NO. COA01-647

NORTH CAROLINA COURT OF APPEALS

Filed: 16 April 2002

STATE OF NORTH CAROLINA

v. Guilford County
No. 97 CRS 030786

RICKY BULLARD

Appeal by defendant from judgment entered 25 October 2000 by Judge Michael E. Helms in Guilford County Superior Court. Heard in the Court of Appeals 26 March 2002.

Attorney General Roy Cooper, by Assistant Attorney General Jane Rankin Thompson, for the State.

Donald E. Gillespie, Jr., for defendant appellant.

TIMMONS-GOODSON, Judge.

On 23 October 2000, a jury found Ricky Bullard ("defendant") guilty of felony child abuse inflicting serious injury. Evidence before the trial court tended to show the following: In April 1996, the Guilford County Department of Social Services ("DSS") received allegations against defendant concerning potential neglect and physical and sexual abuse of defendant's two-year-old son, "R." Bobby Cunningham ("Cunningham"), a social worker with DSS, subsequently investigated the case and discovered that defendant's children had been returned to defendant from foster care in October 1995.

On 4 April 1996, Cunningham met with the director of R's daycare, who had reported the alleged abuse. Cunningham learned that defendant's explanation for R's injuries was that "the toilet seat had [fallen] on his penis." Cunningham also met with R in order to observe his injuries. When daycare workers began removing R's clothing, "he became very afraid. He cried very intensely. He was very afraid to have his clothes removed." When R was undressed, Cunningham observed that "[h]is penis was swollen and blistered . . . . [and] [v]ery red. [He had] bruises on his buttocks . . . . [and] a bruise on his right jaw that extended back to his ear." Cunnigham spoke with R's sisters, who also attended the daycare. They told Cunningham "that they couldn't tell [him] what happened to their brother's pee-pee because their father told them [not to] tell anyone because it was a secret." After observing R's injuries and meeting with the director and the owner of R's daycare, Cunningham decided that R was in need of immediate medical care, and he therefore filed a petition with the Guilford County court for custody of R and his three sisters. Pursuant to a nonsecured order authorizing placement in foster care, DSS took custody of the children.

Pediatrician Kathleen E. Lucas ("Dr. Lucas") testified for the State. During her examination of R on 5 April 1996, Dr. Lucas observed a "flap tear on the top side of the penis . . . approximately three quarters of an inch wide at the tip and a half inch in length on each side." Dr. Lucas agreed that the laceration was "fairly deep" and opined that the injury had probably occurred

on or about 31 March 1996. In Dr. Lucas' opinion, three potential causes of the injury were "some kind of clamp device that was actually applied to the penis . . . . [or] a bite injury . . . . [or] an over-forceful squeeze [from] a [finger]nail." Dr. Lucas testified that R's injury was painful and unlikely to have been self-inflicted, and that it could not have occurred as a result of a toilet seat falling on his penis. Further examination revealed "symmetrical, equally-spaced line bruises down both [of R's] buttock cheeks." These bruises were "bluish-green" and "showed a grid pattern design." According to Dr. Lucas, "it definitely was not accidental bruising pattern on a child," but rather the result of "the child [being] forcibly tied against something or forcibly held against something."

Dr. Angela Stanley ("Dr. Stanley"), a pediatrician specializing in child physical and sexual abuse, also testified for the State. Dr. Stanley stated that she examined R on 24 August 1995, 12 April 1996, and 24 May 1996. On the 12 April 1996 visit, Dr. Stanley observed that R's penis was in the process of healing, and that he had "a pale scar, about one inch at his left flank area posteriorly." In Dr. Stanley's opinion, R's injury

> would have to have been an injury inflicted upon the child by some outside force. It was not a crash injury or a bruise-type injury. It was what I stated actually an evulsion type in that there had been obviously some pulling away of the skin from the penis itself. It would not be consistent with anything that a child would do to himself or herself, because it would obviously have a lot of pain associated with the injury.

