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NO. COA12-161
NORTH CAROLINA COURT OF APPEALS

Filed: 6 November 2012

STATE OF NORTH CAROLINA

v.

Guilford County
No. 10 CRS 94422

SALMAN ASLAM CHAUDHRY,
Defendant.

Appeal by defendant from order entered 8 September 2011 by Judge William Z. Wood, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 29 August 2012.

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

Daniel F. Read for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant appeals from judgment entered against him after a jury found him guilty of indecent exposure to a minor for the purpose of arousing or gratifying sexual desire. Defendant argues on appeal that the trial court erred by: (1) denying defendant's motions to dismiss for insufficient evidence; (2) denying defendant's motion for a mistrial; (3) excluding evidence regarding defendant's citizenship status; and (4)

finding that the offense involved the mental abuse of a minor for sentencing purposes. After careful review, we find no error.

Background

Defendant Salman Aslam Chaudhry ("defendant") was charged with indecent exposure, a violation of N.C. Gen. Stat. § 14-190.9, and indecent liberties with a child, a violation of N.C. Gen. Stat § 14-202.1. The evidence at trial tended to establish the following: M.L.¹ and her grandmother Terry Ritchie ("Ms. Ritchie") shopped weekly at the Hilltop grocery store ("Hilltop"), a convenience store where defendant worked. M.L. testified that on 14 November 2010, she and her grandmother stopped at Hilltop to buy gas and milk. While Ms. Ritchie stayed outside pumping gas, M.L. went inside Hilltop to buy the milk and pay for the gas. After taking the change and milk out to her grandmother's car, M.L. went back into Hilltop because defendant had asked her to do a favor for him. M.L. alleged that defendant came around from the counter and "pulled his penis over top of his pants." Defendant asked her to put his penis in her mouth; after she said no, defendant asked her to not tell anyone about the incident and gave her \$10. After

¹ We use the initials M.L. throughout this opinion to protect the identity of the minor victim.

leaving the store, M.L. got in her grandmother's car and told Ms. Ritchie about the incident. They called 9-1-1.

Defendant testified in his own defense at trial and stated that he is trying to become a citizen of the United States. When his attorney tried to ask more specific questions about defendant's citizenship status, the State objected claiming that the evidence was not relevant. After the trial court excused the jury to hear counsels' arguments, defendant contended that the evidence was relevant because it "show[ed] a lack of motive to commit [] this offense" since an incident like this could potentially jeopardize his chance of becoming a citizen. During the arguments, the State indicated that it may ask defendant about his seven felony worthless check charges. The trial court told the State that those charges are not coming in unless defense counsel "open[ed] the door[.]" The trial court then sustained the State's objection to the evidence regarding defendant's citizenship status pursuant to Rules 401, 402, and 403.

Defendant's mother-in-law Jeanette Griggs ("Ms. Griggs") testified that defendant has a "tendency for truthfulness." On cross-examination, the State asked Ms. Griggs if her opinion as to defendant's truthfulness would change if she "knew that on

January 18th, 2011, [defendant] wrote a worthless check for [\$]8,959[.]” After defendant objected, the trial court sustained the objection and allowed defendant’s motion to strike. The trial court then told the jurors to not “consider that [question] in any way at all[.]” The trial court asked the jurors to raise their hands to indicate that they understood, and they all did.

After the curative instructions, defendant made a motion for a mistrial. The prosecutor argued that she thought defendant had “opened the door” for the question because the witness testified as to defendant’s truthful character. The trial court admonished the State to not mention the charges again and denied defendant’s motion “because [it] sustained the objection immediately and . . . asked all the -- told the jurors to disregard that, and they all raised their hand [sic] when I asked them.”

On 8 September 2011, the jury found defendant guilty of indecent exposure and not guilty of indecent liberties. The trial court sentenced defendant to 30 months of supervised probation and imposed special conditions of probation because the offense constitutes a “reportable conviction” pursuant to N.C. Gen. Stat. § 14-208.6 (2012) and found that the offense

involved the "physical, mental, or sexual abuse of a minor." Defendant gave oral notice of appeal at his sentencing hearing on 9 September 2011.

