NO. COA01-835

NORTH CAROLINA COURT OF APPEALS

Filed: 16 July 2002

STATE OF NORTH CAROLINA

v. Forsyth County
No. 00-CRS-052546
CHARLES FRANKLIN HARGETT, JR. 00-CRS-3607

Appeal by defendant from judgment entered 25 January 2001 by Judge Catherine C. Eagles in Forsyth County Superior Court. Heard in the Court of Appeals 4 June 2002.

Attorney General Roy Cooper, by Assistant Attorney General R. Kirk Randleman, for the State.

Paul M. Green, for defendant.

BIGGS, Judge.

Charles Franklin (defendant) appeals his convictions of indecent liberties with a minor and statutory rape. For the reasons herein, we conclude that the defendant is entitled to a new trial.

The evidence at trial tended to show the following: In the early morning hours of 28 November 1999, MW, age fifteen, appeared at the house of Rhonda Rhodes wearing only a t-shirt, asking that she call the police. When asked what was wrong, MW

stated that she had been raped by the defendant, who was later determined to be 31 years of age. When law enforcement arrived a short time later, MW told them that the defendant raped her. MW was then escorted to the hospital by Dewayne Hedgecock (Hedgecock) of the Forsyth County Sheriff's Office, who testified as follows:

> I gave her the information that we give to all juveniles about what to expect during a sexual assault investigation. . . . She was explained procedure that is done in a rape investigation. There's blood taken, semen samples taken, any body fluids collected. There's a pelvic examination and a number of other tests that are given to a rape victim; I explained a little bit of that to her. And the nurses are really good about explaining that, also, to them [rape victims], what to expect.

At the hospital, MW was first seen by an emergency room physician and then released to Michelle Tucker (Tucker), a Forensic Nurse Examiner with the Sexual Assault Nurse Examiner's program. Tucker testified as follows:

> The first order of business with her was to explain to her what we were going to do and what we were there for. . . . I introduced myself to MW and identified who I was and told her that we would be collecting evidence and treating her for any injuries that we might would find during that process.

Before the examination, Tucker obtained a statement from MW in which she gave a detailed account of the rape. Tucker found swelling in MW's vaginal area and prescribed antibiotics to treat

possible sexually transmitted diseases. At trial, Tucker read MW's account of the rape verbatim to the jury. Forensic experts for the State testified that the defendant's semen was found on the outside of MW's genitalia, but no semen was found inside the vagina.

The defendant called MW as a witness. At trial, MW's testimony contradicted her earlier statement made to Tucker concerning the rape. She testified that she called the defendant on the night in question and he picked her up from a date. MW stated that they went to defendant's apartment, and though she "kind of like wanted to have a relationship with him," defendant wanted to telephone MW's father. MW became angry and locked herself in the bathroom, where she found a used condom and rubbed it over her genitals. MW further testified that she claimed the defendant raped her so she would not be in trouble with her stepfather, who did not know that MW was on a date that night. At trial, MW categorically denied that the defendant ever raped her or touched her inappropriately.

Defendant was convicted of indecent liberties with a minor and statutory rape. From these convictions, defendant appeals.

I.

We note at the outset that while the defendant sets forth seven assignments of error in the Record on Appeal, those

assignments not addressed in his brief are deemed abandoned, pursuant to the North Carolina Rules of Appellate Procedure, Rule 28(b)(5).

The sole issue on appeal is whether the trial court erred in allowing into evidence, under the medical diagnosis hearsay exception, Tucker's testimony as to MW's out-of-court statement.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801(c) (2001). Hearsay is inadmissible except as provided by statute or the rules of evidence. N.C.G.S. § 8C-1, Rule 802 (2001). N.C.G.S. § 8C-1, Rule 803(4) (2001) provides that the following statements are not excluded by the hearsay rule:

> Statements for Purposes of Medical Diagnosis or Treatment--Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Rule 803(4). Such statements are admissible even though the declarant is available as a witness. *State v. Hinnant*, 351 N.C. 277, 284, 523 S.E.2d 663, 667 (2000). This exception to the hearsay rule requires a two-part inquiry before evidence may be admitted: "(1) whether the declarant's statements were made for

purposes of medical diagnosis or treatment; and (2) whether the declarant's statements were reasonably pertinent to diagnosis or treatment." *Id.* Satisfying the first prong requires the proponent to "affirmatively establish that the declarant had the requisite intent by demonstrating that the declarant made the statements understanding that they would lead to medical diagnosis or treatment." *Id.* at 287, 523 S.E.2d at 669. "The trial court may consider all objective circumstances of record in determining whether the declarant possessed the requisite intent." *Id.* at 289, 523 S.E.2d at 671. Our Supreme Court in *Hinnant* recognized that "statements made for purposes of medical diagnosis or treatment are inherently trustworthy and reliable because of the patient's strong motivation to be truthful." *Id.* at 284, 523 S.E.2d at 668.

