An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA05-732

NORTH CAROLINA COURT OF APPEALS

Filed: 5 July 2006

STATE OF NORTH CAROLINA

v. Johnston County
No. 03 CRS 53978

SAMUEL ANDREW FITZGERALD

Appeal by defendant from judgment entered 22 October 2004 by Judge Knox V. Jenkins Jr. in Johnston County Superior Court. Heard in the Court of Appeals 07 February 2006.

Attorney General Roy Cooper, by Assistant Attorney Anita LeVeaux, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Barbara S. Blackman, for defendant-appellee.

ELMORE, Judge.

Samuel Fitzgerald (defendant) appeals from judgements entered consistent with jury verdicts finding him guilty of one count of first-degree sex offense and one count of indecent liberties with a child. Defendant argues that the trial court erred by allowing certain witnesses to enhance the credibility of the victim. We disagree; defendant received a trial free from prejudicial error.

In February 2003 twelve-year-old K.G. reported to a teacher that she had been sexually abused several years earlier by defendant. Defendant was living with his girlfriend, Jennifer Johnson, at this time. The two had lived together for nearly

thirteen years and owned a business together. Jennifer's son, Chris Johnson, is K.G.'s step-father. At the time of the allegations K.G. lived with Chris and her mother, Kim Johnson, just down the road from defendant and his girlfriend. Defendant is K.G.'s step-grandfather.

K.G. testified that during her third-grade year she would spend afternoons at defendant's house waiting for her mom to get off from work. She testified that she generally watched TV, played with pets, or did homework until her mother arrived. On one afternoon defendant asked her to come watch television in his bedroom. She did, and when defendant came out of the adjacent bathroom, he was naked. K.G. testified that defendant asked her to lie on the bed next to him and then on top of him. When she did not want to, he pulled her up on top of him. She stated that defendant asked her to kiss him and tried to insert his tongue in her mouth. She got scared, got off the bed, and left the room. She said that defendant told her not to tell anyone about what happened.

K.G. testified that the next day defendant invited her out to his R.V. that was parked at the house. Once inside, he unzipped his pants and exposed his penis. She stated that defendant asked her to hold his balls and she cupped her hand around them. When she did, K.G. testified that defendant began running his hand up and down his penis until he ejaculated. K.G. said that again defendant told her not to say anything.

K.G. next testified that several days after the incident in the R.V., she and defendant rode a four-wheeler—not an uncommon event for the two—to an abandoned house across the field from defendant's house. There, defendant brought her in and exposed himself to her. He asked her to perform fellatio on him and instructed her how to do so. K.G. testified that she did, and stopped when her throat began to hurt. She went outside followed shortly thereafter by defendant. He again told her not to say anything and the two rode back to defendant's house.

After K.G. finished the third grade, she and her family moved to a different town and she did not stay with defendant anymore in the afternoons. Several years after the move, K.G. told one of her fifth-grade teachers what defendant had done. This was the first time K.G. mentioned anything about she and defendant.

Following the allegations, K.G. was interviewed at the school by Melissa Williams, a child protective services investigator. K.G. also talked with Nivien Carey, a licensed clinical social worker at Wake Medical Center, and Dr. Vivian Everett, a board certified specialist in child sexual abuse. Since these witnesses' testimony sits at the heart of defendant's appeal, we will discuss that testimony as part of our analysis.

Defendant presented evidence at trial. He denied the allegations and stated that K.G. was rarely at his house. He said she regularly went to other relatives' houses after school and he rarely spent any time alone with her. He also had several character witnesses.

On appeal, defendant argues that the trial judge erred in allowing several witnesses to support the credibility of K.G.'s in-court testimony. The State called Melissa Williams and Nivien Carey to testify in corroboration of K.G.'s testimony. Williams was the DSS social worker assigned to investigate K.G.'s allegations against defendant; she interviewed K.G. following the report of abuse from K.G.'s teacher. Carey is a clinical social worker with the sexual abuse team at Wake Medical. She interviewed K.G. when Williams referred K.G. to the team for a sexual abuse evaluation. Both testified as to the process of their investigations and corroborated K.G.'s trial testimony as to the allegations against defendant.

When being questioned by the State regarding her investigation, Williams blurted out her office's conclusion regarding their investigation:

> STATE: After you spoke with the different people that you spoke with and went to the child medical exam, what other action did you take in connection with this investigation?
>
> WILLIAMS: We staffed the case . . . . I went over the allegations as to what was reported, the information that I had obtained from my investigation and we made a case decision. At that time, we substantiated that Mr. Fitzgerald had sexually abused --
>
> DEFENSE: Objection.
>
> COURT: Sustained. Ladies and gentlemen, totally disregard that. This is a trial. That was not a trial. Disregard that, strike it. That's inappropriate. The question of the guilt or innocense of this Defendant is for the jury to decide, not for a conference some where. Now I'm going to caution you not to do that anymore; you understand me?

