IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-561

Filed: 21 February 2017

Mecklenburg County, Nos. 12CRS251525-26

STATE OF NORTH CAROLINA

v.

ZERRICK RAMON MACK.

Appeal by defendant from judgment entered 29 January 2016 by Judge Linwood O. Foust in Mecklenburg County Superior Court. Heard in the Court of Appeals 16 November 2016.

*Joshua H. Stein, Attorney General, by Narcisa Woods, Assistant Attorney General, for the State.*

*Richard Croutharmel for defendant-appellant.*

DAVIS, Judge.

Zerrick Ramon Mack ("Defendant") appeals from his convictions of attempted statutory rape and taking indecent liberties with a child. On appeal, he contends that the trial court erred in allowing the State's expert witness in forensic serology to offer an opinion as to the manner in which semen stains were made on a hand towel. After careful review, we conclude that Defendant received a fair trial free from prejudicial error.

## Factual and Procedural Background

The State presented evidence at trial tending to establish the following facts: In August 2012, thirteen-year-old "Susan"[1] visited the home of her aunt, Alvita Wells, and Defendant. During this visit, Defendant's minor son Z.M. — who lived with Wells and Defendant — "tried to rape [her] in [Z.M's] room" when the two children were alone. When Wells and Defendant returned home, Susan "handed [Wells] a letter that I wrote about what happened . . . [and it] said that [Z.M.] tried to rape me and that I never wanted to come back to that house again." Susan testified that "I don't know if [Wells] believed me or not. She told -- they both told -- her and [Defendant] told me not to tell anybody."

Susan testified that Defendant would occasionally play hide and seek with the children and "[h]e would tell me to hide near here on the floor or find him last and then he would tell me to come by him and he would touch my vagina." She also testified that at some point after the August incident with Z.M., Defendant told her "[she] needed to stop messin' with them little n[*****]s and get with a real n[****]r."

Over the Thanksgiving weekend in 2012, Susan and her brother D.C. were staying at their grandmother's house. On the night of 24 November 2012, the children decided to visit Wells' house again. After playing with Defendant and Z.M. at the house, Susan and D.C. went to sleep on a mattress on the floor in Z.M.'s

[1] Pseudonyms and initials are used throughout this opinion to protect the privacy of the minors referenced herein.

bedroom. After the children had fallen asleep, Defendant came into the room to wake Susan up. At first, she tried to go back to sleep. Then he woke her up a second time and told her to go into the bathroom.

After Susan went into the bathroom, Defendant followed her inside and locked the bathroom door. He picked her up, put her on the bathroom counter, and pulled down her pants. He then pulled down his own pants and "tried to stick his private part into [hers], but it didn't go in. And then when it didn't go in he went to the sink and he jacked off in the sink."

Susan testified that "[a]fter [Defendant] ejaculated into the sink . . . [h]e got a rag and he washed the sink out and washed the sink out with this rag." Susan stated that the rag was dark green in color. Then "[h]e told [Susan] not to tell anybody what happened."

At that point, Defendant let Susan out of the bathroom, and she returned to Z.M.'s bedroom. D.C. was awake and asked her where she had gone, and she told him "that [Defendant] asked [if Z.M. was] being mean to us. And then [D.C.] said okay and we went back to sleep." Susan testified that this was not the truth and that she "just told [her] brother that because [she] didn't want him to know what happened . . . [b]ecause [she] was scared."

When she returned to her grandmother's house, Susan told her female cousin P.C. about "everything that happened that night." P.C. told Susan that she had to

"tell [Susan's] mama or [P.C.] would go and tell her herself." Susan then "told her to call my mama herself . . . [b]ecause I didn't want -- like I was scared to tell her and I didn't know what she would say."

P.C. then called Susan's mother and told her about both the incident with Z.M. that had occurred in August 2012 and the incident with Defendant that had occurred over the Thanksgiving weekend. After receiving this information, her mother asked Susan what had happened, and Susan responded that Defendant had "raped her or tried to rape her."

Her mother called Wells and asked about the incident, but Wells said "she didn't know nothing that [the mother] was talking about." Susan's mother then called the police and took Susan to the hospital. On 29 November 2012, Defendant was arrested and charged with statutory rape of a thirteen-year-old and taking indecent liberties with a child.

