NO. COA14-439
NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

STATE OF NORTH CAROLINA

v. Transylvania County
No. 12 CRS 50388 – 12 CRS 50397

BOBBY DARRELL HOXIT, SR.

Appeal by defendant from judgments entered 11 September 2013 by Judge J. Thomas Davis in Transylvania County Superior Court. Heard in the Court of Appeals 19 November 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Anita LeVeaux, for the State.

Appellate Defendant Staples Hughes, by Assistant Appellate Defender Hannah Hall, for defendant.

ELMORE, Judge.

This case was tried at the 9 September 2013 session of Transylvania County Superior Court, before the Honorable J. Thomas Davis, on indictments charging ten counts of taking indecent liberties with a minor. The jury found Bobby Darrell Hoxit, Sr. (defendant) guilty as charged. Defendant was sentenced within the presumptive range as a Level I offender.

In file numbers 12 CRS 50388 – 12 CRS 50395, the trial court imposed eight consecutive sentences of 16 to 20 months imprisonment, to run consecutively, with 573 days credit for time served. The trial court consolidated file numbers 12 CRS 50396-97 for judgment and imposed a sentence of 16 to 20 months imprisonment, to be served consecutively to the other sentences. Defendant appeals his convictions. After careful consideration, we order a new trial.

I. Factual Background

The State's evidence at trial tended to show the following: Sarah Morgan (Sarah) and Bobby Hoxit, Jr. (Bobby) were dating when they had Amanda[1], the parties' only child, on 12 September 2008. Sarah testified that in 2010, she and Bobby "took a break" from their relationship "for a few months" but "then got back together." Bobby resided with defendant, Bobby's father. Sarah and Amanda moved in with Sarah's parents, Linda and Howard Morgan, in August 2010 and they have resided there ever since. After resuming their relationship in February 2011, Sarah and Amanda visited Bobby nearly "every day" at defendant's residence. Amanda called defendant, her paternal grandfather, "Pop Pop." Sarah testified that defendant often cared for

[1] A pseudonym has been used to protect the identity of the minor.

Amanda when she and Bobby ran errands. The amount of time that Amanda was left in defendant's care "varied." Defendant changed Amanda's diapers and bathed her. Sarah and Amanda would spend the night at defendant's residence on occasion.

Shortly after Amanda turned three years old, Sarah's parents hosted Thanksgiving dinner for Bobby and defendant at their home on 25 November 2011. The following day, Sarah observed Amanda rubbing her vaginal area over her clothes. When she asked Amanda what she was doing, Amanda allegedly replied, "I'm massaging my wee wee like Pop Pop does." Sarah testified that she had observed Amanda touching herself in the same way several days earlier, and, when she asked Amanda what she was doing, Amanda had replied, "I'm massaging my wee wee like Pop Pop does." Initially, Sarah "kind of shrugged [Amanda's statement] off[;]" however, when Amanda repeated her statement after Thanksgiving, Sarah saw a "red flag" which told her "something [was] not normal."

Linda Morgan, Amanda's maternal grandmother, gave Amanda a bath on the evening of 26 November 2011. Linda Morgan testified that after Amanda's bath, while Amanda was still naked, she observed Amanda "rubbing herself" in her vaginal area. When Linda Morgan asked Amanda what she was doing, Amanda allegedly

told her, "Mamawm, I'm [m]assaging myself like Pop Pop does." Linda Morgan fetched her daughter, Elizabeth Powell, and asked Amanda to repeat herself. Elizabeth Powell testified that Amanda told her that "she was massaging her wee wee like Pop Pop does." Linda Morgan told Sarah about the statements Amanda had made to her and Elizabeth Powell. That same evening, Sarah and Bobby took Amanda to the emergency department at a local hospital for an evaluation.

Sarah testified that in mid-December 2011, when she was giving Amanda a bath, she observed Amanda slide her legs and her bottom up under the faucet to allow water to run over her vaginal area. Sarah asked Amanda, "what in the world are you doing?" Amanda allegedly responded, "Pop Pop taught me it feels good."

