spontaneity of statements made by young children, there is more flexibility concerning the length of time between the startling event and the making of the statements because 'the stress and spontaneity upon which the exception is based is often present for longer periods of time in young children than in adults.'

State v. Boczkowski, 130 N.C. App. 702, 710, 504 S.E.2d 796, 801 (1998) (quoting *State v. Smith*, 315 N.C. 76, 87, 337 S.E.2d 833, 841 (1985). Statements made by young children three days after an alleged sexual assault, which relate to the assault, have been deemed admissible under the excited utterance exception. *State v. Rogers*, 109 N.C. App. 491, 501, 428 S.E.2d 220, 226, *cert. denied*, 334 N.C. 625, 435 S.E.2d 348 (1993), *cert. denied*, 511 U.S. 1008, 128 L. Ed. 2d 54 (1994). In this case, the minor victim's statements were made within one day of the sexual assault and we find that the passage of only one day did not detract from the spontaneity of the minor victim's response to the startling episode of a sexual assault by her babysitter.

Also, the minor victim's statement, as testified to by her mother, that the minor victim "did not want to do that anymore" was not the result of questioning by Barck. Rather, it was a spontaneous reaction to the news that defendant was going to babysit. Only after the minor victim told her mother that "she did not want to do that anymore" did her mother inquire as to what she meant. "The fact that the victim spoke in response to a question does not defeat the trustworthiness of her utterance." *State v. Murphy*, 321 N.C. 72, 77, 361 S.E.2d 745, 748 (1987). We find that the minor victim's additional statements resulting from her mother's questioning did not defeat the trustworthiness of her response in this case. The trial court did not err in admitting Barck's testimony pursuant to N.C. Gen. Stat. § 8C-1, Rule 803(2).

B.

Defendant next contends the trial court improperly allowed Barck's testimony as to statements the minor victim made to her while in Barck's bedroom on 7 September 1998.

Barck testified that on the morning of 7 September, the minor victim came into Barck's bedroom and Barck asked the minor victim what had happened with defendant. Barck asked the minor victim if she remembered telling her that defendant hurt her, and if anything else had happened. Barck testified that the minor victim "made a gesture of oral sex" by holding "her hand to her mouth and mov[ing] it back and forth like if she was hold[ing] something." Defendant objected to this testimony. The trial court allowed the testimony for corroborative purposes only and thus the statement was not used

to prove the truth of the matter asserted and was not hearsay. The trial court instructed the jury as follows:

> Members of the jury, the testimony just given by the witness . . . is being offered for the limited purpose and to the extent that you find it is corroborative with the prior testimony given at this trial by the [minor victim]. The term 'corroboration' means as tending to strengthen or to support. It is for you the members of the jury to determine what if anything this evidence does show, but to the extent that you find that it is corroborative of the testimony given at this trial by [the minor victim], you may consider it for that limited purpose and for no other purpose.

The minor victim had already testified that defendant made her suck on his "private part". She then gestured as to what defendant did. The record reflected that "she was sticking out her tongue and sticking her finger into her mouth." The minor victim testified that this "[m]ade [her] feel like sick." Defendant contends that admission of Barck's testimony for corroboration was improper because the facts testified to by the minor victim are not consistent with the facts as testified to by Barck.

"It is not necessary . . . that evidence . . . prove the precise facts brought out in a witness's testimony before that evidence may be deemed corroborative of such testimony and properly admissible." *State v. Burns*, 307 N.C. 224, 231, 297 S.E.2d 384, 388 (1982). To corroborate means "'[t]o strengthen; to add weight or credibility to a thing by additional and confirming facts or evidence[.]'" *State v. Case*, 253 N.C. 130, 135, 116 S.E.2d 429, 433 (1960), *cert. denied*, 365 U.S. 830, 5 L. Ed. 2d 707 (1961) (quoting Black's Law Dictionary, 444 (3rd ed.) (citation omitted)).

In this case, the statement Barck testified to at trial tended to confirm and strengthen the minor victim's earlier testimony. The trial court properly allowed Barck's testimony for the limited purpose of corroboration and correctly instructed the jury that whether or not the statement was corroborative was a matter for the jury to decide. Defendant's second assignment of error is overruled.

III.

Defendant next argues the trial court erred in allowing Detective Greenwae to testify as to statements made to him by the minor victim because the statements are hearsay.