Accordingly, Dr. Stanley concluded that R's injuries were the

result of abuse.

The State presented further evidence by R's thirteen-year-old sister, "M." M explained that defendant was "trying to potty train my brother and he wasn't doing such a fantastic job of it." According to M, defendant pulled R's penis and told him that, "you don't need it because you don't know how to use it." M further stated that defendant "spank[ed] [R] with the belt" "a bunch of times," and that she was afraid of defendant, because she didn't "want to get hurt again."

R's twelve-year-old sister, "A," also testified for the State. She described an incident where defendant reached under the table at which she and R were sitting and pulled "very hard" on R's penis. A stated that R "burst out crying" and continued crying for "a long time." She further testified that defendant "hit [R] with a belt with metal things on it."

The State also introduced a statement made by defendant on 11 April 1996. In the statement, defendant gave the following explanation for R's injuries:

> We were sitting at the kitchen table on Sunday and [R] wet in his training pants. . . . And I touched him and noticed he [was] wet and said, See man, you need to go to the bathroom to pee. I said, If you're not going to use it, I'm going to pull it off. I grabbed his penis and I pinched it to let him know he peed on himself.
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> Monday morning when he got up, it was swollen. His penis was swollen and I put Desitin on it.
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> On Sunday, [R] would not step up to the commode. He would stand there and pee on the floor. So I put a cinder block in there for him to stand on and he wouldn't, so I spanked his bare butt with my hand, and I told him to

> stand up to the commode and hold his [penis]. If I left those bruises, I didn't know it or see them.

Defendant presented no evidence at trial.

Based on the above-stated evidence, the jury found defendant guilty of felony child abuse. The trial court thereafter sentenced defendant to an active term of imprisonment for a minimum of forty-two (42) months, and a maximum term of sixty (60) months, from which conviction and sentence defendant appeals.

Although defendant designated ten assignments of error in the record on appeal, his brief to this Court contains arguments concerning only three assignments of error. Assignments of error in support of which no reason or argument is stated or authority cited are deemed abandoned. *See* N.C.R. App. P. 28(b)(6) (2002). We therefore limit our review to those assignments of error addressed by defendant in his brief.

Defendant argues that the trial court erred by admitting into evidence prior recorded statements of a witness. Defendant also contends that he was subjected to double jeopardy in the case at bar, and that the trial court erred in placing the burden on defendant of proving that former jeopardy had attached. For the reasons stated herein, we conclude that the trial court committed no error, and we therefore uphold defendant's conviction and resulting sentence.

Defendant first argues the trial court erred in admitting into evidence a written statement made by his daughter M to law

enforcement officers in April 1996. The portion of M's statement that was received into evidence read as follows:

> 1996 April 9. My dad pulled my brother[']s] private part. He pulled it six times. If he didn't use the bathroom that he would pull it off. It turned purple and red. He cried.

When shown the statement at trial, M stated that it did not refresh her recollection of the incident therein described. Defendant now contends that admission of such evidence was reversible error. Defendant's argument has no merit.

Under section 8C-1, Rule 803(5), of our General Statutes, a witness's recorded recollection is admissible when it is "shown to have been made or adopted by the witness when the matter was fresh in his memory." N.C. Gen. Stat. § 8C-1, Rule 803(5) (1999); *see also State v. Corn*, 307 N.C. 79, 83, 296 S.E.2d 261, 264-65 (1982) (explaining the proper use of past recorded recollections). The record reveals that M initially testified about R's injury from her own independent recollection. Moreover, when shown the statement, M positively identified it as the one she had given law enforcement officers. She also testified that she remembered making the statement, that it was truthful, and that she wrote the statement herself. The statement was therefore admissible, and we overrule defendant's first assignment of error.