On 24 January 2012, Detective Jeremy Queen of the Transylvania County Sheriff's Office, questioned defendant. Defendant told Detective Queen that he was "glad to be there" and "something need[ed] to be done for his grandbaby." Defendant did not admit to having touched Amanda inappropriately during the interview. At a subsequent interview on 16 February 2012, SBI Special Agent Christopher John Smith (Agent Smith) administered a polygraph examination to defendant. Agent Smith

did not testify at trial. According to Detective Queen, who was present during the questioning, defendant did not admit to having touched Amanda inappropriately during the polygraph test. Detective Queen testified that Agent Smith told defendant he had failed the polygraph and "accused [defendant] of lying[.]" Defendant replied, "[n]o, I'm not lying. . . . I don't know why I could have failed [the polygraph examination], maybe I don't remember this happened, maybe it's a suppressed memory." Detective Queen alleged that Agent Smith repeatedly confronted defendant, saying that "no, this is not a repressed memory, you absolutely remember this, and you're -- you're simply not telling the truth about it." Detective Queen testified that eventually defendant admitted that he touched Amanda "a couple of times or maybe three times for sexual gratification." Defendant told Agent Smith he had touched Amanda's bare vagina at least eight to ten times. He also confessed to having touched Amanda's vagina over her clothes a dozen of times for sexual arousal. Defendant signed the following statement that had been authored by Detective Queen:

> I, [defendant] admit that I did, in fact, touch my granddaughter [Amanda] on her vagina for my own sexual gratification. I did this sexual touching dozens of times, more times than I can count.

In addition, on his own accord, defendant wrote:

> About one year ago I started to touch [Amanda] inappropriately, not every day. She was at the house almost every day though. Apparently this was for sexual gratification outside her clothes and without clothes. For [Amanda's] sake this should not happen. My granddaughter loves her Pop Pop, and I love her and do not want her to go through such as this [sic].

Defendant was subsequently indicted for ten counts of taking indecent liberties with a minor. Prior to trial, the trial court determined that Amanda, who was then four years old, was incompetent to testify due to her inability "to express herself as to what is the truth and what is not the truth."

The defense called one witness at trial, Cindy McJunkin, a registered nurse certified in pediatrics, forensic interviewing, and the sexual assault examination of children. On 6 January 2012, Ms. McJunkin interviewed Amanda. After Ms. McJunkin specifically asked Amanda about a massage, Ms. McJunkin alleged that Amanda touched her genital area and said, "[t]hat will make it burn." Ms. McJunkin asked Amanda, "[w]ho does massage?" Amanda responded, "[M]ama does massage thing on my wee wee and stuff." Thus, Amanda identified her mother, not defendant, as the person who massaged her "wee wee." Defendant now appeals his convictions.

II. Analysis

Defendant argues that the trial court committed prejudicial error by allowing Sarah Morgan, Linda Morgan, and Elizabeth Powell to testify regarding certain out-of-court statements made by Amanda. We agree.

Whether an out-of-court statement is admissible pursuant to N.C. Gen. Stat. § 8C-1, Rule 803 is a question of law, reviewable *de novo* on appeal. *State v. Wilson*, 197 N.C. App. 154, 159, 676 S.E.2d 512, 515 (2009). Defense counsel objected to the admission of certain statements made by Sarah and Linda Morgan and therefore the admission of this testimony is reviewed *de novo*. When a defendant fails to object to the improper admission of evidence, its admission is reviewed for plain error. *State v. McLean*, 205 N.C. App. 247, 249, 695 S.E.2d 813, 815 (2010). To establish plain error, the defendant must show that the erroneous admission of evidence was a fundamental error that "had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 517, 723 S.E.2d 326, 333 (2012). Defendant did not object to Elizabeth Powell's hearsay statement and therefore its admission is reviewed for plain error.

