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COA01-1049

NORTH CAROLINA COURT OF APPEALS

Filed: 7 May 2002

STATE OF NORTH CAROLINA

v.

Wayne County  
No. 99 CRS 9378

JOHNATHAN FRANK JAMES

Appeal by defendant from judgment entered 14 July 2000 by Judge Jerry Braswell in Wayne County Superior Court. Heard in the Court of Appeals 22 April 2002.

*Attorney General Roy Cooper, by Assistant Attorney General Fred Lamar, for the State.*

*Benjamin M. Turnage for defendant-appellant.*

MARTIN, Judge.

Defendant was charged with felony assault on a female and habitual misdemeanor assault based upon "ha[ving] been previously convicted of five or more prior misdemeanor convictions, at least two of which were assaults." The State's evidence tended to show that defendant and Keri Allyson James (James) were married in October of 1996 and divorced in January of 1999. One child was born of the marriage. On 28 May 1999, James and her boyfriend, Christopher Brad Worrell (Worrell) went to an Applebee's Restaurant in Goldsboro, North Carolina to meet friends. Upon entering the foyer area, James noticed defendant sitting at the bar. James

immediately turned around and said to Worrell, "[w]e have to go. We have to go now." James told Worrell they had to leave because "he" was at the restaurant.

Defendant came up behind James and said, "Yeah, that's what you better do, b----. Because you're both dead anyway." Defendant then grabbed James' wrist, pulled her towards him and spat in her face. Defendant returned to the bar after his friend intervened. James and Worrell subsequently left the restaurant.

Defendant presented evidence that he and James had "words" at the restaurant, but he did not touch or spit on James. A jury found defendant guilty of assault on a female. Defendant stipulated to his prior assault convictions and the trial court sentenced defendant to a minimum term of six months and a maximum term of eight months imprisonment. Defendant appeals.

In two arguments, defendant contends the trial court erred in sustaining the State's objection to his attempt to elicit testimony from witnesses. Defendant first argues the trial court erred by excluding the testimony of James regarding a custody dispute. The trial court excluded proffered testimony that James refused to allow defendant to exercise his visitation rights in violation of a child custody order. The trial court ruled that the issue regarding the child custody and child visitation was not relevant to the question of whether defendant assaulted James. Defendant asserts the excluded evidence was relevant to James' bias and the truthfulness of her testimony under N.C.R. Evid. Rule 401.

Generally, all relevant evidence is admissible. N.C. Gen.

Stat. § 8C-1, Rule 402 (1999). 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 (1999). Our Supreme Court has stated that "[w]hen relevant evidence not involving a right arising under the Constitution of the United States is erroneously excluded, a defendant has the burden of showing that the error was prejudicial. This burden may be met by showing that there is a reasonable possibility that a different result would have been reached had the error not been committed." *State v. Weeks*, 322 N.C. 152, 163, 367 S.E.2d 895, 902 (1988) (citing N.C. Gen. Stat. § 15A-1443(a) (1999)).

Evidence that defendant and James had a child custody dispute at the time of the alleged incident did not tend to prove any fact in issue in this case. Furthermore, defendant has not shown that there is a reasonable possibility that a different result would have been reached had the evidence been admitted. Accordingly, the trial court properly excluded the testimony. Defendant also argues the trial court erred by excluding certain testimony from Officer David L. Cooner of the Selma Police Department. The trial court excluded proffered testimony that James had informed Cooner that defendant had made a forcible entry into her home and thrown items around the premises; however, Officer Cooner found no evidence of a violent altercation or forcible entry. The trial court determined that the testimony's prejudicial value would outweigh

any probative value.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (1999). "Rule 403 requires balancing the proffered evidence's probative value against its prejudicial effect." *State v. Kelly*, 118 N.C. App. 589, 599, 456 S.E.2d 861, 869, *disc. review denied*, 341 N.C. 422, 461 S.E.2d 764 (1995). Whether to exclude evidence under this rule is a matter within the sound discretion of the trial court, and will only be reversed on appeal upon a showing that the decision was manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision. *State v. Womble*, 343 N.C. 667, 690, 473 S.E.2d 291, 304 (1996), *cert. denied*, 519 U.S. 1095, 136 L. Ed. 2d. 719 (1997).

Defendant has failed to show that the trial court abused its discretion by excluding the testimony of Officer Cooner. Defendant argues the testimony was relevant and should not have been excluded because it showed James' intent to fabricate instances of assault against defendant, thus proving "defendant's defense that Keri James['] intent was to fabricate this alleged assault on May 28, 1999." This theory is pure conjecture. Both James and Worrell testified that defendant grabbed James and spat on her at the Applebee's restaurant. The proffered testimony did not reveal that James fabricated the May 28<sup>th</sup> altercation.

The record reveals that the trial court carefully weighed the probative value of the evidence against the possibility of unfair

prejudice and specifically found that the probative value of the evidence was substantially outweighed by the risk of unfair prejudice. In light of the lack of probative value of the evidence offered by the defendant and the strong possibility of prejudice to the State, we conclude that the trial court properly exercised its discretion in excluding the testimony of Officer Cooner. This assignment of error is overruled. Moreover, defendant has not met his burden of showing there is a reasonable possibility a different result would have been reached had the excluded evidence been admitted. See N.C. Gen. Stat. § 15A-1443(a) (1999). Accordingly, the trial court properly excluded the testimony of Officer Cooner.

No error.

Judges HUNTER and BRYANT concur.

Report per Rule 30(e).