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NO. COA01-583

NORTH CAROLINA COURT OF APPEALS

Filed: 7 May 2002

IN RE: K.M.A.

Davidson County  
No. 00 J 41

IN RE: S.L.A.

Davidson County  
No. 00 J 42

Appeal by respondents from judgment entered 5 July 2000 and signed 11 September 2000 by Judge Samuel A. Cathey in Davidson County District Court. Heard in the Court of Appeals 18 February 2002.

*Doris C. Gamblin, for petitioner-appellee, Davidson County Department of Social Services.*

*Joetta McQueen, for respondent-appellant, Stephanie Dolby Adams.*

*Scott B. Lewis, for respondent-appellant, Glen Adams.*

*Hunton & Williams, by Jason S. Thomas, as guardian ad litem-appellee for minor children, K.M.A. and S.L.A.*

EAGLES, Chief Judge.

On 11 February 2000, Davidson County Department of Social Services (DSS) filled two petitions alleging that K.M.A., aged four years, and S.L.A., aged one year, (the children), were sexually abused and neglected. DSS filed supplemental petitions on 2 May 2000. Judge Cathey entered ex-parte orders 2 May 2000 directing nonsecure custody. After a hearing on 9 May 2000, Judge Cathey

ordered continued custody with DSS and granted supervised visitation at DSS for the mother, Stephanie Adams.

Additional hearings occurred on 29 June 2000 and 5 July 2000. As a result of these hearings, Judge Cathey adjudicated the children to be abused and neglected and ordered custody to remain with DSS. A written adjudication order was signed on 11 September 2000. From this order, respondents appeal.

In December 1999, Stephanie Adams (then Stephanie Dolby) moved with her two children, K.M.A. and S.L.A., from Ohio to Lexington, North Carolina. Ms. Dolby's boyfriend and father of the children, Glen Adams, joined them in Lexington. On 20 January 2000, DSS received a child protective services report alleging that Ms. Dolby had walked in on Glen Adams raping K.M.A. On 21 January 2000, social worker Jennifer Cooke interviewed the parents, Stephanie Dolby and Glen Adams. The parents denied any sexual abuse of the children. They did, however, inform Ms. Cooke that Glen Adams had been convicted in Warsaw, Indiana, in 1989 of molesting his two stepdaughters. Mr. Adams was incarcerated for six months with the Indiana Department of Corrections. Stephanie Dolby told Ms. Cooke that she was aware of the conviction but did not believe Glen Adams was guilty.

The parents agreed to a protection plan under which the children underwent medical evaluation and the father was prohibited from having contact with the children. Glen Adams moved out of the residence and the children remained with their mother.

On 4 February 2000, Dr. Robert Timberlake, Jr., examined both children pursuant to the Child Medical Evaluation Program. Based on the physical evidence of "notching" of the hymens of both children, statements of K.M.A., and knowledge of Glen Adams' prior convictions for child molestation, Dr. Timberlake found it probable that both children had been sexually abused. After the examinations, DSS issued petitions alleging abuse and neglect.

On 7 March 2000, Stephanie Dolby took the children to Dr. Kathleen Russo. Dr. Russo examined the children for physical evidence of sexual abuse. Ms. Dolby did not inform Dr. Russo about Glen Adams' prior convictions. Dr. Russo found no physical evidence of sexual abuse.

On either 5 or 7 April 2000, against the recommendation of DSS, Stephanie Dolby married Glen Adams and became Stephanie Adams.

On 16 March 2000, psychologist Dr. Robert Borgman met with Glen Adams. Dr. Borgman and Mr. Adams scheduled a second appointment which Glen Adams failed to keep. Accordingly, Dr. Borgman completed his assessment of Glen Adams' mental health based on the 16 March 2000 interview. Dr. Borgman concluded that Glen Adams exhibited six of the nine characteristics that mental health professionals associate with sexual offenders. Dr. Borgman recommended that Glen Adams undergo sexual offender treatment and that Mr. Adams have no unsupervised contact with the children without the approval of Mr. Adams' sex offender therapist. Dr. Borgman also recommended that Stephanie Adams undergo evaluation to determine her emotional capacity to protect her children.

