NO. COA01-1209

NORTH CAROLINA COURT OF APPEALS

Filed: 21 May 2002

STATE OF NORTH CAROLINA

v. Wake County
Nos. 98CRS11366-67

GUELLIAMO BEY, JR.
Defendant

Appeal by defendant from judgments entered 17 February 2000 by Judge Henry W. Hight, Jr., in Wake County Superior Court. Heard in the Court of Appeals 29 April 2002.

Attorney General Roy Cooper, by Assistant Attorney General Sylvia Thibaut, for the State.

John T. Hall for defendant-appellant.

MARTIN, Judge.

Defendant appeals from judgments entered upon his conviction by a jury of first degree rape, first degree sexual offense, and two counts of taking indecent liberties with a child. In each of the cases, the alleged victim was the defendant's minor child.

The State's evidence tends to show that defendant's wife (and the minor victim's mother) died in 1991. Thereafter, with the exception of a six-month period during which the victim and her brother resided with their maternal grandparents, the minor victim lived with defendant. The two enjoyed a good relationship until

defendant began to inappropriately touch the minor victim when she was around eight years old (1996). From that time until 17 February 1998, defendant would ask the minor victim to touch his penis when he was undressed; place her hand on his penis and manipulate her hand until he ejaculated; perform cunnilingus on her; slightly penetrate her vaginal opening with his penis; force her to perform fellatio on him; touch her breasts; make her watch pornographic videos with him on his bed; and show her pornographic magazines. Defendant cautioned the minor victim not to tell anyone about these activities because it was a secret.

Despite defendant's warnings, the minor victim told her best friend about her father molesting her when the two children were in fourth grade. In addition, the minor victim subsequently wrote two letters to her maternal grandfather reporting defendant's sexual abuse of her and physical abuse of her brother. The grandfather contacted Wake County Department of Human Services (DHS). After an investigation involving DHS and the Raleigh Police Department, charges were filed against defendant.

During the presentation of his evidence, defendant sought to introduce the testimony of Dedra Copeland, another of his children, regarding whether the minor victim's allegations of abuse were in response to overhearing Copeland detailing her own rape by another man in May 1995. Upon the State's objection, and after hearing Copeland's testimony on *voir dire,* the trial court excluded the evidence. Defendant thereafter testified on his own behalf and denied sexually abusing the minor victim. Defendant, however,

admitted to beating his children with a fifteen-inch-long paddle, making a pornographic film of himself and a girlfriend, and having and viewing pornographic videotapes and magazines in his bedroom. Defendant's step-son, Darvel Rouse, also testified regarding defendant's use of the large paddle and a belt to discipline the minor victim's younger brother. Rouse noted that the minor victim and her brother started to become afraid of defendant in late 1993.

On appeal, defendant argues that the trial court erred in sustaining the State's objection to Dedra Copeland's testimony which was offered to impeach the victim. We disagree.

Only relevant evidence is admissible. N.C.R. Evid. 401. In *State v. Mackey* this Court quoted, "Evidence is relevant if it 'has any logical tendency, however slight, to prove the fact at issue in the case.'. . . It is relevant if it can assist the jury in 'understanding the evidence.'" 137 N.C. App. 734, 737, 530 S.E.2d 306, 308 (quoting *State v. Huang*, 99 N.C. App. 658, 663, 394 S.E.2d 279, 283 (1990)), *affirmed*, 352 N.C. 650, 535 S.E.2d 555 (2000). Even relevant evidence may be excluded, however, if its probative value is substantially outweighed by the danger of unfair prejudice. N.C.R. Evid. 403.

Under Rule 701, a lay witness may testify in the form of opinions or inferences which are "(a) rationally based on the perception of the witness and (b) helpful to clear understanding of his testimony or the determination of a fact in issue." This Court has referred to such opinion testimony as "shorthand statement[s]

of fact," which may "encompass[] a witness' conclusion 'as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time.'" *State v. Miller*, 142 N.C. App. 435, 443-44, 543 S.E.2d 201, 207 (2001) (quoting *State v. Spaulding*, 288 N.C. 397, 411, 219 S.E.2d 178, 187 (1975) citations and quotations omitted)). A trial court's decision regarding the admissibility of evidence of this type is reviewable upon a showing of an abuse of discretion. *State v. Handy*, 331 N.C. 515, 419 S.E.2d 545 (1992).

In the present case Dedra Copeland testified on *voir dire,* that the minor victim and two other siblings overheard her talking to defendant about being raped. Copeland also testified that some of the trial testimony, which was based upon the minor victim's statements to a therapist, "reminded" her of when she was raped. However, when pressed about why she thought the minor victim had overheard the conversation between her and defendant, Copeland admitted that she only suspected as much since the door to the room where she was having the conversation with defendant was closed. Copeland stated that she heard laughing outside the door, saw the children running away from the door when she opened the door and peered outside, and the three children later asked her if she had been really raped. In truth, Copeland had no idea how long the children were outside the door, or which of the children had been listening at the door. Copeland conceded that she never questioned the minor child about what, if anything, she heard while listening

at the door, and never spoke directly to the minor victim about the rape.

Defense counsel argued that the testimony Copeland heard "brought up this memory of what ha[d] happened in the past," and therefore, it should be allowed into evidence to prove that the minor victim was merely mimicking Copeland's rape. The State countered that there was no evidence that the minor victim actually heard any of the details Copeland told defendant about the rape, and that defendant should properly lay a foundation for such testimony by re-calling the minor victim to the witness stand to testify as to whether she had overheard Copeland's conversation with defendant about the rape. Otherwise, the State argued, the testimony was not relevant. After hearing the arguments of counsel, the trial court sustained the State's objection.

Copeland's testimony was, at best, speculative and of a nature which would have confused, more than helped, the jury. *See* N.C.R. Evid 403 (providing for the exclusion of relevant evidence if "its probative value is substantially outweighed by the danger of . . . confusion of the issues, or misleading the jury"). While the minor victim's testimony about *her* abuse may have reminded Copeland of her rape, there are few details to support Copeland's opinion testimony, within the meaning of N.C.R. Evid. 701, that the minor victim's allegations were based upon her overhearing Copeland's account of her rape, and therefore, not truthful. Copeland's testimony was clearly outside of the "shorthand statement of fact" considered by the Court in *Miller, supra*. Indeed, there is

uncertainty as to whether the minor victim even overheard Copeland's account of her rape. Hence, there was no basis before the trial court to admit such speculative opinion testimony and we discern no abuse of discretion by the trial court in sustaining the State's objection to the subject testimony. Accordingly, this assignment of error is overruled.

Defendant has failed to argue, and therefore has abandoned, his remaining assignments of error. *See* N.C.R. App. P. 28(b)(5). We hold defendant received a fair trial, free from prejudicial error.

No error.

Judges HUNTER and BRYANT concur.

Report per Rule 30(e).