

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA07-12

NORTH CAROLINA COURT OF APPEALS

Filed: 04 December 2007

STATE OF NORTH CAROLINA

v.

Stanly County  
No. 05 CRS 2566-83  
05 CRS 51055-64

DARRELL WADE BARBEE

Appeal by defendant from judgments entered 21 August 2006 by Judge Christopher M. Collier in Stanly County Superior Court. Heard in the Court of Appeals 30 August 2007.

*Attorney General Roy Cooper, by Assistant Attorney General Laura E. Crumpler, for the State.*  
*Cheshire, Parker, Schneider, Bryan & Vitale, by John Keating Wiles, for defendant-appellant.*

STEELMAN, Judge.

Defendant's allegations of error in the trial court's evidentiary rulings fail to demonstrate prejudice from those rulings as required by N.C. Gen. Stat. § 15A-1443(a).

Defendant was indicted on thirty counts of statutory rape and thirteen counts of indecent liberties, involving his fifteen-year-old stepdaughter, S.M., one count of statutory rape and one count of indecent liberties with an eleven-year-old girl, M.G., and three counts of statutory sexual offense with M.G. M.G. is unrelated to defendant.

The State's evidence at trial tended to show that over a four-month period between December 2004 and March 2005, the defendant engaged in sexual activities with the two child victims in the family home. The victims were his stepdaughter, S.M., age fifteen, and a classmate, M.G., age eleven, who often stayed overnight with the Barbee family while her father was working. School authorities made a referral to the Department of Social Services ("DSS") on 22 March 2005 when M.G. disclosed to her teacher that Mr. Barbee was "having sex" with the two girls. DSS investigator Jennifer Burden and Detective Carla Eudy interviewed S.M., defendant's stepdaughter, who disclosed a pattern of sexual abuse. S.M. reported that the defendant had "had sex" with her the previous night. The investigators took her to the hospital, where a rape kit was completed.

The sexual assault nurse examiner ("SANE nurse") observed that S.M.'s cervix was reddened, indicating trauma, and that fluorescence under a Woods light suggested the presence of semen "at the top of the vagina, above the clitoris[.]" "Sperm fractions" recovered from S.M.'s underwear and vaginal smears showed a DNA mixture with the "predominant profile" on the underwear matching the defendant's DNA sample. At trial, S.M.'s mother explained the presence of defendant's semen on her daughter's underwear as the result of her own and her daughter's hygiene routines and the fluorescence of her vagina as the result of a medical ointment.

The two girls were interviewed on 5 April 2005 during medical examinations at the Children's Advocacy Center ("CAC"), Northeast Medical Center, in Concord, North Carolina. SANE nurses conducted the medical evaluations.

The State presented testimony from the two child victims and various professionals. The two investigators testified to the initial interviews that were conducted with the girls. Nurse Gina Smith testified to the Emergency Room report, including statements made by S.M. to hospital personnel. Northeast Medical Center SANE nurses and State Bureau of Investigation forensic specialists provided expert testimony regarding the evaluations and the rape kit results.

The defendant's motions to dismiss were denied. The jury returned a guilty verdict on all charges and also found an aggravating factor to be present. The trial court consolidated the offenses into four judgments and sentenced defendant from the presumptive range to three consecutive active sentences of 240-297 months and a fourth consecutive sentence of 16-20 months for the indecent liberties charges. Defendant appeals.

In his only argument, defendant contends that the trial court's evidentiary rulings constituted an abuse of discretion in that one ruling allowed the State "to elicit hearsay harmful to the defendant" in regards to M.G. and two other rulings prevented defense counsel from eliciting evidence that tended to undermine the trustworthiness of his stepdaughter's accusations, and that he was prejudiced by such rulings. We disagree.

Because defendant alleges non-Constitutional errors, we analyze his argument under N.C.G.S. § 15A-1443(a), which reads, in relevant part:

A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant.

N.C.G.S. § 15A-1443(a) (2005). A trial court's ruling on an evidentiary issue is presumed correct; even if the complaining party can demonstrate error, relief is ordinarily not granted without a showing of prejudice. *State v. Herring*, 322 N.C. 733, 749, 370 S.E.2d 363, 373 (1988). Evidentiary rulings are reviewed for abuse of discretion. See *State v. McNeil*, 47 N.C. App. 30, 36, 266 S.E.2d 824, 827-828 (1980). Thus, we utilize a two-pronged analysis. First, we examine, under an abuse of discretion standard, whether the court committed error. If error exists, we then determine whether defendant has shown prejudice.

