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NO. COA05-844

NORTH CAROLINA COURT OF APPEALS

Filed: 6 June 2006

STATE OF NORTH CAROLINA

v.

Union County  
No. 03 CRS 53975

DAVID JACK FREEMAN,  
Defendant.

Appeal by defendant from judgment entered 3 March 2005 by Judge Christopher M. Collier in Union County Superior Court. Heard in the Court of Appeals 22 May 2006.

*Attorney General Roy Cooper, by Assistant Attorney General Kimberly D. Potter, for the State.*

*Haakon Thorsen for defendant-appellant.*

GEER, Judge.

Defendant David Jack Freeman was found guilty of taking indecent liberties with a minor and was sentenced to an active term of imprisonment of a minimum of 16 months and a maximum of 20 months. We hold that he received a trial free of prejudicial error.

The State's evidence tended to show the following facts. On 22 June 2003, defendant, age 53, was assisting the child victim's parents in moving furniture in a Union County home. The child, age eight, testified that she and defendant were alone in a bedroom when defendant "put his hand in his pants and pulled his wiener

out. And then he put it back in." She reported that defendant also asked her what kind of underwear she was wearing. The child reported the incident to an older brother, who told their parents. When questioned by the parents, the child confirmed that defendant had exposed his penis to her.

At trial, defendant denied the child's account. He testified that he believed the child fabricated the incident because she was angry about not being allowed to go with him to a swimming pool at his house in South Carolina.

Defendant was tried and acquitted in South Carolina on other charges involving the same child. Before trial, the court allowed the State's motion in limine to prohibit the admission of any evidence relating to defendant's acquittal, but precluded the State from referring to any acts apart from the exposure incident in Union County. On appeal, defendant's arguments all rest on his contention that the State violated this limitation.

In the first assignment of error argued in his brief, defendant contends the court erred under Rule 403 of the Rules of Evidence in admitting the testimony of a therapist. The witness testified that, during play therapy, the child drew a picture, identified it as "Jack's winky," and said she "was stapling his winky so that he could not touch or hurt anyone with it again."

Defendant does not argue on appeal that this evidence lacked any probative value. Indeed, the picture provided evidence that this eight-year-old had an interaction with defendant in which she saw his penis. The picture, therefore, rebutted defendant's claim

that the child had made up the incident because of her disappointment in not going to the swimming pool. Defendant, however, argues that the prejudice outweighed any probative value. According to defendant, because there was no allegation at this trial that defendant had touched or hurt her with his penis, the child's explanation as to why she stapled the picture intimated that defendant had done more than just expose his penis to the child.

The decision whether or not to exclude evidence under Rule 403 is a matter within the sound discretion of the trial judge. *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986). "A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985). While defendant's interpretation of the child's comment is possible, it is not the only reasonable interpretation of what the eight year old meant. Since the jury - unaware of any other conduct - would not necessarily draw the same inference as defendant, we believe that the trial judge had a reasoned basis for admitting the evidence and did not act arbitrarily.

Defendant also argues broadly that the trial court erred "in allowing the presentation and admission of evidence in violation of court order excluding such evidence." The pertinent assignment of error then lists 11 references to the transcript. Six of those references involve testimony to which no contemporaneous objection

was made. Without any objection, defendant has failed to preserve for appellate review any question regarding the admissibility of that evidence. N.C.R. App. P. 10(b)(1) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.").

Three of the references relate to the trial court's ruling that admitted testimony that defendant admitted to the child's father that he had "messed with" the child's "bottom." Defendant's brief, however, contains no specific argument relating to this evidence. N.C.R. App. P. 28(b)(6) ("Assignments of error . . . in support of which no reason or argument is stated . . . will be taken as abandoned.").