Hearsay is "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c). Once a statement is determined to be hearsay, it is inadmissible at trial unless allowed by statute or an applicable exception. N.C. Gen. Stat. § 8C-1, Rule 802. In the instant case, the trial court admitted the following statements under two exceptions to the hearsay rule, the present sense impression exception, Rule 803(1), and the declarant's then existing state of mind or physical condition exception, Rule 803(3):

> **Sarah Morgan**:
> A few days before Thanksgiving [Amanda] had been rubbing her vaginal area over her clothes, and I asked her what she was doing because it seemed odd to me. And [Amanda] said, **'I'm massaging my wee wee like Pop Pop does.'**
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> Friday morning [the day after Thanksgiving],. . . [Amanda] was rubbing herself in her vaginal area, . . . and I asked her, I said, '[Amanda], what you are doing?' And [Amanda] said, **'I'm massaging my wee wee like Pop Pop does.'**
>
> I was giving [Amanda] a bath, and she slid her legs and her bottom up under the faucet and was letting the water run on her vaginal area. And I said, '[Amanda], what in the world are you doing?' And she said, 'Pop Pop taught me it feels good.'

> There was one time [when I was bathing Amanda] that [Amanda] slid her legs up and had her vaginal area under the faucet. And I said, '[Amanda], what you are doing?' And she said, **'Pop Pop told me it feels good.'**
>
> **Linda Morgan:**
> The day after Thanksgiving, I had given [Amanda a] bath and had brought her into the living room. And [Amanda] started rubbing herself. And I looked at her, and I said, '[Amanda], what you are doing?' She says, **'Mamaw, I'm [m]assaging myself likes Pop Pop does.'**
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> **Elizabeth Powell:**
> Linda Morgan asked me to come in there whenever I went on to my 15-minute break. So I went into the living room, and my mom had said that [Amanda] was doing something. And she asked . . .[Amanda] to tell me what it was that she had just told her. And [Amanda] had said that she was **'massaging her wee wee like Pop Pop does.'**

According to defendant, these statements constitute hearsay that did not fall within any statutory exception to the hearsay rule and were therefore inadmissible at trial. A present sense impression is a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." N.C. Gen. Stat. § 8C-1, Rule 803(1). "There is no rigid rule about how long is too long to be immediately thereafter," *State v. Clark*, 128 N.C. App. 722, 725, 496 S.E.2d 604, 606 (1998); however, "[t]he basis of

the present sense impression exception is that closeness in time between the event and the declarant's statement reduces the likelihood of deliberate or conscious misrepresentation." *State v. Pickens*, 346 N.C. 628, 644, 488 S.E.2d 162, 171 (1997). A lapse in time between the declarant's statement and the event may preclude admission of the statement under this hearsay exception depending on the facts of each case. *See e.g.*, *State v. Smith*, 152 N.C. App. 29, 36, 566 S.E.2d 793, 799 (2002).

Although not directly on point, we find our Supreme Court's holding in *State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985) to be relevant to this case. In *Smith*, our Supreme Court held that the child-declarant's statements to her grandmother that "Sylvester had went [sic] in her and had, you know, hurt her; and in her 'butt' area, he put his hand there" and "[s]he said he pressed his 'peeter' in her 'project;' and in her 'butt,' his finger," were admissible under the excited utterance exception to the hearsay rule despite the fact that two to three days had passed between the event and the time the child-declarant informed her grandmother of the alleged abuse. *Id.* at 81-90, 337 S.E.2d at 837-843. In deciding to admit the child-declarant's statements despite the lapse between the time of the incident and the time when the statements were made, our Supreme

Court adopted a policy of leniency because "a young child may not make immediate complaint because of threats, fear of reprisals, admonishments of secrecy, or other pressures not to disclose, particularly where, as here, the child had a close relationship with the offender." *Id.* at 89, 337 S.E.2d at 842. (citation and quotation omitted). However, our Supreme Court clarified that such leniency was not possible when there was a complete absence of evidence concerning exactly when an attack or sexual misconduct occurred. *Id.* at 89, 337 S.E.2d at 842 (relying on *State v. Hollywood*, 67 Or. App. 546, 680 P.2d 655 (1984), where the Oregon court "found the excited utterance exception inapplicable where there was a complete absence of evidence as to exactly when the attack took place and the victim had been in defendant's custody for nearly a month").