Beginning on 25 January 2016, a jury trial was held before the Honorable Linwood O. Foust in Mecklenburg County Superior Court. On that same date, Defendant filed a motion *in limine* seeking to exclude "[a]ny opinion testimony that a stain, found on a hand towel recovered from the defendant's bathroom, is consistent with it being used to wipe the sink as opposed to having been used to wipe a penis." Before the jury was selected, it was agreed that the prosecutor and defense counsel would conduct a *voir dire* examination of Patricia Levins, the State's expert witness

on serology, at the appropriate time during trial and that Levins would be instructed not to discuss the stain pattern evidence in the jury's presence until the *voir dire* examination was complete.

At trial, Susan testified as to the events of 24 November 2012, and the State offered the testimony of P.C.; Susan's mother; Ann Williams, a sexual assault nurse examiner; and Kelli Wood, a forensic interviewer at Pat's Place Child Advocacy. All of these witnesses testified that Susan had previously recounted to them the same series of events from the night of 24 November 2012 to which she had testified at trial.

The State also offered expert witness testimony from Levins, a criminalist with the Charlotte-Mecklenburg police crime laboratory. Levins testified that she had worked in the field of forensic serology for over seventeen years, obtained a Bachelor's degree in biology and earth science, had worked on over 1800 cases, and had testified as an expert witness 49 times. Levins was tendered by the State and accepted by the trial court as an expert in the field of forensic serology. Levins stated that she had examined a sexual assault evidence collection kit from Susan as well as two green hand towels that had been recovered from Defendant's home as evidence.[2]

[2] Levins testified that two green hand towels were found in Defendant's bathroom. One had a large semen stain and the other had a small semen stain. She testified that it was likely that the smaller stain on the second towel originated from being in contact with the larger stain on the first towel.

Outside of the jury's presence, the court conducted a *voir dire* examination of Levins. During *voir dire*, Levins testified (1) that she had conducted approximately 1800 serology examinations while at the police department; (2) that she possessed training and experience in how "things are deposited on fabrics[;]" (3) regarding the existence of two primary types of stains — direct deposit stains[3] and wiping stains; and (4) that she had made the determination that the large semen stain found on one of the green hand towels was made after the towel "was used to wipe a surface."

After hearing Levins' testimony on *voir dire*, the trial court determined that "this witness ha[d] done 500 experimental stain tests[, and t]hat the stain tests that she ha[d] done [were] consistent with the ones being done by others in her field of practice and accepted methods." The court then found that "the information that the witness desire[d] to present to the jury would be helpful to the jury in this case, and that her methodology [was] reliable." Over Defendant's objection, the trial court then allowed Levins to give an opinion to the jury that one of the green hand towels "was used to wipe [semen off of] a surface."

During her testimony, Williams stated that on the evening of 26 November 2012 she had examined Susan and found that Susan had injuries on the inner area of her vagina consistent with "blunt force trauma." The State also offered testimony from Rachel Scott, a DNA analyst with the Charlotte-Mecklenburg Police

[3] Levins also alluded to another type of deposit stain, which she referred to as "transfer" stains.

Department who had conducted DNA analysis on three separate stained areas on the green hand towel and determined that each stain was "consistent with the DNA profile obtained from [Defendant]."

Defendant testified on his own behalf. He denied having any sexual contact with Susan or waking her up that night. He testified that the semen stains were on the green hand towel because he had cleaned his penis off with the towel after having sex with Wells earlier that evening. Wells also testified, confirming Defendant's testimony that she had sexual relations with him that evening.

On 29 January 2016, the jury found Defendant guilty of attempted statutory rape and taking indecent liberties with a child. The trial court sentenced Defendant to 144 to 233 months imprisonment. Defendant gave oral notice of appeal.

**Analysis**

The sole issue raised on appeal by Defendant is whether the trial court erred in allowing Levins to testify as to her opinion regarding the origin of the semen stains on the towel. The admissibility of expert witness testimony is governed by Rule 702 of the North Carolina Rules of Evidence, which was recently amended by the General Assembly.

Rule 702 now provides, in pertinent part, as follows:

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or

> education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. R. Evid. 702(a).

A trial court's ruling on "whether the proffered expert testimony meets Rule 702(a)'s requirements of qualification, relevance, and reliability . . . will not be reversed on appeal absent a showing of abuse of discretion." *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016) (citation and quotation marks omitted). "[A] trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *Id.* (citation, quotation marks, and brackets omitted).

