NO. COA01-1530

NORTH CAROLINA COURT OF APPEALS

Filed: 19 November 2002

STATE OF NORTH CAROLINA

v. McDowell County
No. 01 CRS 2135

PAUL EDWARD TILLEY

Appeal by defendant from judgment entered 25 July 2001 by Judge James L. Baker, Jr. in McDowell County Superior Court. Heard in the Court of Appeals 18 September 2002.

Attorney General Roy Cooper, by Assistant Attorney General Margaret A. Force, for the State.

Hosford & Hosford, PLLC, by Sofie W. Hosford, for defendant-appellant.

WALKER, Judge.

Defendant was convicted of committing a crime against nature in violation of N.C. Gen. Stat. § 14-177 (2001). The evidence at trial tended to show the following: Sergeant Scott Spratt, an Investigative Sergeant with the Marion Police Department, responded to defendant's report that two women had stolen a video camcorder from his apartment. Defendant told Sergeant Spratt that he was an anthropologist making a video documentary depicting two women engaged in lesbian sexual acts. Based on probable cause that defendant was in violation of several obscenity laws, Sergeant

Spratt obtained a search warrant for defendant's apartment and executed it on 8 November 2000, whereby he seized several items including 75 videotapes. One of the videotapes seized was labeled "Christina from 30 minutes, 4/21/00." He viewed the videotape which showed the defendant and a woman named Christine Sellers engaging in various oral sex acts.

In an interview conducted by Sergeant Spratt, Ms. Sellers stated that defendant took her to his apartment on or about 21 April 2000 where he performed various oral sex acts on her, paid her $20 and bought her liquor. Although Sellers originally was charged with one count of a crime against nature as a co-defendant, she reached a plea agreement whereby she pled guilty to one count of prostitution in exchange for her truthful testimony against defendant.

At trial, Sergeant Spratt testified that among the items he seized from defendant's apartment was a videotape labeled "Christina from 30 minutes, 4/21/00." Further, the videotape had been in the custody of the Marion Police Department at all times since it had been seized and had not been tampered with in any manner. Sergeant Spratt also testified that he had viewed the videotape which depicted defendant and Ms. Sellers engaging in various oral sex acts and that he had interviewed her about her relationship with defendant and the acts portrayed in the videotape.

During Ms. Sellers' trial testimony, she was shown a portion of the videotape, which she had viewed for the first time the day

before her testimony. Ms. Sellers testified that the videotape depicted defendant and herself, that she recalled the various oral sex acts shown in the videotape as having occurred "approximately around" 21 April 2000 and that she had not given defendant permission to videotape these acts. On cross-examination, Ms. Sellers testified that she could not be certain of the date on which the videotape had been made.

During his cross-examination of Ms. Sellers, defendant made a motion to suppress the videotape on the grounds that the State had failed to lay a proper foundation for its admission to show the acts charged occurred on 21 April 2000. The trial court heard arguments from defendant and the State and denied the motion to suppress, holding that the question of the exact date of the videotape did not render it inadmissible but presented an issue for the jury as to the proper weight to afford the evidence.

Defendant first contends that the trial court erred in denying his motion to suppress the videotape because the State failed to properly authenticate it and its prejudicial nature outweighed the probative value. "Our review of a trial court's denial of a motion to suppress is strictly limited to a determination of whether it's [sic] findings are supported by competent evidence, and in turn, whether the findings support the trial court's ultimate conclusion." *State v. Allison*, 148 N.C. App. 702, 704, 559 S.E.2d 828, 829-30 (2002) (*citing State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). Prior to denying defendant's motion to suppress, the trial court had before it the following evidence: (1)

the videotape was taken from defendant's apartment where he lived alone; (2) Sergeant Spratt testified that the videotape had not been altered or changed in any way; (3) the videotape was labeled "Christina from 30 minutes, 4/21/00;" (4) both Ms. Sellers and Sergeant Spratt identified defendant in the videotape; (5) Ms. Sellers testified that the various oral sex acts depicted in the video occurred on or about 21 April 2000; and (6) defendant taped Ms. Sellers without her knowledge. Based on these findings, the trial court, in denying the motion to suppress, concluded that the issue of the date of the videotape went to the weight the jury should give the evidence, not its admissibility.