Again, to fall under the present sense impression exception, a statement must be made while the declarant is perceiving the event or immediately thereafter. Here, Amanda made the requisite statements to each of the three witnesses during the course of Thanksgiving week in 2011, but there is no evidence that the alleged misconduct occurred during that week. Thus, assuming *arguendo* that a policy of leniency is similarly applicable under Rule 803(1), such policy would not apply given

the complete absence of evidence concerning when the alleged misconduct took place. In addition, defendant's indictment alleges that the sexual offenses occurred between 1 February 2011 through 25 November 2011, and the witnesses gave no indication about the amount of time that elapsed between when defendant allegedly massaged Amanda and when Amanda spoke about the massages. Amanda's statements could have been made days, weeks, or possibly months after the incident(s). Given that the basis of the present sense impression exception involves the closeness in time between the statement and the conduct, we cannot hold that Amanda's statements fell within this exception. Amanda did not make the statements while perceiving/experiencing the sexual abuse or immediately thereafter.

Moreover, none of Amanda's alleged statements qualify for admission under the then existing state of mind or mental condition exception to the hearsay rule. This exception allows into evidence "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)[.]" N.C. Gen. Stat. § 8C-1, Rule 803(3). This exception specifically excludes "a statement of memory or belief to prove the fact remembered or believed unless it relates to

the execution, revocation, identification, or terms of declarant's will." *Id.*

The State argues that Amanda's statements were properly admitted under Rule 803(3) because they reflected her emotional state, a sensation she felt, her state of mind and "physically what and why she was rubbing her vagina with her hand, the faucet or the bean bag and running water across her vagina." However, the State does not argue why we should find this to be true, nor does the State cite to any authority supporting its position. The State merely reasons: "[W]hat [Amanda] exhibited to her grandmother and mother reflected Amanda's mental and physical state." The State has focused on Amanda's actions or the behavior she "exhibited" to support its argument. It is the content of the statements (often taken in conjunction with the context) that is relevant to determining whether the statements fall within a hearsay exception. The declarant's behavior alone is insufficient to allow a statement to be admissible under this exception. The State's argument is not persuasive.

When one reads the statements made by Amanda it is tempting to draw an inference regarding her state of mind. For example, one could infer that these statements mean: "I'm upset because Pop Pop touched my vagina" or "I don't want Pop Pop to touch

me." However, simply because one may be able to infer something about Amanda's state of mind from these statements does not mean that they fall within Rule 803(3). None of Amanda's statements expressed her then-existing, subjective response to allegedly being massaged by defendant. Amanda never made statements such as "I'm frightened when Pop Pop massages my wee wee" or "it feels good when Pop Pop massages me," which would have more clearly evidenced her then-existing state of mind. Instead, Amanda made statements of fact: she was "massaging [her] wee wee like Pop Pop does" and "Pop Pop *told* me it feels good." Mere statements of fact are not admissible under Rule 803(3) because such statements "are provable by other means and they are not inherently trustworthy." *State v. Hardy*, 339 N.C. 207, 229, 451 S.E.2d 600, 612 (1994) (holding that "facts lack the trustworthiness of statements such as 'I'm frightened' and amount to precisely the type of evidence the hearsay rule is designed to exclude"); *see also State v. Cruz*, 2012 N.C. App. LEXIS 371, 722 S.E.2d 798 (2012) (Statements of a child victim alleging that defendant had raped her and had been raping her since she was young were inadmissible under Rule 803(3) because the statements "did not include information regarding [the victim's] then existing state of mind or mental condition" and

relayed factual events provable by better evidence.).[2] We conclude that the trial court erred in admitting Amanda's statements as present sense impressions under Rule 803(3).

Lastly, defendant contends that none of the hearsay statements were admissible under Rule 804(b)(5). We agree. "Rule of Evidence 804(b)(5) provides for the admission of hearsay statements when the declarant is unavailable and the statement is not covered by any specific exception, but is determined to have equivalent circumstantial guarantees of trustworthiness." *State v. Downey*, 127 N.C. App. 167, 169, 487 S.E.2d 831, 834 (1997) (citation and quotation omitted). As a threshold issue, the trial court is charged with determining whether a hearsay statement possesses "circumstantial guarantees of trustworthiness equivalent to those required for admission under the enumerated exceptions." *Smith*, 315 N.C. 76 at 93, 337 S.E.2d at 844-45. "This threshold determination has been called 'the most significant requirement' of admissibility" under Rule 804(b)(5). *Id.* at 93, 337 S.E.2d at 845.