Detective Greenwae testified that he met with the minor victim on 7 September 1998 at Cape Fear Valley Hospital. During his interview with the minor victim, he drew an anatomical doll and had the minor victim point out the parts of the body "to make sure she knew the parts of the body[.]" Detective Greenwae testified that he asked the minor victim what happened and if she knew defendant, to which defendant objected. The trial court then instructed the jury as follows:

> Members of the jury, the testimony that is now being elicited from the witness now before you, Detective Greenwae, is being offered and received for the limited purpose of corroborating the prior testimony given at this trial of the prior state's witness, [the minor victim].
>
> Again, corroboration means tending to strengthen or tending to support. But it is you, the members of the jury, to determine what if anything this evidence does show. But to the extent that you find that it is corroborative of the prior testimony give[n]

> at this trial of [the minor victim], you may consider it for that limited purpose and no other purpose.

Detective Greenwae then testified that the minor victim correctly identified parts of the body on the anatomical drawing of a doll. When Detective Greenwae asked the minor victim if she had ever seen defendant's "private parts," she told him she could draw a picture of them, which she did. After she drew the picture, Detective Greenwae asked the minor victim what defendant had made her do with his privates. Detective Greenwae testified that "she demonstrated with her hand in her mouth, with her mouth open and her hands going like this (demonstrating), as far as what she was made to do and that [defendant] had told her to go faster." Defendant objected to this testimony and the trial court overruled defendant's objection.

We find that Detective Greenwae's testimony corroborated testimony of the minor victim earlier at trial because it supplemented and confirmed facts already in evidence. The trial court properly instructed the jury that whether or not Detective Greenwae's statement was corroborative was a matter for the jury to decide. This evidence was not admitted to prove the truth of the matter asserted and therefore was not hearsay. This assignment of error is overruled.

IV.

By his fourth assignment of error, defendant contends the trial court erred in allowing Detective Greenwae to testify to statements defendant made while in custody.

Defendant objected to admission of certain statements he made

to Detective Greenwae on the grounds that they were not voluntary. Specifically, defendant contested the admission of his statement to Detective Greenwae that the minor victim could have seen defendant's penis because "he still has wet dreams, and that it was proven that males get an erection every ninety minutes while at sleep." Prior to admitting Detective Greenwae's testimony regarding what defendant told him, the trial court conducted a *voir dire* of both Detective Greenwae and defendant.

Detective Greenwae stated that before leaving defendant's home, defendant's father told Detective Greenwae he was coming to the law enforcement center but Detective Greenwae started the interview process before defendant's father arrived. Detective Greenwae testified that defendant was handcuffed to a chair while at the law enforcement center, that he knew defendant was fifteen years old, and that he read defendant his *Miranda* rights. Detective Greenwae testified that defendant initialed the juvenile rights form in six places and signed at the bottom of the form. Defendant told Detective Greenwae that he knew what he was reading when he went over the juvenile rights form. Detective Greenwae testified that defendant told him that "he wanted to talk to [Detective Greenwae] before his parents got there." Defendant never indicated he wanted to wait for his parents to arrive. Detective Greenwae testified that he was not aware defendant was on medication but that defendant was very calm and responded to questions asked.

Defendant testified that he took Ritalin for ADHD. On the day

in question he missed his last dose of Ritalin and noticed an effect from missing his medicine dosage because his knees started bouncing, but he understood what Detective Greenwae was talking about "most of [the] time." Defendant stated that he never told Detective Greenwae he was on medication or that needed his medication. Defendant stated that he did not know his father was coming to the law enforcement center but that he recalled signing and initialing the juvenile rights form. Further, he remembered that Detective Greenwae advised him of his right to have a parent, guardian, or other responsible person present and that he indicated he did not wish to have a parent present. Defendant stated that he never told Detective Greenwae he did not understand his rights.

Following a *voir dire* hearing, the trial court made the following pertinent findings of fact:

> 4. The defendant . . . was arrested at his home on September 7, 1998.
>
> 5. The defendant was subsequently taken by Deputy Greenwae . . . to the law enforcement center, Fayetteville, North Carolina.
>
> . . .
>
> 7. Prior to being formally charged the defendant was interrogated by Deputy Greenwae in an office located in the law enforcement center . . . .
>
> 8. Prior to being interrogated the defendant was advised of his constitutional rights by Deputy Greenwae . . . .
>
> . . .
>
> 10. After being orally advised of his rights . . . the defendant indicated that he understood his rights by placing his initials on [the juvenile rights form] indicating that he (a.) understood that he has the right to remain silent; (b.) understood that anything he said could be used against him in the court. The defendant further indicated that he wished to talk with Deputy Greenwae.