Argument

Defendant first argues that the trial court erred in denying his motions to dismiss. In support of his argument, defendant does not argue that the State failed to provide substantial evidence of each element; instead, defendant argues that the evidence was "inherently incredible."² Specifically, defendant claims that the "inherently incredible" evidence is based on: (1) Ms. Ritchie's testimony that she did not see defendant expose himself even though she was standing "right outside" Hilltop and could see inside the store; (2) M.L.'s conduct of staying in the store with defendant for five minutes even after he exposed himself; and (3) M.L.'s conflicting stories of the events in her testimony at trial and statements to other witnesses. We disagree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). In support of his contention that the

² Since defendant did not specifically argue that the evidence was not substantial to support his conviction, we will not address this issue on appeal and will only address defendant's contention that the evidence was "inherently incredible."

evidence was "inherently incredible," defendant cites *State v. Miller*, 270 N.C. 726, 730, 154 S.E.2d 902, 904 (1967), where our Supreme Court stated that "[o]rdinarily, the credibility of witnesses and the proper weight to be given their testimony is to be determined by the jury, not by the court upon a motion for judgment of nonsuit." However, the only evidence "connect[ing]" the defendant with the crime was an eyewitness who identified the defendant while standing 286 feet away from him. *Id.* at 732, 154 S.E.2d at 905. The Court found the evidence "inherently incredible" based on the "physical conditions" surrounding the identification of the defendant as the perpetrator and reversed the trial court's denial of the defendant's motion for nonsuit. *Id.* at 732, 154 S.E.2d at 906.

In applying *Miller*, defendant argues that "the evidence that Mr. Chaudhry exposed himself is not inherently incredible because he was far away and the lighting was poor. It is inherently incredible because he was so close and in such a public place." In other words, defendant seems to argue that the evidence was "inherently incredible" because the conditions were too good for Ms. Ritchie to not see what defendant was doing inside Hilltop. However, defendant's reliance on *Miller* is misplaced because the "inherently incredible" evidence in

Miller only involved the identification of the defendant as the perpetrator. Here, defendant's identification as the perpetrator was never at issue, only his actions were at issue. M.L. identified defendant as the perpetrator, and there was nothing "inherently incredible" about that identification; Ms. Ritchie's identification of defendant as the perpetrator was unnecessary. Moreover, the fact that Ms. Ritchie did not see what happened in Hilltop does not mean that it did not happen. M.L. testified as to the events in Hilltop, and that was sufficient. Therefore, defendant's argument that the evidence was "inherently incredible" is without merit, and *Miller* is not applicable. Furthermore, while defendant points to contradictions in M.L.'s testimony at trial and statements made to other witnesses in support of his contention that the evidence was "inherently incredible," this evidence speaks to credibility which is not a factor in determining whether the trial court erred in denying his motions to dismiss. See *State v. Thaggard*, 168 N.C. App. 263, 281, 608 S.E.2d 774, 786 (2005) (noting that "[t]he trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witnesses' credibility").

Defendant next argues that the trial court erred in denying

his motion for a mistrial after the State asked Ms. Griggs about the felony worthless check charge. We disagree.

Pursuant to N.C. Gen. Stat. § 15A-1061 (2011),

[u]pon motion of a defendant or with his concurrence the judge may declare a mistrial at any time during the trial. The judge must declare a mistrial upon the defendant's motion 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.

"Whether to grant a motion for mistrial is within the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless it is so clearly erroneous as to amount to a manifest abuse of discretion." *State v. McCarver*, 341 N.C. 364, 383, 462 S.E.2d 25, 36 (1995) (citations omitted), *cert. denied*, 517 U.S. 1110, 134 L. Ed. 2d 482 (1996). The trial court should grant a defendant's motion for a mistrial "only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law." *State v. Blackstock*, 314 N.C. 232, 243-44, 333 S.E.2d 245, 252 (1985).