> WILLIAMS: Yes, sir.
>
> COURT: You know better than that. You've testified time after time in Court. You cannot testify to that.
>
> WILLIAMS: Alright.

Defendant contends that Williams's answer and the trial court's response was insufficient; he indicates the trial court erred by *sua sponte* failing to order a mistrial. We disagree. The trial court's curative instruction here was swift and complete, and we presume the jury followed the trial court's instructions. *See State v. Thornton*, 158 N.C. App. 645, 652-53, 582 S.E.2d 308, 312 (2003) (no error in a sexual abuse case in which State elicited impermissible opinion testimony, the trial court instructed the jury to disregard it, and defendant argued on appeal mistrial was necessary). As such, there was no need for a mistrial. *Id.*

Defendant alleges similar inadmissible credibility enhancement from Carey's testimony. Specifically he argues that her statement to K.G. that "what [defendant] did to her was not her fault and that it was very good that she told someone about what happened," was inadmissible hearsay that required a mistrial. Again, we disagree.

> A motion for a mistrial is addressed to the sound discretion of the trial judge and is only appropriate when there are such serious improprieties as would make it impossible for the defendant to have a fair trial and impartial verdict under the law. [*State v. Black*, 328 N.C. 191, 200, 400 S.E.2d 398, 403 (1991)] 'Absent a showing of gross abuse of that discretion, the trial court's ruling will not be disturbed on appeal.' *State v. Roland*, 88 N.C. App. 19, 26, 362 S.E.2d 800, 805

(1987), *affirmed*, 322 N.C. 469, 368 S.E.2d 385 (1988).

Id. at 652, 582 S.E.2d at 312. The context of Carey's remark was what she typically tells victims of sexual abuse as their interview draws to a close. While perhaps marginally implicating defendant as the perpetrator, in this context, we do not agree that this comment warranted the trial court to intervene by ordering a mistrial.

Further, defendant argues that following his cross-examination of Carey the trial court errantly allowed Carey to testify that due to the child's age she would not expect exacting dates for the incidents. The trial court overruled defense counsel's objections to these questions. Although the objection was to the fact that this testimony did not corroborate K.G.'s testimony, the trial court noted that defendant inquired of these very discrepancies in cross-examination and overruled the objection. It has been the longstanding view of the courts that a child's relative lack of precision in recalling dates, while not grounds for dismissal, *is* an area of consideration for jurors who must weigh that testimony against someone else's. *See e.g. State v. Everett*, 328 N.C. 72, 75, 399 S.E.2d 305, 306 (1991) (quoting *State v. Wood*, 311 N.C. 739, 742, 319 S.E.2d 247, 249 (1984)). And since the scope of cross-examination, and any redirect, is a matter within the trial court's discretion, we can see no prejudicial error or abuse of that discretion in the questioning here. *See State v. Trogden*, 135 N.C. App. 85, 91, 519 S.E.2d 64, 67 (1999) (discussing the zeal of

prosecutor's questions on cross-examination in a sexual abuse trial).

In line with previous arguments, defendant also alleges that the trial court erred by not ordering a mistrial after Dr. Vivian Everett's comments. Dr. Everett was tendered and accepted as an expert in the evaluation of child sexual abuse. She testified regarding the medical examination performed on K.G. and ultimately concluded there were no physical signs of abuse. But, after that conclusion, the State asked Dr. Everett if she reviewed the interview conducted by Carey—the social worker who is part of Everett's team. She testified that she had, and the State asked her:

> STATE: Did you form an opinion as to whether or not [K.G] was sexually abused?
>
> DEFENSE: Objection.
>
> COURT: Sustained.
>
> STATE: I don't have any further questions.
>
> COURT: All she did was do a physical examination.

It is settled law in North Carolina that absent physical evidence supporting abuse, an expert cannot testify that it is their opinion the child has been sexually abused, because "such testimony is an impermissible opinion regarding the victim's credibility." *State v. Stancil*, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002). However, as noted *supra*, the trial court sustained the objection before any opinion was rendered, and instructed the jury that Dr. Everett only performed a physical

examination. Since no opinion was rendered, we cannot agree with defendant that a mistrial was warranted. *Thornton*, 158 N.C. App. at 652, 582 S.E.2d at 312.

Although defendant briefs several other assignments of error, after having reviewed them, we find them to be without merit. Thus, we are left with a review of defendant's case that yields no prejudicial error.

No error.

Judges McCULLOUGH and LEVINSON concur.

Report per Rule 30(e).