> 11. During the advice of rights . . . Deputy Greenwae advised the defendant that he had the right to have a parent, guardian or custodian with him during questioning, and that he had a right to talk to a lawyer or to have one present during questioning, and also advised him that he had a right to have a lawyer provided for him . . . .
>
> 12. The defendant indicated by placing his initials on [the juvenile rights form] that he understood those rights and wished to talk to . . . Deputy Greenwae.
>
> . . .
>
> 15. . . . at the time [of] interrogation the defendant was 15 years of age . . . .
>
> 16. The Court finds that at the time of interrogation the defendant was in the ninth grade, that he suffered from ADHD, had been prescribed medication for that condition and had taken his medication earlier that morning and shortly after lunch.
>
> 17. The Court finds that the physical condition of the defendant at the time of interrogation was consistent with someone of his age being questioned by a law enforcement officer under those circumstances;
>
> The Court finds that there was nothing about the physical condition of the defendant at the time of the interrogation that would have made his interrogation involuntary.
>
> . . .
>
> 19. The defendant appeared calm, coherent and appeared to understand the questions put to him by Detective Greenwae.
>
> . . .
>
> 21. The Court finds that there were no promises made by Detective Greenwae, no offers of reward, no inducements to the defendant to make any statement.
>
> 22. The Court finds that Detective Greenwae [in] no way threatened the defendant or suggested violence or made any show of violence to persuade or induce the defendant to make a statement.
>
> . . .
>
> 24. The Court further finds that based on the testimony of the defendant, the defendant specifically did not want his parent or parents present during the interrogation.

The trial court concluded as a matter of law that statements

made by defendant to Detective Greenwae on 7 September 1998 were made freely, voluntarily and with understanding. The trial court also concluded that defendant understood his right to remain silent, right to counsel and "all other rights," and that he "freely, knowingly, intelligently, and voluntarily waived [his] rights[.]" The trial court allowed Detective Greenwae to testify to the statement at issue made by defendant.

Defendant argues that considering the totality of the circumstances in this case, defendant's "confession was not voluntarily and knowing[ly] made and should not have been admitted into evidence."

The trial court must determine whether the State has met its burden of showing, by a preponderance of the evidence, that defendant's statement was voluntary. *State v. Perdue*, 320 N.C. 51, 59, 357 S.E.2d 345, 350 (1987). Where the findings of fact made by the trial court as to the voluntariness of a statement are supported by competent evidence, the findings are conclusive on appeal; however, conclusions of law are reviewable *de novo*. *State v. Barber*, 335 N.C. 120, 129, 436 S.E.2d 106, 111 (1993), *cert. denied*, 512 U.S. 1239, 129 L. Ed. 2d 865 (1994). In determining whether a statement was voluntary and thus admissible, our Court must consider the totality of the circumstances. *State v. Gainey*, 355 N.C. 73, 84, 558 S.E.2d 463, 471 (2002) (citing *State v. Corley*, 310 N.C. 40, 47, 311 S.E.2d 540, 545 (1984)). An admission is rendered incompetent by circumstances indicating coercion or involuntary action. *State v. Guffey*, 261 N.C. 322, 324, 134 S.E.2d

619, 621 (1964) (citations omitted).

In the case before us, the trial court's findings of fact are supported by competent evidence in the record. Further, the trial court's conclusion of law that defendant's statements made to Detective Greenwae were voluntary is supported by the findings of fact and the law. The record is devoid of evidence that defendant's failure to take one dose of Ritalin resulted in an involuntary statement. Defendant's fourth assignment of error is overruled.

V.

Although defendant next assigns as error the trial court's admission of testimony by Dr. Cooper as to certain statements made to her by Barck, defendant failed to properly address this issue in his brief to our Court. Rather, defendant's arguments as to this assignment of error address arguments contained in defendant's second and sixth assignments of error. Further, defendant's only argument in his brief with regards to Dr. Cooper's testimony regarding statements made to her by Barck is in violation of our appellate rules in that defendant's argument fails to provide any citation and authority upon which defendant relied in making his argument. N.C.R. App. P. 28(b)(5).

Defendant's fifth assignment of error is overruled.

VI.

By his sixth assignment of error, defendant contends the trial court erred in allowing Dr. Cooper to testify as to statements the minor victim made to her.

Dr. Cooper testified that the minor victim came into her office where they had a "free association" conversation. Because she was not wearing a uniform, Dr. Cooper told the minor victim that she was a doctor and that she was there to "make sure [the victim's] body is okay."

Dr. Cooper described her office as having a regular adult size chair and "is covered with animals" that she uses to "get children to look at when we're examining" them. Dr. Cooper asked the minor victim if she knew the difference between the truth and a lie and "establish[ed] competence for" the minor victim. The minor victim, "rather readily began to relate to [Dr. Cooper] that there had been someone who had hurt her body, and she referred to that person as Chas" and that Chas was her babysitter. Dr. Cooper testified that the minor victim

> went on to tell me essentially three things: One that Chas had -- She changed her voiced and said Chas said, 'Come here and suck on this.' She changed the tenor or her voice when this child was telling me this. And I said, 'What do you mean? What did he want you to suck on?' And she pointed to her vaginal area, but I don't think she meant her vaginal area . . . . She also described that this person had placed her on his stomach and had put her head over his penile area and had forced her to place his penis in her mouth and suck on this.