Our Supreme Court has held that

> the date given in a bill of indictment usually is not an essential element of the crime charged. The State may prove that the crime was in fact committed on some other date. We have held that this rule may not be used to deprive a defendant of his defense, however.

State v. Sills, 311 N.C. 370, 376, 317 S.E.2d 379, 382 (1984) (citations omitted). Here, defendant does not contend that he was deprived of the ability to prepare his defense in any way. Further, competent evidence exists to support the trial court's findings and conclusions regarding the admissibility of the videotape. Thus, we hold that the trial court did not err in denying defendant's motion to suppress the videotape.

During Ms. Sellers' testimony, her attorney was present, and he objected to certain questions put to her by the defendant. Defendant now contends that the trial court erred in allowing and sustaining objections made by Ms. Sellers' attorney at trial. To

support his contention, the defendant argues that the trial court's sustaining such objections infringed on his constitutional right to confront the witness which limited his cross-examination of Ms. Sellers. "'[T]he right to confront and to cross-examine is not absolute'" and may be limited in certain cases. *State v. McAllister*, 132 N.C. App. 300, 302, 511 S.E.2d 660, 662 (*quoting State v. Fortney*, 301 N.C. 31, 36, 269 S.E.2d 110, 113 (1980), aff'd, 351 N.C. 44, 519 S.E.2d 524 (1999)). "[T]he scope of cross-examination rests largely within the trial court's discretion and is not ground for reversal unless the cross-examination is shown to have improperly influenced the verdict." *State v. Woods*, 345 N.C. 294, 307, 480 S.E.2d 647, 653, *cert. denied sub nom, Woods v. North Carolina*, 522 U.S. 875, 139 L. Ed. 2d 132 (1997); *see also State v. Barber*, 317 N.C. 502, 346 S.E.2d 441 (1986), *State v. Beane*, 146 N.C. App. 220, 552 S.E.2d 193 (2001), *appeal dismissed*, 355 N.C. 350, 563 S.E.2d 562 (2002).

Here, Ms. Sellers testified on cross-examination that she reached a plea agreement whereby she would plead guilty to one count of prostitution and give truthful testimony to the events on or about 21 April 2000 in exchange for the crime against nature charge being dismissed. She further testified that she had been convicted of prostitution and other criminal violations and had been treated for alcohol abuse. Defendant has failed to show that he would have elicited other favorable testimony on cross-examination absent the trial court's rulings or that the jury's verdict was improperly influenced by the rulings. Therefore, we

conclude that the trial court properly exercised its discretion to limit further cross-examination and did not err in allowing and sustaining the objections made by Ms. Sellers' attorney.

In his next assignment of error, defendant argues that the trial court erred in denying his motion to dismiss due to insufficient evidence that defendant committed a crime against nature on 21 April 2000. The standard of review for a motion to dismiss is "whether there is substantial evidence of each essential element of the offense charged ..., and of the defendant being the one who committed the crime." *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 387 (1984) (citations omitted). "'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* (citation omitted). The trial court must consider all evidence in the light most favorable to the State and draw all reasonable inferences in the State's favor. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980); *State v. Jackson*, 145 N.C. App. 86, 89, 550 S.E.2d 225, 229 (2001).

In this case, Ms. Sellers testified that she and defendant had engaged in various oral sex acts on or about 21 April 2000. Sergeant Spratt's interview with Ms. Sellers corroborated her in-court testimony regarding the nature and timing of the acts with defendant. Both Ms. Sellers and Sergeant Spratt testified that a videotape taken from defendant's apartment and labeled "Christina from 30 minutes, 4/21/00" depicted Ms. Sellers and defendant engaging in various oral sex acts. Further, Sergeant Spratt

testified that the videotape had not been tampered with in any manner since the time it was seized from defendant's apartment. Viewing this evidence in the light most favorable to the State and making necessary inferences in the State's favor, there is substantial evidence to support the charge of a crime against nature. Thus, we hold that the trial court properly denied defendant's motion to dismiss.

We have carefully reviewed defendant's remaining assignments of error and find them to be without merit.

No error.

Judges McGEE and HUDSON concur.

Report per Rule 30(e).