The State asked Ms. Griggs about the worthless check charge after the trial court had specifically ruled that this evidence was inadmissible. After the question, the trial court

immediately sustained defendant's objection and gave curative instructions to the jury to disregard the question. "When a court withdraws incompetent evidence and instructs the jury not to consider it, any prejudice is ordinarily cured." *State v. Morgan*, 164 N.C. App. 298, 302, 595 S.E.2d 804, 808 (2004) (internal quotation marks omitted). Moreover, the trial court asked the jurors to indicate their understanding of his instruction by raising their hands, which they all did. Because the trial court gave curative instructions and ensured that the jury understood those instructions, any potential prejudice caused by the question was cured and would have no effect on the fairness or impartiality of the verdict. Therefore, the trial court did not abuse its discretion in denying defendant's motion for mistrial.

Defendant next argues that the trial court erred by sustaining the State's objection to questions regarding the steps defendant is taking to obtain United States citizenship. Specifically, defendant contends these questions established defendant's motive to "avoid engaging in random acts of sexual misconduct." In support of his argument, defendant claims the questions regarding his citizenship status were admissible pursuant to Rule 404(b).

Here, although defendant argued that the evidence was admissible under N.C. Gen. Stat. § 8C-1, Rule 404(b) (2011) as proof of motive, the trial court excluded the evidence under N.C. Gen. Stat. § 8C-1, Rules 401, 402, and 403. Therefore, the issue is whether the trial court properly excluded the evidence, not whether the trial court erred in not admitting the evidence under Rule 404(b).

Pursuant to Rule 401, "[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2011). "Evidence which is not relevant is not admissible." N.C. Gen. Stat. § 8C-1, Rule 402 (2011). "Although the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal." *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (citations and internal quotation marks omitted).

Here, the trial court did allow defendant to testify that he was trying to become a citizen of the United States over the State's objection for relevancy. However, the trial court

sustained the State's objections when defendant was asked what he was doing to try to become a citizen and whether defendant had attended a formal hearing in that process. This evidence does not have the tendency to make any fact of consequence more or less probable since it is not relevant as to any fact or issue in determining whether defendant exposed himself to M.L. or committed indecent liberties with her. Therefore, the evidence was irrelevant and was properly excluded by the trial court under Rule 402. Because we find that exclusion was proper pursuant to Rule 402, we will not address whether the trial court's exclusion under Rule 403 was proper.

Finally, defendant argues that the trial court erred in finding that the offense involved the "mental abuse of a minor" at sentencing. Defendant concedes that even if the trial court erred in finding the indecent exposure conviction involved the mental abuse of M.L., the special probation conditions would still apply because defendant's conviction constitutes a reportable offense under § 14-208.6(4). We are not persuaded.

Pursuant to N.C. Gen. Stat. § 15A-1343(b2) (2011), the trial court must impose special probation conditions for "a defendant who has been convicted of an offense which is a reportable conviction as defined in G.S. 14-208.6(4), or which

involves the physical, mental, or sexual abuse of a minor." According to N.C. Gen. Stat. § 14-208.6(4) (2011), reportable convictions include "sexually violent offenses." A "[s]exually violent offense," as defined in N.C. Gen. Stat. § 14-208.6(5), includes felonious indecent exposure convictions pursuant to N.C. Gen. Stat. § 14-190.9(a1). Therefore, since defendant's conviction for indecent exposure constitutes a sexually violent offense, the special probation conditions of N.C. Gen. Stat. § 15A-1343(b2) would have been imposed even if the trial court determined the conviction did not involve the physical, mental, or sexual abuse of M.L. by defendant. Thus, we need not address whether the trial court's finding that the offense involved the physical, mental, or sexual abuse of M.L. was error. Defendant's argument is without merit.

Conclusion

Based on the foregoing reasons, we find no error.

No error.

Judges BRYANT and STEELMAN concur.

Report per Rule 30(e).