NO. COA01-800

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2002

STATE OF NORTH CAROLINA

v. Wayne County
Nos. 99 CRS 55272
CHARLES DUNN 00 CRS 1312

Appeal by defendant from judgment entered 29 September 2000 by Judge Jerry Braswell in Wayne County Superior Court. Heard in the Court of Appeals 22 July 2002.

Attorney General Roy Cooper, by Assistant Attorney General C. Norman Young, Jr., for the State.

MacQueen & Turnage, LLP, by Kevin F. MacQueen, for defendant-appellant.

WALKER, Judge.

Defendant was charged with attempted second degree rape, two counts of attempted second degree sexual offense, second degree sexual offense, and second degree kidnapping. The State's evidence tended to show that, on 25 November 1999, the victim accompanied her Aunt Mary to a party at the apartment of Mamie Dixon (Aunt Mamie). Aunt Mary lived in the 1500 building of Courtyard Apartments and Aunt Mamie lived in the 1800 building. After consuming about a pint of an alcoholic beverage, the victim went to a party located upstairs from Aunt Mamie's apartment. At the

party, the victim danced with defendant, who she knew as her Aunt Mamie's boyfriend. When the victim returned to Aunt Mamie's apartment, she became sick from the alcohol. Aunt Mary argued with the victim about her drinking. As the victim and Aunt Mary started walking back to Aunt Mary's apartment, the victim vomited in the parking lot and the two women continued to argue. Aunt Mary went to talk to someone while the victim sat with a woman named Kendra and her boyfriend on the steps of the 1200 building.

Defendant joined the victim on the steps. After defendant advised the victim to reconcile with her Aunt Mary, the victim and defendant walked to Aunt Mary's apartment. No one answered Aunt Mary's door, so they walked back outside. Upon seeing Aunt Mamie, Kendra and Aunt Mary at the 1200 building, defendant suggested to the victim that they keep walking to make Aunt Mamie jealous.

As the two reached the breezeway of the 1100 building, defendant pushed the victim against the wall and tried to pull up her dress. Defendant forced the victim onto the ground and removed her underwear. The victim started to cry and told defendant to stop. Defendant then inserted his fingers into the victim's vagina. He attempted to force the victim to perform fellatio on him. Defendant stopped when a man came down the steps of the building holding a phone in his hand. Defendant represented to the man that the victim was his girlfriend and led her away from the breezeway. Aunt Mamie saw defendant and the victim and called to the victim. The victim, who was crying, ran to Aunt Mamie.

Defendant then ran around the side of the building where a "bunch of people jumped on him."

Meanwhile, Officer Brandon Harris of the Goldsboro Police Department took a 911 call from a male who subsequently hung up on him. After two attempts to call him back, Officer Harris spoke to the male. Officer Harris testified that the male told him that a female was being raped around the 1000 building of Courtyard Apartments and that the suspect walked the female off toward the 1200 or 1300 building. Officer Harris further testified that he received another 911 call from a female who stated that another female had been raped and that the suspect was being beaten up by several people. Over defendant's objection, a portion of the 911 tape was admitted into evidence.

Sergeant Michael West of the Goldsboro Police Department subsequently received a call from dispatch requesting that he back up a primary unit en route to a possible sexual assault at the Courtyard Apartments. Upon his arrival, Sergeant West saw a group of about twenty people in the vicinity of the 1600 building. Sergeant West began his search for the victim and suspect at the 1100 building. He eventually found the victim, whose hair and clothes were "messed up." Sergeant West stayed with her until another patrol car arrived. After he located the defendant at the 1800 building, Sergeant West transported the victim to the police station.

Officers Wayne Cannucci and Denise Salo took defendant into custody. Officer Salo advised defendant of his Miranda rights at

the police station. Defendant waived his rights and made a written statement. Defendant stated that, while he and the victim were walking in the breezeway, he "started to want to have sex with her." He further stated that, while he kissed the victim and touched her breasts, he did not have sex with the victim. The trial court admitted defendant's pre-trial statement into evidence over defendant's objection.

At the close of the State's evidence, defendant moved to dismiss. The trial court allowed the motion as to the second degree kidnapping charge and one attempted second degree sexual offense charge. Defendant did not present any evidence. A jury found defendant guilty of attempted second degree sexual offense. Defendant admitted to being an habitual felon. The trial court sentenced defendant to 80 to 105 months in prison. Defendant appeals.

In his first two arguments, defendant contends the trial court erred in admitting into evidence the audio tape of the 911 calls and defendant's pre-trial statement. Defendant argues that the prejudicial effect of the tape and pre-trial statement outweighed their probative value under Rule 403 of the North Carolina Rules of Evidence.

Under N.C. Gen. Stat. § 8C-1, Rule 403 (2001), "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." The decision to exclude evidence under Rule 403 is left to the sound discretion of the trial court, and its decision in this respect will not be overturned absent a

manifest abuse of that discretion. *State v. Cagle,* 346 N.C. 497, 506-07, 488 S.E.2d 535, 542, *cert. denied,* 522 U.S. 1032, 139 L. Ed. 2d 614 (1997). An abuse of discretion occurs only where a trial court's ruling is neither supported by reason nor is the result of a reasoned decision. *State v. Riddick,* 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986).

Here, defendant has not shown that the trial court abused its discretion in admitting the 911 tape or the pre-trial statement. Specifically, defendant has not shown that the trial court's decision to admit the 911 tape or the pre-trial statement was not the result of a "reasoned decision." *Id.* Moreover, defendant has failed to show that, had this allegedly prejudicial evidence been excluded, a different result would have been reached at trial. N.C. Gen. Stat. § 15A-1443. Any error by the trial court was thus harmless. Accordingly, defendant's first two assignments of error are overruled.

Defendant has abandoned his remaining assignment of error.

No error.

Judges THOMAS and BIGGS concur.

Report per Rule 30(e).