

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA01-1538

NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2002

STATE OF NORTH CAROLINA

v.

Avery County
No. 99CRS2215

DAVID LEE CALLOWAY

Appeal by defendant from judgment entered 11 July 2001 by Judge Zoro J. Guice, Jr. in Avery County Superior Court. Heard in the Court of Appeals 30 September 2002.

Attorney General Roy Cooper, by Assistant Attorney General David Gordon, for the State.

David Childers for defendant-appellant.

BIGGS, Judge.

David Lee Calloway (defendant) was charged with indecent liberties with a child and second degree rape. The State's evidence tended to show the following: On or about 29 September 1999, defendant drove with his niece (the victim) to the grocery store. After leaving the grocery store, defendant drove the victim to a secluded area where he attempted to put her hand on his penis, rubbed her breasts and vagina, and kissed her. Defendant also engaged in non-consensual intercourse with the victim, who was thirteen years old. The victim testified that she was yelling, and

demanding that defendant stop, and that if he did not get off of her, she was going to get out of the car and walk home. Moreover, though she tried to push defendant off of her, he was stronger. After the incident, defendant apologized to the victim, and told her that he would give her \$20 if she did not tell anyone and that he would take both she and her friends out to a movie if she didn't say anything about the incident. The victim also testified that 29 September 1999 was not the first time that defendant had made sexual advances towards her. Defendant had rubbed her breasts and vagina on two prior occasions.

Defendant testified on his own behalf at trial and stated that he was 37 years old, and that he had never engaged in any improper sexual conduct with the victim. He further testified that prior to the incident in question, he had confronted the victim about "messing around" with his son. At that time, defendant testified that the victim told him, "I'll fix you any way I can; I'll get even with you." When questioned by the prosecutor on cross-examination, over the objection of defense counsel, defendant denied ever inappropriately touching other children. In response to similar questions, defendant's character witness also denied knowledge of such allegations against defendant on cross-examination.

The jury subsequently found defendant guilty of indecent liberties, but acquitted him of the charge of second degree rape. The trial court imposed an intermediate punishment of 36 months supervised probation. Defendant appeals.

On appeal, defendant argues that the trial court erred in allowing the prosecutor to question him and one of his character witnesses about allegations that he had previously touched other children improperly. Defendant argues that the evidence was inadmissible under N.C.R. Evid. 403, 404(b), and/or 608(b). Defendant contends that "[t]he only possible purposes for the unsupported, alleged acts with other children by the defendant herein, were to show that the defendant acted in conformity therewith; to excite the emotions of the jury unfairly; and to prejudice the defendant unfairly."

Rule 608(b) provides:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

N.C.R. Evid. 608(b). While Rule 608(b) addresses the admissibility of specific instances of conduct, Rule 404(b) addresses more general evidence of "other crimes, wrongs, or acts." N.C.R. Evid. 404(b). Rule 404(b) provides pertinently:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of

mistake, entrapment or accident.

N.C.R. Evid. 404(b). Both Rule 608(b) and Rule 404(b) evidence is subject to the balancing test of N.C.R. Evid. 403. Rule 403 prohibits the admission of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. N.C.R. Evid. 403. The decision to exclude evidence under Rule 403 is left to the discretion of the trial court. *State v. Hoffman*, 349 N.C. 167, 184, 505 S.E.2d 80, 91 (1998).

In the instant case, the prosecutor cross-examined defendant and his character witness, C.L. "Butch" Hughes, about defendant allegedly having engaged in inappropriate behavior with other minor girls. When defense counsel objected, citing N.C.R. Evid. 608 (b), counsel's objections were overruled. The trial court subsequently made specific findings as to the admissibility of those prosecutor's questions when addressing counsel's objections and resulting motion for mistrial:

1. That the cross-examination objected to by the defendant relates to acts or conduct which are alleged to have occurred on the part of the defendant with other minor children.

. . . .

4. That the questions asked by Assistant District Attorney, Jerry Wilson, were . . . asked . . . in good faith with a factual basis existing for his asking of such questions.

5. That cross-examination under the law of North Carolina is unrestricted provided that the questions are asked in good faith and further provided that there is a factual basis for the said questions being asked.

6. That the specific acts complained of by the defendant are acts of conduct and of conduct on the part of the defendant and are a proper subject for cross-examination of a defendant after a defendant has elected to take the witness stand in his own behalf.