By his second assignment of error, defendant argues that he was subjected to double jeopardy for the same offense. In June 1996, defendant was charged with two counts of misdemeanor child abuse based on the bruising on R's buttocks and the injury to his penis. Defendant pled guilty to the abuse charge involving the

bruised buttocks and was accordingly sentenced. The State voluntarily dismissed the misdemeanor warrant against defendant for the injury to R's penis. Upon reconsideration of the severity of the injury to R's penis and the seriousness of the offense, however, the State indicted defendant in February 1997 with the felony child abuse charge that is the subject of the instant case against defendant. Defendant now claims that he pled guilty to the misdemeanor abuse charge regarding the bruising to R's buttocks in exchange for the dismissal of the misdemeanor charge involving the injury to R's penis. Defendant argues, therefore, that his present conviction for the injury to R's penis represents additional punishment for an offense for which defendant had already been sentenced, thereby violating the Fifth Amendment's prohibition against multiple punishments for the same offense. We disagree.

"'It is a fundamental and sacred principle of the common law, deeply imbedded in our criminal jurisprudence, that no person can be twice put in jeopardy of life or limb for the same offense.'" *State v. Cameron*, 283 N.C. 191, 197, 195 S.E.2d 481, 485 (1973) (quoting *State v. Ballard*, 280 N.C. 479, 482, 186 S.E.2d 372, 373 (1972)). The constitutional guarantee against double jeopardy protects a defendant from multiple punishments for the same offense. *See State v. Summrell*, 282 N.C. 157, 173, 192 S.E.2d 569, 579 (1972), *overruled in part on other grounds*, 324 N.C. 539, 380 S.E.2d 118 (1989). "'The test of former jeopardy is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense.'" *Cameron*, 282

N.C. at 198, 195 S.E.2d at 486 (quoting 2 Strong's North Carolina Index 2d *Criminal Law* § 26).

In the instant case, defendant has produced no evidence, other than his own assertions, that the State agreed to dismiss the charge that is the basis of his present conviction as part of a plea agreement. The record contains no evidence thereof, and the State presented evidence to the contrary at trial. Officer Robin McDonald ("Officer McDonald") testified at trial that she took out the two original misdemeanor warrants against defendant based on two separate injuries to R occurring on the same weekend. Officer McDonald explained that, because certain witnesses were unavailable when defendant's case was brought to court, the assistant district attorney, John Neimann, decided to dismiss the misdemeanor involving the injury to R's penis, as there was insufficient evidence to go forward with the prosecution. Officer McDonald could not recall any discussion regarding a dismissal of the second misdemeanor charge in exchange for defendant's guilty plea regarding the first misdemeanor charge. The State thereafter reissued the warrant as a felony charge.

Assistant District Attorney John Neimann ("Neimann") also testified regarding the dismissal of the original misdemeanor charge against defendant. Neimann stated that he dismissed the misdemeanor charge against defendant when he recognized that the offense "should have been charged as a felony and that we should not proceed on it in District Court." Neimann denied that the dismissal was part of a plea arrangement with defendant, and

further noted that "[i]t doesn't seem logical that we would have dismissed what would be arguably the more serious allegation in this case just in return for a guilty plea." Neimann added, however, that he "specifically remember[ed] reading [the charge] and saying this is a felony and doesn't belong [in district court]." As there was no evidence to support defendant's contention at trial that the charge against him placed him in double jeopardy, the trial court properly ruled that defendant's constitutional rights had not been violated. We overrule this assignment of error.

Defendant's remaining assignment of error is equally without merit. Defendant argues that the trial court erred in placing the burden on defendant at trial to show that his trial subjected him to double jeopardy. It is well established in this State that the burden is on the defendant to prove a plea of former jeopardy, and the trial court did not err in so ruling. *See State v. McKenzie*, 292 N.C. 170, 175, 232 S.E.2d 424, 428 (1977); *State v. Stinson*, 263 N.C. 283, 286, 139 S.E.2d 558, 561 (1965). We therefore overrule defendant's final assignment of error.

No error.

Judges GREENE and HUNTER concur.

Report per Rule 30(e).