#### I. Parent/Caregiver Assessment Testimony

Defendant first contends that the trial court abused its discretion by overruling his hearsay objection to Nurse Steele's testimony regarding information provided by M.G.'s father during the CME process and that he was prejudiced thereby. We disagree.

During the five-day jury trial, both girls testified to tickling episodes by the defendant in S.M.'s bedroom that evolved to vaginal penetration, digital penetration, and cunnilingus during

the four-month period when M.G. was spending the night at defendant's home. M.G. testified that the defendant engaged in vaginal intercourse on seven or eight occasions and cunnilingus more frequently. S.M. testified that the defendant first began touching her sexually when she was thirteen-and-a-half or fourteen, and that the sexual activity, including intercourse, occurred every night except when she was menstruating or having a headache. The girls' testimony regarding the episodes during M.G.'s overnight visits was consistent. They described contextual detail and how they felt about what was happening to them.

Nurse Steele testified as an expert witness in SANE practices and forensic interviewing. After defense counsel adduced testimony that M.G.'s medical examination showed no physical abnormalities, the State questioned Nurse Steele on re-direct regarding the CAC Parent/Caregiver Assessment Form completed by M.G.'s father. Following defendant's hearsay objection, this exchange took place:

PROSECUTOR: [D]o you recall what those [stress related] behaviors were, and if [M.G.] did exhibit those?

\* \* \*

NURSE STEELE: . . . Mr. [G.] actually noted that [M.G.] had had an attitude lately, with increased aggression. He also noted that she had been depressed, and that she had been doing a lot of crying. Which . . . was abnormal for her.

PROSECUTOR: And would you characterize those characteristics as

s i m i l a r t o  
characteristics of  
sexually abused children?

NURSE STEELE: Yes ma'am.

The defense did not object to the characterization question, nor did defense counsel request a limiting instruction to the jury.

Defendant argues that the court improperly overruled the hearsay objection because its ruling was based upon the medical treatment exception, which our Supreme Court has limited to statements made by the person being diagnosed or treated. *State v. Jones*, 339 N.C. 114, 146, 451 S.E.2d 826, 842 (1994). He then asserts prejudice from the objected-to testimony as the sole foundation for Nurse Steele's opinion that M.G.'s conduct was "similar to characteristics of sexually-abused children." Suggesting that defendant's reliance upon *Jones* is misplaced, the State responds that, even if such testimony does not fall within the medical treatment exception, it falls squarely within the business records exception or, alternatively, was admissible under N.C.G.S. § 8C-1, Rule 703, which governs the bases of expert opinion testimony. Moreover, in light of the physical evidence and the consistency of the girls' accounts, the State argues that the defendant has failed to establish that such error would have resulted in a different result at trial.

"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) (2005). Hearsay is inadmissible except where

allowed by statute or the Rules of Evidence. N.C.G.S. § 8C-1, Rule 802 (2005). "Inherently reliable information is admissible to show the basis for an expert's opinion, even if the information would otherwise be inadmissible hearsay." *State v. Daughtry*, 340 N.C. 488, 511, 459 S.E.2d 747, 758 (1995) (citations omitted). "N.C.G.S. § 8C-1, Rule 703 permits an expert to give an opinion based on evidence not otherwise admissible at trial, provided the evidence is of the type reasonably relied upon by other experts in the field." *Id.* at 512, 459 S.E.2d at 759.

We find defendant's reliance on *State v. Jones*, 339 N.C. 114, 451 S.E.2d 826 (1994) to be misplaced. Assuming *arguendo* that the court wrongfully admitted the statement under the medical treatment exception, such error would be harmless because the father's statements were admissible as the basis of Nurse Steele's expert medical opinion. The trial court properly allowed Nurse Steele to testify to the statements made by M.G.'s father from the Caregiver Assessment Form for the purpose of explaining the basis of her characterization of the child's behaviors as consistent with those of a child who has been sexually abused. This argument is without merit.

## II. State's Objection to Hypothetical Question

Defendant next contends that the trial court abused its discretion by denying him the opportunity to pose a hypothetical question to the SANE expert that was within her field of expertise and permissible under the rules of evidence, and he was prejudiced thereby. We disagree.