We note, however, that defendant testified on direct examination that the child's father hit him repeatedly in the head, kicked him, knocked him to the floor, broke his glasses, and "messed up [his] face real good, chipped some of [his] teeth." The State contended that the father did this because defendant admitted to him that he had "messed with" the child's "bottom." The trial court allowed the State to ask defendant whether he made that admission to the father; defendant testified that he did not remember ever saying anything like that. The State was subsequently allowed to call defendant's wife to the stand as a rebuttal witness. She testified that immediately prior to the father's striking defendant, she heard defendant tell the father:

"'I messed with her bottom.' Or 'Played with her bottom.' It was close to that. He said something to that effect."

Defendant's sole argument in this portion of his brief is that the trial court properly ordered that there be no mention of "the South Carolina matter." He provides no argument as to why the trial court erred in concluding that defendant opened the door to evidence of defendant's admission by choosing to testify that the child's father violently attacked him. Without any argument from defendant, we cannot perceive any abuse of discretion in allowing the State to provide an explanation for that attack.

The final two transcript references relate to defendant's motions for a mistrial, which is also the subject of the final assignment of error addressed by defendant in his brief. That assignment of error states only that defendant assigns error to "[t]he denial of defendant's motion for mistrial." This is not a proper assignment of error because it fails to state "the legal basis upon which error is assigned." N.C.R. App. P. 10(c)(1). This assignment of error identifies the particular action being challenged, but does not explain why that action was in error. Even if we overlook the lack of compliance with the appellate rules, defendant has failed to establish a basis for overturning the trial court's decision.

Upon motion of a defendant, a court must declare a mistrial "if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case."

N.C. Gen. Stat. § 15A-1061 (2005). Our Supreme Court has held that "[a] mistrial should be granted only when there are improprieties in the trial so serious that they substantially and irreparably prejudice the defendant's case and make it impossible for the defendant to receive a fair and impartial verdict." *State v. Bonney*, 329 N.C. 61, 73, 405 S.E.2d 145, 152 (1991) (quoting *State v. Warren*, 327 N.C. 364, 376, 395 S.E.2d 116, 123 (1990)). Whether or not to declare a mistrial is a decision committed to the sound discretion of the trial court, and its decision will not be overturned on appeal unless an abuse of discretion is shown. *State v. Johnson*, 341 N.C. 104, 114, 459 S.E.2d 246, 252 (1995).

Here, defendant's counsel was cross-examining a detective about his interview with the child. The detective explained that he asked her whether defendant said anything to her. Counsel asked, "[d]id she respond whether he said anything to her or not?" He answered that "[s]he said that he only said her name this time and just held his weeny in his hand." Following that response, defendant's counsel asked for a conference outside the presence of the jury and, after the jury left, objected that the reference to "this time" suggested that there were other incidents. Counsel then moved for a mistrial on the grounds that "[t]his is not the first time, this is the fourth or fifth time at least that either the District Attorney or one of her witnesses has said this." Counsel asked alternatively that the court "admonish the witnesses how serious these offenses are that they are committing."

After extensive argument by counsel, the trial court sustained

the objection to the detective's testimony and instructed the witness that "we need to be made very careful to avoid that kind of thing." The court also pointed out to defense counsel the "need to be careful in the way you ask the questions." The court denied the motion for a mistrial, stating: "There have been vague references to something else out there. I don't think your client has been prejudiced at this point." The court decided, with no objection from defendant, not to address the testimony with the jury because that would simply draw attention to it.

Based upon our review of the record, we cannot conclude that the trial court abused its discretion in denying the mistrial. As the court indicated, the references that defendant contends suggested other conduct were, with the exception of the detective's remark, quite vague. Defendant relies upon the State's references to Union County, suggesting that they indicated to the jury that conduct had also occurred elsewhere. Notably, defendant did not make contemporaneous objections with respect to any of these references. We hold that the trial court's determination that these ambiguous references were not sufficient to require declaration of a mistrial was not manifestly unreasonable.

No error.

Chief Judge MARTIN and Judge BRYANT concur.

Report per Rule 30(e).