NO. COA09-354

NORTH CAROLINA COURT OF APPEALS

Filed: 17 November 2009

STATE OF NORTH CAROLINA

v. Columbus County
No. 07 CRS 443

TIMOTHY RANDOLPH WILLIAMS,
Defendant.

Appeal by defendant from judgment entered 28 August 2008 by Judge E. Lynn Johnson in Superior Court, Columbus County. Heard in the Court of Appeals 26 October 2009.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Susannah B. Cox, for the State.

Greene & Wilson, P.A., by Thomas Reston Wilson, for defendant-appellant.

STROUD, Judge.

On 7 February 2007, defendant Timothy Randolph Williams ("defendant") was indicted for two counts of first degree statutory rape pursuant to N.C. Gen. Stat. § 14-27.7A(a) (2005). Under this statute, a defendant is guilty of rape in the first degree if the defendant engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is at least six years older than the person. *Id.* Force is not an element of the offense. *Id.* The first indictment alleged the offense as occurring between 1 September 2005 and 30 October 2005

(File No. 07 CRS 443). The second indictment alleged the offense as occurring between 1 and 30 November 2005 (File No. 06 CRS 53699).

Defendant was tried during the 25 August 2008 Session of Superior Court, Columbus County, and evidence from trial establishes the following factual background. During the relevant time period, the victim, M.P., ("Mary")[1] was fifteen years old and lived in Whiteville with her mother and two sisters. Mary had known defendant for at least one year before the incidents in this case began. Defendant was a friend of Mary's mother, and they may have had a romantic relationship. Mary spent time with defendant's children, and defendant would come to Mary's house once or twice per week. Mary also testified that she did not have a relationship with her biological father, so defendant began to play a father figure role in her life, even teaching her how to drive.

In the summer of 2005, Mary told defendant that she liked his nephew, K.J. ("Kyle")[2]. Defendant arranged for a telephone call between Mary and Kyle, because Kyle's mother was strict and did not want him to be involved with girls. Defendant told Mary that she would have to do something for him in return for the phone call. He wanted Mary to show him her panties, but before Mary could answer, he placed the call. Defendant then begged to see her panties, and Mary eventually gave in to "get him off [her] back."

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[1] We will refer to the minor child M.P. by the pseudonym Mary to protect the child's identity and for ease of reading.

[2] We will also refer to the minor child K.J. by the pseudonym Kyle.

On a later date when defendant was at her house, he asked Mary if he could put his hand down her pants. She said "no," but defendant disobeyed and touched her vagina. Defendant subsequently tried to touch Mary's breasts and vagina while teaching her how to drive and performed oral sex on Mary on at least one occasion.

In August 2005, defendant began pressuring Mary to have sex with him. Defendant was in his forties at the time. He asked her to "do it just one time" and tried to persuade her by saying things, such as "I'm going to do it slow so it's not going to hurt." Defendant also threatened to tell their families about the previous sexual encounters, indicating that the families would be angry to learn what had happened. Although she did not want to, Mary gave in and had sexual intercourse with defendant. From August 2005 until the end of October 2005, defendant came to Mary's house and they had sex two or three times per week.

Mary found out that she was pregnant in October 2005, after noticing that she missed a period. Defendant pressured Mary to have sex again, telling her that he could "knock [her period] on." This last incident occurred in October. After this did not work, defendant told Mary that he would pay for an abortion. However, defendant later asked for more sex in exchange for paying for the abortion, but Mary refused.

In March 2006, Mary told her mother that she was pregnant. Shortly thereafter, Mary and her mother filed a report with the Columbus County Sheriff's Department, and Mary later gave a statement to a detective. Mary's baby was born on 21 June 2006.

Detective Trina Godwin was assigned to the investigation of defendant. She collected DNA cheek swabs from Mary and the baby on 11 July 2006. After several months, she made contact with defendant and collected a DNA cheek swab from defendant on 29 November 2006. On this same day, she collected additional samples from Mary and the baby. Detective Godwin placed the samples in glassine bags, which she sealed and labeled with the date of collection and her initials. On 1 December 2006, Detective Godwin sent the packages by certified mail to the State Bureau of Investigation ("SBI") for DNA testing.

The SBI never tested the samples, and returned the unopened samples to the Sheriff's Department, with a note indicating that it does not perform paternity testing. The only part of the package that was opened was a letter-sized envelope taped to the outside, which contained forms with a request for paternity testing. Detective Godwin was no longer employed by the Sheriff's Department at the time the samples were returned. Captain David Nobles received the returned samples on 8 November 2007 and removed the three samples from the outer packaging. In doing so, he did not open the individual samples or damage them and did not see any damage. Captain Nobles sent the samples to Labcorp for DNA testing via FedEx on 13 November 2007.