On appeal, respondents contend: (1) the trial court erred by allowing into evidence Glen Adams' prior convictions for child molestation and any references to the convictions; (2) the trial court erred by excluding rebuttal testimony by Glen Adams' sister; (3) the trial court's adjudication of the children as abused and neglected is not supported by clear and convincing evidence; and (4) the trial court erred by placing the children in the custody of DSS. After careful review of the record, briefs, and contentions of the parties, we disagree and affirm.

I.

Respondents first contend that the trial court erred by admitting and considering evidence of Glen Adams' two prior child molestation convictions. In 1989, Mr. Adams was convicted of two counts of felony child molestation in Indiana. Over respondents' objections, these convictions were referred to during the adjudicatory proceedings. On appeal, respondents argue that the trial court erred by admitting this evidence because petitioners failed to present a non-character theory of relevance for the evidence and because the convictions occurred more than ten years prior.

North Carolina Rule of Evidence 404(b) is a "general rule of inclusion of relevant evidence." *State v. Coffey*, 326 N.C. 268, 278, 389 S.E.2d 48, 54 (1990) (emphasis in original). "[E]vidence of other offenses is *admissible* so long as it is *relevant to any fact or issue other than* the character of the accused." *Id.* In criminal cases, our Supreme Court has said that it is "very liberal

in admitting evidence of similar sex crimes in construing the exceptions to the general rule." *State v. Williams*, 303 N.C. 507, 513, 279 S.E.2d 592, 596 (1981). In *State v. Jacob*, 113 N.C. App. 605, 439 S.E.2d 812 (1994), this Court affirmed the trial court's consideration of evidence of other similar sexual offenses, despite a ten-year lapse of time between incidents, to show a common scheme or plan to molest children.

While a lapse of time between instances of sexual misconduct slowly erodes the commonality between acts and makes the probability of an ongoing plan more tenuous, the continuous execution of similar acts throughout a period of time has the opposite effect. When similar acts have been performed continuously over a period of years, the passage of time serves to prove, rather than disprove, the existence of a plan.

*Id.* at 611, 439 S.E.2d at 815.

Here, Glen Adams' prior convictions for child molesting show his motive, intent, knowledge, or plan to sexually abuse children in his household and under his care. The victims of the prior molestation for which Glen Adams was convicted came from within Mr. Adams' family -- his stepchildren. See *State v. Carpenter*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 556 S.E.2d 316, 320-21 (2001).

Accordingly, we conclude that the evidence was properly admitted and that its probative value far outweighed the risk of unfair prejudice. Glen Adams' prior convictions, coupled with other evidence of the children being abused, tended to show a scheme of abuse. Evidence of Glen Adams' prior convictions did not unfairly prejudice respondents. This assignment of error fails.

At the hearing, Dr. Timberlake's testimony included statements made to him by victim K.M.A. Respondents contend that the trial court erred by excluding rebuttal testimony of Glen Adams' sister, Tonya Adams.

The trial court allowed hearsay statements of victim K.M.A. that pertained to inappropriate sexual conduct by Glen Adams. In rebuttal to Dr. Timberlake's testimony, Tonya Adams was asked two questions about what K.M.A. and S.L.A. may have said to her. Petitioners objected to the questions and the objections were sustained. Respondents argue that under North Carolina Rule of Evidence 806 the trial court erred because the rebuttal hearsay evidence from Tonya Adams was offered to impeach hearsay offered by Dr. Timberlake and was therefore admissible. See *State v. Small*, 131 N.C. App. 488, 508 S.E.2d 799 (1998).

On appeal, the party asserting an evidentiary error bears the burden of showing the error and that the error was prejudicial. *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893 (2001). Evidentiary errors are harmless, however, unless respondents demonstrate that absent the error there is a reasonable possibility that a different result would have been reached had the error not occurred. *State v. Nobles*, 350 N.C. 483, 506, 515 S.E.2d 885, 899 (1999).