In the case *sub judice*, Tucker's testimony was hearsay because it recounted MW's out-of-court statement to her and was offered in evidence to establish the truth of the matter asserted--that defendant raped MW. We must next examine whether the trial court properly admitted Tucker's testimony under the medical diagnosis treatment exception to the hearsay rule. *See* Rule 803(4). Pertinent portions of Tucker's testimony are as follows:

> I spoke with the physician in the emergency department and he had already examined the

> victim,. . . I introduced myself to MW and identified who I was and told her that we would be collecting evidence and treating her for any injuries that we might would find during that process.
>
> After taking [MW's statement] we started with the evidence collection. . . . We got her to undress, took the clothing that she was wearing and sealed it for the officers, and then we start[ed] pulling known head hair . . . [t]o identify that that was her hair strands. . . . We take known saliva samples, . . . to put into the kit, SBI kit.
>
> . . . .
>
> We also look for any injuries. She was not complaining of any pain. . . . We move on to do pubic hair combings and then actually pulling of pubic hair from the victim. . . . [Each sample] was sealed. It was all going back into the SBI kit to go to the SBI lab. . . . It's a kit that's sent – they are sealed kits that are sent to us by the, from the SBI. . . . We actually put a piece of evidence tape on [the SBI kits] and sign them with our initials.

Based on this testimony, it is clear that the primary purpose of the exam, as articulated by Tucker, was the collection of evidence, rather than treatment or diagnosis. More critically, we are unable to discern MW's intent at the time she made the out-of-court statement. The trial court made no findings as to MW's purpose in making the statements, and there is no testimony as to her intent. In fact, the following excerpt indicates that the trial court, in allowing the testimony, focused on the intent

of Hedgecock and Tucker rather than that of MW as required by *Hinnant*:

> **THE COURT:** I did evaluate [*State v. Hinnant*]. I think the testimony both from the deputy and the nurse was that [the exam] was at the hospital, it was in [an] examining room. She's obviously not a young child, she was fifteen, intelligent, and aware of what was going on. There was obviously a forensic purpose to this, but the [nurse] clearly said that she was responsible for medical care and treatment and that she communicated that to [MW], and, who indicated that she you know, there was nothing to indicate she didn't understand it. She was obviously communicating clearly, so under those circumstances I think it's admissible under 803(4).

Absent findings or testimony of MW's intent, we are unable to conclude that MW was motivated by a treatment purpose in making her statement to Tucker. Thus, we can not conclude that MW's out-of-court statement possesses the requisite guarantee of trustworthiness contemplated by Rule 803(4).

Moreover, we conclude that Tucker's statements were not reasonably pertinent to diagnosis or treatment, thus failing to satisfy the second Rule 803(4) inquiry. This Court has held that statements made to one other than a medical doctor may constitute statements made for the purpose of obtaining medical diagnosis. *State v. McGraw*, 137 N.C. App. 726, 529 S.E.2d 493, *disc. review denied*, 352 N.C. 360, 544 S.E.2d 554 (2000). However, our Supreme Court in *Hinnant* stated,

> . . . Rule 803(4) does not include statements to non[-]physicians made after the declarant has already received initial medical treatment and diagnosis. . . . If the declarant is no longer in need of immediate medical attention, the motivation to speak truthfully is no longer present. . . . In such cases, the declarant's statements 'lack[] the indicia of reliability based on the self-interest inherent in obtaining appropriate medical relief.'

Hinnant, 351 N.C. at 289, 523 S.E.2d at 670 (quoting *State v. Stafford*, 317 N.C. 568, 574, 346 S.E.2d 463, 467 (1986)) (citations omitted).

In the instant case, MW had already been seen by an emergency room physician. Further, there is no evidence that MW was "in need of immediate medical attention" when she made her statements. *Id.* She did not complain to Tucker of any pain or discomfort before the exam. We are unable to find that MW's statement was reasonably pertinent to diagnosis and treatment. We conclude that the evidence does not demonstrate that either prong of Rule 803(4) has been met; accordingly, we hold that the trial court erred in admitting the out-of-court statement of MW.

Nevertheless, the defendant is not automatically entitled to a new trial. "The erroneous admission of hearsay 'is not always so prejudicial as to require a new trial.'" *Hinnant*, 351 N.C. at 291, 523 S.E.2d 672 (quoting *State v. Ramey*, 318 N.C. 457, 470, 349 S.E.2d 566, 574 (1986)). The burden is on the defendant to

show "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at . . . trial. . . ." N.C.G.S. § 15A-1443(a) (2001). If such a burden is not met, the error is deemed harmless and the decision of the trial court will stand. *See* N.C.G.S. § 15A-1443(a). With respect to both of defendant's convictions, we hold that the erroneous admission of Tucker's hearsay testimony was sufficiently prejudicial to warrant a new trial.

This Court has held that where there is no abundance of substantive evidence, the erroneous admission of hearsay testimony is prejudicial error. *State v. Watts*, 141 N.C. App 104, 539 S.E.2d 37 (2000). In *Watts*, the hearsay testimony of a nurse recounting a rape victim's statement was allowed under Rule 803(4) and was the only direct evidence of penetration. Further, the hearsay testimony of the nurse, a child medical examiner, and a child mental health examiner was "among the most damaging evidence offered by the state." *Id.* at 108, 539 S.E.2d at 40. This Court found that the admission of the testimony was prejudicial error, and reversed the trial court's decision.

In the present case, after reviewing the record, we conclude that the admission of Tucker's hearsay testimony was prejudicial error with respect to both of defendant's convictions. There was a lack of direct physical evidence of the

rape: Tucker found no bruises or injuries and no evidence of penetration. Further, Tucker's testimony was the only account of the rape admitted as substantive evidence. Tucker's testimony was also the only substantive evidence that the defendant inappropriately or improperly touched MW, leading to the indecent liberties with a minor conviction. In the absence of this testimony, we conclude that there is a reasonable possibility that there would have been a different result at trial.

Accordingly, we hold that the defendant is entitled to a new trial on his conviction of both statutory rape and taking indecent liberties with a minor.

New Trial.

Judges GREENE and HUDSON concur.

Report per Rule 30(e).