SANE Nurse Bonds testified to findings involving S.M., which showed no physical abnormalities. Nurse Bonds noted that although S.M. was fifteen at the time of the interview, she acted younger and showed "slower thinking." On cross-examination, defense counsel posed the following question:

DEFENSE: If you take [S.M.'s] statement that Darrell Barbee started sexually assaulting her when she first came there in 2001, when she weighed 48 pounds, and he had sexual relations with her every night except during the time she either had a headache or she had her menstrual cycle, would you expect that[,] based upon that statement, that history - - -

PROSECUTOR: Objection to that.

DEFENSE: -when you examined the genital examination, a hymen that would have had excessive opening?

PROSECUTOR: Objection.

THE COURT: Sustained.

"In order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record." *State v. Ray*, 125 N.C. App. 721, 726, 482 S.E.2d 755, 758 (1997) (citations omitted). When the defendant objects to the exclusion of testimony, but does not make an offer of proof for the record of what the resulting testimony would be, this Court "cannot



assess the significance of the evidence sought to be elicited[.]”  
*Id.*, 482 S.E.2d at 758-59.

In the instant case, defense counsel made no proffer in the record of any opinion Nurse Bonds might have had. We will not speculate as to what that testimony might have been. See *State v. Barton*, 335 N.C. 741, 749, 441 S.E.2d 306, 310-11 (1994). While defendant argues that the answer is “apparent from the context,” we find that there is nothing in the record from which we can deduce whether Nurse Bonds had an opinion or what that opinion might have been. This argument is without merit.

### III. S.M.’s Statement to Investigators

Next, defendant contends that the trial court “misapplied” N.C.G.S. § 8C-1, Rule 412 and violated N.C.G.S. § 8C-1, Rule 106 when it refused to allow Detective Eudy to testify to “a statement whose topic was sexual behavior” that was made in the course of S.M.’s interview. He asserts that he was prejudiced by the error because “had such error[] not occurred there is ‘a reasonable possibility that . . . a different result would have been reached at trial.’” N.C.G.S. § 15A-1443(a). We disagree.

During the State’s direct examination of M.G., wherein she testified to watching the defendant “having sex” with S.M., the prosecutor asked M.G. “Did [S.M.] ever talk . . . about this? . . . What, if anything did she say?” M.G. answered:

She told me that he would not do it - which he did. And she told me that it was her real dad that did it to her, not her stepdad.



Defendant argues that the trial court improperly applied Rule 412 to exclude this statement, which he contends was not evidence of sexual activity, but rather a statement, the topic of which was "sexual behavior." Even assuming that defendant is correct in his analysis of Rule 412, we hold that the trial court did not err in the exclusion of the evidence pursuant to Rule 403, which provides that:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence

N.C.G.S. § 8C-1, Rule 403 (2005).

As noted above, our standard of review of evidentiary issues is abuse of discretion. In order for us to conclude that the trial court abused its discretion we must find that the judge's decision is "manifestly unsupported by reason" and "so arbitrary that it could not have been the result of a reasoned decision." *State v. Lasiter*, 361 N.C. 299, 301-02; 643 S.E.2d 909, 911 (2007) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)). Given that M.G. had already testified that S.M. "told me that it was her real dad that did it to her, not her stepdad[,] " the statement to Detective Eudy was merely cumulative evidence. We cannot say that the judge's decision was an abuse of discretion.

In addition, given that the substance of the excluded testimony had already been presented to the jury, defendant cannot demonstrate prejudice to the extent "that there exists any

reasonable possibility that the outcome of the trial would have been any different had the testimony . . . been allowed." *State v. Smith*, 87 N.C. App. 217, 22, 360 S.E.2d 495, 498 (1987), *disc. rev. denied*, 321 N.C. 478, 364 S.E.2d 667 (1988).

Before this Court, defendant argues for the first time that the court's ruling violated N.C.G.S. § 8C-1, Rule 106 (2005) (requiring introduction of other parts of a writing which "ought in fairness to be considered contemporaneously with it."). The record is devoid of any mention of these arguments at trial.

"The theory upon which a case is tried in the lower court must control in construing the record and determining the validity of the exceptions." *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982) (citations omitted). To allow defendant to argue a completely different theory in this Court based upon this argument would be contrary to our Supreme Court's holding in *Hunter* and its predecessors. Pursuant to N.C. R. App. P. 28(b)(6) and *Hunter*, we deem this argument abandoned.

Defendant's brief addresses only three of six original assignments of error. Pursuant to N.C.R. App. P. 28(b)(6) (2007), the other three assignments of error are deemed abandoned.

NO ERROR.

Judges ELMORE and STROUD concur.

Report per Rule 30(e).