An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA01-415

NORTH CAROLINA COURT OF APPEALS

Filed: 21 May 2002

STATE OF NORTH CAROLINA

v.

HAROLD FRANKLIN ROUSH

Randolph County
Nos. 99 CRS 15491-15496
99 CRS 16486
00 CRS 35-41

Appeal by defendant from judgment entered 20 October 2000 by Judge A. Moses Massey in Randolph County Superior Court. Heard in the Court of Appeals 12 February 2002.

Roy Cooper, Attorney General, by Amy C. Kunstling, Assistant Attorney General, for the State.

Robert T. Newman, Sr. for defendant-appellant.

THOMAS, Judge.

Defendant, Harold Franklin Roush, was convicted in a jury trial of first-degree statutory rape, statutory rape, two counts of first-degree statutory sexual offense, and ten counts of taking indecent liberties with a child. He was sentenced to a total of 480 to 594 months in prison. He now appeals, setting forth two assignments of error.

Defendant argues the trial court erred by denying his motions to sever the trials and to suppress his statement to Randolph County Department of Social Services (DSS) workers. For the reasons discussed herein, we find no error.

The State's evidence tended to show the following: "K" and "W" are two females who were ages eight and fifteen, respectively, at the time of trial on 16 September 2000.

Defendant is K's stepfather. In February 1999, Cheryl Roush (Mrs. Roush), defendant's wife and K's mother, awoke one morning before dawn to find neither K nor defendant in bed. When Mrs. Roush found them sitting together on the sofa, K appeared upset. Later that morning, after defendant left for work, Mrs. Roush asked K what had happened. K responded that defendant was "pulling on her arm . . . to [get her to] touch his privates."

When defendant returned home, he and Mrs. Roush discussed K's report and his involvement with the child. With K present, they decided the family would remain together in the house and attempt to remedy the problem. Mrs. Roush did not alert law enforcement or any other governmental agency.

In November 1999, Officer James Sparks of the Randolph County Sheriff's Department made a presentation at K's elementary school concerning children's safety and good and bad touches. After the presentation, K told her teacher that her stepfather inappropriately touched her. The teacher told Sparks, who spoke with K and subsequently reported the conversation to DSS.

At the offices of DSS, K explained to social worker Jaynetta Butler that defendant touched her genitals with his penis, mouth, and fingers. She described a penetration and stated defendant sometimes would kiss her with his tongue. She also said defendant forced her to watch a pornography videotape while placing his

genitals in her mouth.

Defendant and Mrs. Roush were called to the DSS offices to discuss the allegations. Defendant gave a statement to Butler indicating that K initiated the sexual contact.

Officer Chris Maness of the Randolph County Sheriff's Department was contacted and he immediately came to the DSS meeting room. Maness read defendant his *Miranda* rights, which defendant waived, and then interviewed defendant. Defendant gave a written statement materially consistent with what he had told Butler.

K was removed from the home by DSS and placed with her grandmother. The grandmother had previously noticed, while K was taking a bath, that the child's genitals were red and appeared irritated. After the placement, K suffered nightmares and was afraid to go to sleep until her grandmother moved furniture in front of the windows and moved K's bed from near the windows.

K was evaluated by Kyra Hauser, a counselor at Randolph County Mental Health Center, and Dr. Chris Sheaffer, a clinical child psychologist. It was Dr. Sheaffer's opinion that K's behaviors and statements were consistent with a child who has been sexually abused.

W testified that she and her family lived next door to the Roushes. Her stepfather, Allen Hornaday, was defendant's best friend. W frequently baby-sat for the Roushes. On at least three occasions, defendant touched W's genitals through her clothing. He often kissed her good-bye by using his tongue. During the summer of 1998, defendant went to W's home at least ten times while she

was there alone and digitally penetrated her. Once, he put his penis inside her genitals, but without penetrating her. Throughout the remainder of 1998 and 1999, defendant repeated the same conduct. In all, the sexual abuse occurred from 1993 until 1999.

W told no one about the abuse because she did not think anyone would believe her. However, after K came forward with her experience, W told her parents. W's mother immediately called the police.

Defendant did not testify or present any evidence at trial.

By his first assignment of error, defendant argues the trial court erred by denying his motion to sever the trials. We disagree.