In the present case, the trial court conducted a *voir dire* hearing to determine Amanda's availability as a witness. The

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[2] This Court recognizes that *State v. Cruz* is an unpublished opinion and therefore lacks controlling authority. However, we find it to be persuasive in the instant case.

trial judge found that Amanda was not competent to testify because he had "some serious doubts about the capability of this young child to express herself as to what is the truth and what is not the truth." The trial court also found that Amanda's earlier out-of-court statements did not possess the required circumstantial guarantees of trustworthiness to make them admissible under Rule 804(b)(5) because Amanda was "not able to express herself as to what is the truth and what is not the truth[.]" These findings are consistent and support the trial court's determination that the hearsay statements fall outside the scope of Rule 804(b)(5). Accordingly, the trial court did not err in excluding the hearsay statements under this residual exception.

Having found that the admission of Amanda's hearsay statements was error, we must next determine whether this error entitles defendant to a new trial. After reviewing the evidence against defendant, we hold that this error requires a new trial. Given the lack of other independent evidence offered to support the State's case, we believe that there is a reasonable possibility that the admission of Amanda's statements affected the jury's guilty verdict and that the admission of Ms. Powell's testimony concerning Amanda's statement probably impacted the

outcome at trial. The trial court's erroneous admission of the hearsay statements constituted reversible error. Accordingly, we grant defendant a new trial. *See State v. Morton*, 166 N.C. App. 477, 481, 601 S.E.2d 873, 876 (2004) (granting defendant a new trial upon the determination that the admission of hearsay statements was not harmless beyond a reasonable doubt).

In addition to the argument addressed in the text of this opinion, defendant argues that the trial court erred by failing to intervene *ex mero motu* to stop what he contends to have been an improper prosecutorial argument and by denying his motion to dismiss for insufficiency of the evidence. As a result of the fact that we have already awarded defendant a new trial, we need not address his challenge to the prosecutor's closing argument. In addition, we conclude that the trial court did not err by denying defendant's dismissal motion, which rested on a contention that the record did not contain sufficient evidence to support a conviction for ten counts of taking indecent liberties with a minor under the corpus delicti rule. *State v. Smith*, 362 N.C. 583, 588, 669 S.E.2d 299, 303 (2008) (stating that "[u]nder the *corpus delicti* rule, the State may not rely solely on the extrajudicial confession of a defendant, but must produce substantial independent corroborative evidence that

supports the facts underlying the confession") (citing *State v. Parker*, 315 N.C. 222, 337 S.E.2d 487 (1985). Although we have already concluded that the hearsay statements discussed in the text of this opinion were inadmissible, they must still be taken into account in the sufficiency inquiry that defendant's argument requires us to undertake. *State v. Morton*, 166 N.C. App. 477, 481, 601 S.E.2d 873, 876 (2004) (stating that, in determining whether a motion to dismiss for insufficiency of the evidence should have been granted or denied, "[a]ll evidence actually admitted, whether competent or not, must be viewed in the light most favorable to the State, drawing every reasonable inference in favor of the State"). Although defendant contends that the evidentiary record did not contain sufficient evidence to support a determination that defendant committed ten counts of taking indecent liberties with a minor, we believe that the hearsay statements and other evidence in the record provided the corroboration needed to support a denial of defendant's motion to dismiss. *Parker*, 315 N.C. 238-39, 337 S.E.2d 496-97. We note, however, that the record developed at retrial is likely to be substantially different from the record that is before us now, so that our decision with respect to the sufficiency of the evidence issue in this opinion should not be deemed controlling

in the event that a similar dismissal motion is made at any new trial held in this case.

New trial.

Judges ERVIN and DAVIS concur.

Report per Rule 30(e).