Labcorp received the package on 15 November 2007. Kelli Pegram, a laboratory technologist, received the package from Labcorp's secure locker on 20 November 2007. Ms. Pegram confirmed that the packages had no evidence of tampering. Each package was

sealed with evidence tape, dated, and initialed. Ms. Pegram testified that each envelope contained glassine baggies with the swabs. Each baggie was sealed and initialed, and none of the samples had discoloration indicative of mold or bacteria. Ms. Pegram took cuttings from the samples, repackaged the remaining evidence, and used the cuttings to perform polymerase chain reaction testing. After generating DNA profiles, she gave the results to her supervisor, Dewayne Winston, to conduct the paternity analysis.

Mr. Winston reviewed the profile and determined that defendant could not be excluded as a potential father of Mary's baby. Mr. Winston testified that the odds of another man being the father of Mary's baby are one out of 785,000 and there is a 99.99% probability that defendant is the father of Mary's baby.

Following the conclusion of the State's evidence, defendant moved to dismiss the two charges, and the trial court dismissed the second indictment (File No. 06 CRS 53699), which charged defendant with an offense that occurred between 1 and 30 November 2005. Defendant did not present any evidence, and renewed his motion to dismiss, which the court denied. The first count was submitted to the jury, and on 28 August 2008, a jury found defendant guilty of one count of statutory rape. The trial court thereafter entered judgment and sentenced defendant to a term of 288 to 355 months active imprisonment, which is within the presumptive range for defendant's Class B1 felony and prior record level of II. Defendant gave timely notice of appeal in open court.

First, defendant contends that the trial court committed reversible error by expressing an opinion on the evidence after dismissing one of the counts. Our statutes provide that "[t]he judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C. Gen. Stat. § 15A-1222 (2005). Similarly, N.C. Gen. Stat. § 15A-1232 requires that "[i]n instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence." N.C. Gen. Stat. § 15A-1232 (2005).

Defendant did not object to the trial court's purported statement of opinion. The State therefore argues that appellate review is limited to plain error. However, we disagree with the State's contention, as it is well-established that "[a] defendant's failure to object to alleged expressions of opinion by the trial court in violation of [N.C. Gen. Stat. §§ 15A-1222 and 15A-1232] does not preclude his raising the issue on appeal" because the statutory prohibitions are "mandatory." *State v. Young*, 324 N.C. 489, 494, 380 S.E.2d 94, 97 (1989). Therefore, we review the trial court's comments based on the standard articulated by our Supreme Court:

> In evaluating whether a judge's comments cross into the realm of impermissible opinion, a totality of the circumstances test is utilized. *State v. Blackstock*, 314 N.C. 232, 333 S.E.2d 245 (1985); *State v. Allen*, 283 N.C. 354, 196 S.E.2d 256 (1973); *State v. Holden*, 280 N.C. 426, 185 S.E.2d 889 (1972). "[U]nless it is apparent that such infraction

> of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless." *State v. Perry*, 231 N.C. 467, 471, 57 S.E.2d 774, 777 (1950).

State v. Larrimore, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995).

Defendant challenges the following statement made by the trial court, which was made during the trial court's explanation to the jury of the court's dismissal of one count:

> You will also, additionally, recall during the course of [Mary's] testimony in the evidence that she presented to you that she had indicated to the Court and the jury that all sexual activity between herself and [defendant] had been concluded by the end of October. So, factually, I've had to dismiss the second count involving the alleged date of November 1st, 2005 through November 30th, 2005. And we'll be going forward on the charge of statutory rape with the alleged dates of offense of September 1st, 2005 through October 30th, 2005.

Defendant contends that, by explaining the dismissal of the November charge, the trial court implied that defendant was guilty of the September/October charge. We disagree.

As we must review any error based on the totality of the circumstances, we find the context of the trial court's comment not only relevant but also necessary to our analysis. After the State rested, the trial court dismissed the second count of statutory rape outside the presence of the jury. Upon the jury's return, the trial court explained that it had some "administrative information concerning the status of [the] case." The trial court continued to explain that, while there had originally been two pending charges of statutory rape, the trial court had dismissed one of the

charges. Thus, from the context of the challenged language, it appears that the trial court was attempting to explain the matters that had taken place outside the presence of the jury, while also reminding the jury that one charge was still pending. In doing so, the trial court did summarize some of the victim's testimony, but as further explained below, we do not find the trial court's comment to be an impermissible expression of opinion.