N.C. Gen. Stat. § 8C-1, Rule 803(4) provides that statements made for the purpose of medical diagnosis or treatment are not excluded by the hearsay rule, even if the declarant is available as a witness if the

> [s]tatements [are] made for purposes of medical diagnosis or treatment and describing

> medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

N.C. Gen. Stat. § 8C-1, Rule 803(4) (1999). Our Supreme Court has held that in order to admit evidence pursuant to this exception, two inquiries must be satisfied:

> First, the trial court must determine that the declarant intended to make the statements at issue in order to obtain medical diagnosis or treatment. The trial court may consider all objective circumstances of record in determining whether the declarant possessed the requisite intent. Second, the trial court must determine that the declarant's statements were reasonably pertinent to medical diagnosis or treatment.

State v. Hinnant, 351 N.C. 277, 289, 523 S.E.2d 663, 670-71 (2000).

Defendant argues that the first prong of *Hinnant* is not met in this case because "[t]here is nothing in the record to show that the child was talking to Dr. Cooper with an understanding that she was telling her this information for purposes of medical diagnosis or treatment." We disagree.

Our Supreme Court in *Hinnant* recognized the "difficulty of determining whether a declarant - especially a young child - understood the purpose of his or her statements[.]" *State v. Bates*, 140 N.C. App. 743, 745, 538 S.E.2d 597, 599 (2000). The *Hinnant* court ruled that the trial court "should consider all objective circumstances of record surrounding declarant's statements in determining whether he or she possessed the requisite intent under Rule 803(4)." *Hinnant*, 351 N.C. at 288, 523 S.E.2d at 670.

> Some factors to consider in determining whether a child had the requisite intent are whether an adult explained to the child the need for treatment and the importance of truthfulness; with whom and under what circumstances the declarant was speaking; the setting of the interview; and the nature of the questions.

Bates, 140 N.C. App. at 745, 538 S.E.2d at 599.

In this case, upon consideration of the totality of the circumstances, the trial court properly admitted Dr. Cooper's testimony. The evidence shows that the minor victim was told that she was visiting a doctor; that the doctor wanted to make sure her body was okay; the conversation between the doctor and the minor victim was not based upon leading questions; the doctor discussed the difference between truth and a lie with the minor victim; and nothing indicated the statements the minor victim made to Dr. Cooper were not spontaneous.

The evidence was sufficient to support the first prong of *Hinnant*, that the minor victim made statements to Dr. Cooper for the purpose of medical diagnosis or treatment. The trial court properly admitted Dr. Cooper's testimony as substantive evidence pursuant to N.C. Gen. Stat. § 8C-1, Rule 803(4). Defendant's final assignment of error is overruled.

Defendant received a fair trial free of prejudicial error.

No error.

Judge THOMAS concurs.

Judge GREENE concurs in the result with a separate opinion.

Report per Rule 30(e).

NO. COA01-352

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2002

STATE OF NORTH CAROLINA

v. Cumberland County
No. 99 CRS 004685

RICHARD CHARLES THORNTON

GREENE, Judge, concurring in the result.

While I agree defendant is not entitled to a new trial, I write separately to address defendant's assignment of error to the trial court's admission of Dr. Cooper's testimony concerning statements made by Barck.

Defendant has assigned error to Dr. Cooper's testimony based on Barck's statement of what the victim had told her. Defendant contends the victim's statement to Barck and Barck's statement to Dr. Cooper are both hearsay. Hearsay included within hearsay is only admissible if "each part of the combined statements conforms with an exception to the hearsay rule." N.C.G.S. § 8C-1, Rule 805 (2001). Thus, the victim's statement to Barck and Barck's statement to Dr. Cooper must both conform with an exception to the hearsay rule in order for Dr. Cooper's testimony to be admissible. I agree with the majority that the victim's statement to Barck qualifies as an excited utterance and is thus admissible under Rule 803(2). I, however, do not believe that Barck's statement to Dr. Cooper conforms with any exception to the hearsay rule. Thus, it

was error for the trial court to admit that portion of Dr. Cooper's testimony relating Barck's account of what the victim had related to her. This error, however, does not require a new trial as there is no reasonable possibility that had the evidence in question been excluded, a different result would have been reached at trial. *See State v. Hinnant*, 351 N.C. 277, 291, 523 S.E.2d 663, 672 (2000) (erroneous admission of hearsay requires a new trial only if it results in prejudicial error, such that a reasonable possibility exists that, "absent the trial court's error, a different result would have been reached at trial").