7. That the evidence complained of by the defendant by way of cross-examination has a bearing and a direct relationship as to the defendant's credibility.

8. That many of the questions, if not all of the questions, asked by the State on cross-examination and complained of by the defendant are incriminating type questions and that in most all cases of cross-examination by an Assistant District Attorney of a defendant that the questions are by way of necessity incriminating type questions and the defendant has no basis for complaint based upon the type of questions asked by the Assistant District Attorney.

9. That the fact that the defendant got upset at certain questions asked by the Assistant District Attorney on cross-examination or got mad at the asking of the said questions or got frustrated in giving answers to the said questions is no reason or a legitimate basis for which the Court should limit the cross-examination. That the objections complained of by the defendant do not constitute and do not have a legal basis in fact or in law for the Court sustaining the defendant's objection or for the Court to allow the motion for a mistrial.

10. That the questions objected to by the defendant and asked by the Assistant District Attorney on cross-examination are not unduly prejudicial and are proper cross-examination and are within the normal scope and limits of proper cross-examination.

The trial court went on to conclude, pertinently that the prosecutor's inquiry into allegations that defendant had engaged in inappropriate behavior with other minor girls, was entirely proper under Rule 608(b) and the balancing test of Rule 403. The trial

court, therefore, overruled defendant's objections and denied his motion for mistrial.

We initially note that many of the trial court's findings of fact are more of the nature of mixed findings of fact and conclusions of law. To that end, we conclude that the court's mixed finding and ultimate conclusion regarding the admissibility of the prosecutor's line of questioning on cross-examination of defendant and his character witness, are erroneous. The conduct inquired into here is in no way probative of defendant's truthfulness or untruthfulness, and therefore, is not admissible under Rule 608(b). See *State v. Morgan*, 315 N.C. 626, 635, 340 S.E.2d 84, 90 (1986) (giving the following examples of conduct admissible on cross-examination under N.C.R. Evid. 603: "'use of false identity, making false statements on affidavits, applications or government forms (including tax returns), giving false testimony, attempting to corrupt or cheat others, and attempting to deceive or defraud others.'" 3 D. Louisell & C. Mueller, *Federal Evidence* § 305 (1979)); see also *State v. Brooks*, 113 N.C. App. 451, 457, 439 S.E.2d 234, 237 (1994) (stating that evidence of a defendant's past abusive behavior is not admissible under N.C.R. Evid. 608(b), "'because extrinsic instances of assaultive behavior, standing alone, are not in any way probative of the witness' character for truthfulness or untruthfulness.'" *State v. Morgan*, 315 N.C. 626, 635, 340 S.E.2d 84, 90 (1986)); *Johnson v. Amethyst Corp.*, 120 N.C. App. 529, 538, 463 S.E.2d 397, 403 (1995) (holding that the plaintiff's prior drug use was not in any way probative to

her credibility under N.C.R. Evid. 608(b)).

While the prosecutor's line of questioning was not proper under Rule 608(b), said questions were completely proper under Rule 404(b). Significantly, the trial court indicated during an exchange with counsel (outside of the jury's presence) that the prosecutor's line of questioning as to defendant's alleged inappropriate touching of other minor children was admissible under N.C.R. Evid. 404(b). In fact, the trial court instructed the jury in that regard:

Now, members of the jury, evidence has been received tending to show other alleged acts of the defendant. This evidence was received solely for the purpose of showing that the defendant had the intent which is a necessary element of the crimes charges [sic]; that the defendant had the knowledge which is a necessary element of the crimes charged; that there existed in the mind of the defendant a plan, scheme, system or design involving the crimes charged. If you believe this evidence, you may consider it, but only for the limited purposes for which it is received.

The court also found and concluded that the probative value of said questions was not substantially outweighed by the likelihood of prejudice under N.C.R. Evid. 403.

In sum, we conclude that though the prosecutor's questions propounded to defendant and his character witness, regarding defendant's alleged inappropriate touching of minor girls, were not proper under N.C.R. Evid. 608(b), said questions were admissible under 404(b). Hence, this argument fails. See *State v. McElrath*, 322 N.C. 1, 19, 366 S.E.2d 442, 452 (1988) (providing that when a court's ruling ultimately reaches the correct conclusion but for

the wrong reason, the defendant is not prejudiced by the court's ruling).

Having so concluded, we hold that defendant received a fair trial, free from prejudicial error.

No error.

Judges WALKER and THOMAS concur.

Report per Rule 30(e).