An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA08-278

NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2008

STATE OF NORTH CAROLINA

v. | Franklin County
No. 05 CRS 51360

LINWOOD HINTON PERRY, II

Appeal by defendant from judgment entered 15 June 2007 by Judge Carl R. Fox in Franklin County Superior Court. Heard by the Court of Appeals 13 October 2008.

Attorney General Roy Cooper, by Assistant Attorney General Alexandra M. Hightower, for the State.

Michael E. Casterline for defendant-appellant.

Court of Appeals
Slip Opinion

ELMORE, Judge.

Defendant appeals from judgment entered consistent with a jury verdict finding him guilty of first degree kidnapping and first degree rape. For the reasons stated herein, we find no error.

The State's evidence tends to show that around 2:00 a.m. on 25 May 2005, the victim was asleep at home in her bedroom when she awoke to defendant attacking her. Defendant dragged the victim around the house as he looked for and demanded money. When she tried to fight back, defendant took the victim back to her bedroom where he raped her. Defendant told the victim not to call the police and left. On the morning of 27 May 2005, the victim met

with Rhonda Hopkins, a sexual assault nurse. She told Hopkins about the incident, after which Hopkins performed a physical examination of her visible injuries. Hopkins also used a sexual assault evidence collection kit to check for internal injuries and later turned this over to the police.

As an expert witness for the State, Special Agent Jennifer Elwell of the State Bureau of Investigation testified about the tests performed on the blood samples, DNA, and other physical evidence in the sexual assault kit, as well as the analysis done on samples submitted by defendant. Elwell also testified that some of this evidence was missing from the evidence envelopes introduced at trial. Although vaginal swabs were gone, smears made from those swabs were still available. Due to the missing evidence, defendant moved at trial to suppress any testimony concerning the evidence and test results. After voir dire of Elwell, the trial court found there was no showing of bad faith in this case and overruled defendant's objection and denied his motion to suppress. Elwell testified that

> The DNA profile obtained from the sperm fraction of the vaginal swab is consistent with a mixture from multiple contributors. The DNA profile obtained from the blood stain from [defendant] cannot be excluded as a contributor to this mixture. The DNA profile obtained from the blood stain of the victim . . . cannot be excluded as a contributor to this mixture, and additional alleles were present which cannot be accounted for by the standards submitted.

In other words, defendant could not be excluded as a contributor and the sample contained the DNA of at least one other person.

The jury found defendant guilty as charged. The trial court sentenced defendant to imprisonment for a minimum term of 336 months to a maximum term of 413 months with credit for time served in pre-judgment custody. Defendant appeals.

In his sole assignment of error brought forward on appeal, defendant contends the trial court erred in denying his motion to suppress testimony regarding the physical evidence that had been lost. Defendant argues that due to the State's failure to preserve the evidence, defendant did not have an opportunity to conduct an independent evaluation of the evidence and was denied his constitutional rights to due process and a fair trial.

This Court has previously stated, "The constitutional duty imposed on the State to preserve evidence is 'limited to evidence that might be expected to play a significant role in the suspect's defense.'" *State v. Banks*, 125 N.C. App. 681, 683, 482 S.E.2d 41, 43 (citation omitted), *aff'd*, 346 N.C. 283, 487 S.E.2d 556 (1997), *cert. denied*, 523 U.S. 1128, 140 L. Ed. 2d 955 (1998). Even if missing evidence is material to a defendant's case, failure to preserve the evidence does not constitute a violation of due process "'[u]nless . . . defendant can show bad faith on the part of the police[.]'" *State v. Hunt*, 345 N.C. 720, 725, 483 S.E.2d 417, 420 (1997) (quoting *Arizona v. Youngblood*, 488 U.S. 51, 58, 102 L. Ed. 2d 281, 289 (1988)).

Here, the trial court's finding that there was no showing of bad faith is supported by Special Agent Elwell's testimony that all proper procedures were followed. Further, we note that defendant

has not established that the missing evidence possessed exculpatory value at the time it was lost. *See California v. Trombetta*, 467 U.S. 479, 489, 81 L. Ed. 2d 413, 422 (1984) (holding the State's duty to preserve evidence is limited to that which "both possess an exculpatory value that was apparent before the evidence was destroyed, and [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means"). The presence of DNA from an unknown person found in the physical evidence taken from the victim is not, as defendant asserts, exculpatory. The evidence does not tend to clear defendant from blame; instead it merely indicates that the victim may have had sexual relations with someone in addition to defendant. Moreover, defendant has failed to address the existence of the smears made from the missing swabs. This assignment of error is overruled.

For these reasons we conclude that the trial court's denial of defendant's motion to suppress did not violate his rights to due process and a fair trial. Defendant's remaining assignments of error set forth in the record on appeal, but not argued in his brief to this Court, are deemed abandoned. N.C.R. App. P. 28(b)(6).

No error.

Judges WYNN and GEER concur.

Report per Rule 30(e).