Here, assuming *arguendo* that respondents were entitled to admission of rebuttal evidence from Tonya Adams, respondents have failed to show prejudice caused by the trial court's exclusion of the evidence. At the hearing below, respondents made no offer of

proof as to what Tonya Adams would have testified that either of the children had said to her. On this record, respondents cannot meet their burden of showing that absent the alleged error a different result would likely have been reached by the trial court. Accordingly, this assignment of error fails. See *State v. Cozart*, 131 N.C. App. 199, 205, 505 S.E.2d 906, 911 (1998).

III.

As their third assignment of error, respondents contend that the trial court's adjudication of the children as abused and neglected is not supported by clear and convincing evidence or sufficient factual findings.

Allegations of neglect must be proven by clear and convincing evidence. N.C.G.S. § 7B-807. "In a non-jury neglect adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1987). An appellate court's review of a trial court's conclusions of law is limited to whether the conclusions are supported by the findings of fact. *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984).

Here, the evidence clearly and convincingly supports the trial court's findings of fact. Those findings, in turn, support the trial court's conclusion that both K.M.A. and S.L.A. were abused and neglected.

Dr. Timberlake's medical examination of both K.M.A. and S.L.A. revealed that both girls had notched hymens and other physical

signs of sexual abuse. In addition to this physical evidence, K.M.A. made several statements to Dr. Timberlake during the examination in which she indicated sexual abuse by her father.

Though Dr. Russo, through her examination of the girls, did not see evidence of sexual abuse, she acknowledged that a normal examination does not rule out the possibility of abuse. Dr. Russo also testified that had Mrs. Adams informed her of the children's circumstances, she would have approached examination of the girls differently.

Pursuant to his psychological evaluation of K.M.A., Dr. Borgman concluded that K.M.A. had been sexually abused. The evaluation noted examples of behaviors and comments indicative of sexual abuse. These examples included: (1) stroking of the genital area of dolls and remarking that this is her favorite part; (2) drawings of a sort peculiar to those who have suffered sexual abuse; and (3) nightmares.

Dr. Borgman's mental health assessment of Glen Adams revealed that Mr. Adams possessed six of the nine traits that mental health professionals associate with sex offenders: (1) denial of involvement in documented sexual offenses against children; (2) refusal to discuss events surrounding the offense; (3) a spouse who supports the offender's denial; (4) past history of documented sexual offenses; (5) failure to obtain treatment for sexually offending behavior; and (6) a history of having engaged in violence or physical force. Dr. Borgman concluded that Glen Adams posed a



"high risk for re-offending sexually" and that he should not be permitted any unsupervised contact with his daughters.

The trial court also found that Glen Adams was convicted of two felony counts of sexual abuse on 10 July 1989 in *State of Indiana v. Glen Adams*, case number 25C01-8812-CF-75, Fulton Circuit Court.

After careful review of the record, briefs, and transcripts, we conclude that though some evidence favorable to respondents was adduced, the trial court's findings are supported by clear and convincing evidence. These findings support the trial court's conclusion that K.M.A. and S.L.A. were abused and neglected. Accordingly, this assignment of error fails.

#### IV.

In the 11 September 2000 order adjudicating the children as abused and neglected, the trial court ordered that custody of the children remain with DSS, pending a dispositional hearing. As their final assignment of error, respondents contend that the evidence presented and the findings of fact did not meet the statutory criteria for a nonsecure custody order.

In their brief, respondents seem to wish to challenge the nonsecure custody orders entered by the trial court on 9 May 2000, prior to the 11 September 2000 adjudication. This appeal is barred because respondents have not given notice of appeal from those orders. Moreover, even if the nonsecure custody orders had been appealed, that appeal is now moot because the children have been adjudicated as abused and neglected. "A custody order, entered

after an adjudication on the merits, is not a nonsecure or secure custody order as those terms are used in the context of section 7A-573." *In re Van Kooten*, 126 N.C. App. 764, 771 n.2, 487 S.E.2d 160, 164 n.2 (1997).

Petitioners presented clear and convincing evidence supporting the trial court's findings of fact. Those findings support the trial court's adjudication of the children as abused and neglected. After careful review of the record, we hold that the trial court did not err by ordering that custody remain with DSS. Accordingly, this assignment of error fails.

For the foregoing reasons the decision of the trial court is affirmed.

Affirmed.

Judges McCULLOUGH and BIGGS concur.

Report per Rule 30(e).