"Two or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." N.C. Gen. Stat. § 15A-926(a) (2001). Public policy encourages joinder to "expedite[] the administration of justice . . . and avoid[] the necessity of recalling witnesses who will be called upon to testify only once if the cases are consolidated." *State v. Chandler*, 324 N.C. 172, 187, 376 S.E.2d 728, 737 (1989).

We note that the decision to join offenses is discretionary and will not be disturbed on appeal absent a showing of abuse of discretion. *State v. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985). In deciding whether or not to join offenses it is

appropriate to consider the nature of the joined offenses, *see State v. Greene*, 294 N.C. 418, 422, 241 S.E.2d 662, 665 (1978), and the commonality of facts, *see State v. Bracey*, 303 N.C. 112, 117, 277 S.E.2d 390, 394 (1981).

In the instant case, the nature of the sexual offenses as to each victim are substantially similar. The factual commonalities include: (1) both victims are females; (2) defendant had a familial-type relationship with both victims, which enabled him to have easy access to them; (3) defendant kissed both victims using his tongue; (4) defendant digitally penetrated both victims; (5) defendant touched the victims' genitals through their clothing; (6) defendant partially penetrated both victims' vaginas with his penis, causing them pain; (7) the offenses occurred near in place to one another; and (8) the offenses were committed during overlapping time periods.

Considering the nature of the joined offenses and the commonality of facts, the trial court did not abuse its discretion in denying defendant's motion to sever the trials. We therefore reject defendant's argument.

By defendant's second assignment of error, he argues the trial court committed reversible error by denying his motion to suppress his statements to Butler, a DSS social worker, and Maness, a law enforcement officer. He contends that his inculpatory statements to Butler should have been suppressed because she did not advise him of his *Miranda* rights. Consequently, he argues, his later confession to Maness was the "poisonous fruit" of the first

confession and also should have been suppressed. We disagree.

The scope of appellate review of an order suppressing evidence is strictly limited. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). This Court must determine whether the trial judge's findings of fact are supported by competent evidence. *Id.* Factual findings which are supported by competent evidence are deemed binding on appeal. *Id.* "While the trial court's factual findings are binding if sustained by the evidence, the court's conclusions based thereon are reviewable *de novo* on appeal." *State v. Parker*, 137 N.C. App. 590, 594, 530 S.E.2d 297, 300 (2000).

Here, the trial court concluded that none of defendant's constitutional rights were violated when he gave either statement, and denied defendant's motion to suppress. *Miranda* warnings are not required in interrogations initiated by private individuals who are unconnected to law enforcement, and thus voluntary statements of an accused made to the private individual are admissible at trial. *See In re Weaver*, 43 N.C. App. 222, 223, 258 S.E.2d 492, 493 (1979) (social worker is not required to give a *Miranda* warning to the accused); *but see State v. Morrell*, 108 N.C. App. 465, 473-74, 424 S.E.2d 147, 152-53 (requiring social worker to give a *Miranda* warning where she had been working closely with law enforcement prior to the interrogation), *appeal dismissed and disc. review and cert. denied*, 333 N.C. 465, 427 S.E.2d 626 (1993).

The trial court's unchallenged findings of fact show Butler not to have been acting as an agent of law enforcement when she interviewed defendant. The findings include that: (1) defendant

was questioned by Butler and another social worker about the inappropriate touching of K; (2) no police officer was present at this questioning; (3) there was no ongoing police investigation at the time of the questioning; (4) Butler told defendant to be honest and did not tell him that he would be reported to the police; (5) neither social worker threatened defendant in any way; (6) Butler did not inform defendant and defendant did not ask what would be done with the information he provided; (7) defendant was never told he could not leave the room; (8) at one point during the questioning, defendant took a five-minute cigarette break; (9) there is no indication that defendant did not understand the questions or that he did not give understandable answers; (10) in response to the social workers' questions, defendant gave an incriminating statement; (11) the DSS then contacted the police; and (12) an officer then came to the DSS facility, read defendant his *Miranda* rights, and defendant gave a second incriminating statement to the officer.

The foregoing facts establish that Butler was not connected to law enforcement and therefore was not required to warn defendant of his *Miranda* rights. As a result, defendant's constitutional rights were not violated and his second confession to Officer Maness was not the "poisonous fruit" of his confession to Butler. Accordingly, we reject defendant's argument and find no error.

NO ERROR.

Judges GREENE and MCGEE concur.

Report per Rule 30(e).