We have previously held that the trial court's use of the phrase "'I believe the evidence tends to show . . . .' does not constitute an expression of opinion that any particular facts had been fully proven but rather is a statement of the trial judge's recollection as to what the evidence tended to show." *State v. Alston*, 38 N.C. App. 219, 221, 247 S.E.2d 726, 728 (1978), *cert. denied*, 296 N.C. 586, 254 S.E.2d 30 (1979). Here, in summarizing Mary's testimony, the court qualified the statement with "the evidence that she presented." We find this qualification akin to use of the phrase "the evidence tends to show." Accordingly, we conclude that the trial court did not express an opinion that the facts had been fully proven by the State. Rather, the trial court was explaining the procedural posture of the case.

Nevertheless, even if this remark could possibly be construed as a statement of opinion regarding defendant's guilt, given Mary's testimony and the DNA evidence, the State presented substantial evidence of defendant's guilt. Therefore, it is not apparent that the remark would have had any impact on the jury's verdict, and any

error by the trial court would be harmless. *See Larrimore*, 340 N.C. at 155, 456 S.E.2d at 808.

Next, defendant contends that the trial court erred in admitting certain exhibits into evidence. The exhibits in question relate to the DNA evidence proffered by the State. Defendant argues that the State failed to lay a sufficient foundation regarding the chain of custody as to the exhibits.

Our Supreme Court has articulated that a two-prong test must be satisfied before real evidence is properly received into evidence. *State v. Campbell*, 311 N.C. 386, 388, 317 S.E.2d 391, 392 (1984). "The item offered must be identified as being the same object involved in the incident and it must be shown that the object has undergone no material change." *Id.* (internal citations omitted). In explaining the standard employed in admitting such evidence, the Supreme Court explained:

> The trial court possesses and must exercise sound discretion in determining the standard of certainty that is required to show that an object offered is the same as the object involved in the incident and is in an unchanged condition. *Id.* A detailed chain of custody need be established only when the evidence offered is not readily identifiable or is susceptible to alteration and there is reason to believe that it may have been altered. *See State v. Kistle*, 59 N.C. App. 724, 297 S.E.2d 626 (1982), *review denied*, 307 N.C. 471, 298 S.E.2d 694 (1983).

Id. at 388-89, 317 S.E.2d at 392. Further, "[d]etermining the standard of certainty required to show that the item offered is the same as the item involved in the incident and that it is in an unchanged condition lies within the trial court's sound

discretion." *State v. Fleming*, 350 N.C. 109, 131, 512 S.E.2d 720, 736, *cert. denied*, 528 U.S. 941, 145 L. Ed. 2d 274 (1999).

We hold that an adequate chain of custody was established in this case to prove that the DNA samples examined by Labcorp were those taken from defendant, Mary, and Mary's baby on 11 July 2006 and 29 November 2006 by Detective Godwin. The evidence shows that Detective Godwin placed the samples in evidence bags, sealed them, noted the date collected, and initialed the packages. She then sent them to the SBI for testing. Although the SBI never tested the samples, the evidence establishes that the package was returned to the Sheriff's Department without any signs of damage or tampering. Moreover, Captain Nobles, who received the returned package, testified that he sent them to Labcorp without damaging their seals. Finally, Ms. Pegram testified that the samples had no evidence of damage or tampering when she received and opened them for testing. Based on the foregoing, we conclude that (1) the DNA samples tested by Labcorp were properly identified as being the same samples gathered by Detective Godwin and (2) the samples had not undergone any material change.

Defendant essentially argues that the chain of custody was insufficient due to (1) the amount of time that elapsed between the gathering and testing of the samples, and (2) the fact that unknown individuals had access to the samples at the SBI. However, we have previously stated that "[w]here a package of evidence is properly sealed by the officer who gathered it and is still sealed with no evidence of tampering when it arrives at the laboratory for

analysis, the fact that unknown persons may have had access to it does not destroy the chain of custody." *State v. Newcomb*, 36 N.C. App. 137, 139, 243 S.E.2d 175, 176 (1978) (internal citation omitted). Moreover, our courts have stated that any weak links in chain of custody go to weight, not admissibility of the evidence. *See, e.g., Campbell*, 311 N.C. at 389, 317 S.E.2d at 392 (internal citations omitted). Accordingly, the trial court properly exercised its discretion in admitting the exhibits.

Defendant's remaining assignments of error not brought forth or argued on appeal are deemed abandoned. N.C.R. App. P. 28(a).

No error.

Judges WYNN and CALABRIA concur.

Report per Rule 30(e).