In *McGrady*, our Supreme Court recently confirmed that the General Assembly's 2011 amendments to Rule 702 adopted the federal standard for the admission of expert witness testimony set forth in *Daubert v. Merrell Dow Pharmaceuticals., Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993), and its progeny. *See McGrady*, 368 N.C. at 883, 787 S.E.2d at 5 ("We hold that the 2011 amendment adopts the federal standard for the admission of expert witness testimony articulated

in the *Daubert* line of cases. The General Assembly amended North Carolina's rule in 2011 in virtually the same way that the corresponding federal rule was amended in 2000. It follows that the meaning of North Carolina's Rule 702(a) now mirrors that of the amended federal rule."). "The Supreme Court's analysis in *McGrady* . . . makes clear that trial courts must now perform a more rigorous gatekeeping function when determining the admissibility of opinion testimony by expert witnesses than was the case under the prior version of Rule 702." *State v. Daughtridge*, __ N.C. App. __, __, 789 S.E.2d 667, 675 (2016), *disc. review denied*, __ N.C. __, __ S.E.2d __ (filed January 26, 2017) (No. 329P16). However,

> even when objected to at trial, evidentiary errors are subject to harmless error analysis on appeal. Thus, the burden is on the party who asserts that evidence was improperly admitted to show both error and that he was prejudiced by its admission. The admission of evidence which is technically inadmissible will be treated as harmless unless prejudice is shown such that a different result likely would have ensued had the evidence been excluded. Furthermore, where there exists overwhelming evidence of defendant's guilt, defendant cannot make a showing of prejudicial error.

*State v. Williams*, 232 N.C. App. 152, 168, 754 S.E.2d 418, 428-29 (internal citations, quotation marks, and alterations omitted), *appeal dismissed and disc. review denied*, 367 N.C. 784, 766 S.E.2d 846 (2014).

Following her extensive *voir dire* examination, Levins testified as follows on direct examination:

[PROSECUTOR:] Can you tell the jury about the different types of semen stains that you've seen?

[LEVINS:] I have a simple classification system that's also used by other people in my field. Basically there are two types of deposits. One is a direct deposit to an item, and one is a transfer. Transfer meaning when that sample was wet it touched another area of the fabric. So one is a direct deposit and then it gets transferred over to another surface.

The other one is wiping, where you're taking an object or a surface, wiping the surface across where that surface has a stain on it. And if you're wiping it with an object, then you're actually looking at the object used to wipe the object with, the material used to wipe that object with.

[PROSECUTOR:] So when we're discussing semen in particular, can you explain for us how those three types would appear? Like, what the significance of those are.

[LEVINS:] The stains that are directly deposited are typically oval in shape. They are from smaller spatter. You will see typically oval-shaped type stains because semen is fairly thick.

Then you go onto a transfer pattern what [sic] you will notice is there's a loss. You never typically get a mirror image. You'll get a portion of the stain transferred over to the second surface. But it does have a rough appearance of the first surface in the stain.

When you go to wiping, it's very dependent upon the object or surface which is wiped. If it's an object, it may actually show parts of that object, the shape on it, on the surface that you're wiping with. When you're talking about a surface, you can't necessarily tell that.

[PROSECUTOR:] I want to make sure I understand you. So when you're talking about a direct deposit stain, would that be something like ejaculation onto the face cloth itself?

> [LEVINS:] Correct.
>
> [PROSECUTOR:] Or someone wiping their penis?
>
> [LEVINS:] That would be considered a wipe stain.
>
> [PROSECUTOR:] What is your opinion about the significance of this stain or how this pattern was created on the face cloth?
>
> [LEVINS:] The face cloth was used to wipe a surface.
>
> [DEFENDANT'S COUNSEL:] Objection.
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> THE COURT: Sustained.
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> [PROSECUTOR:] Your Honor, may we approach?
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> THE COURT: You may.
>
> . . . .
>
> THE COURT: You may ask the question.
>
> [PROSECUTOR:] In your expert opinion what is the significance of this pattern?
>
> [LEVINS:] It indicates the towel, the face cloth, was used to wipe a surface.
>
> [DEFENDANT'S COUNSEL:] Objection.
>
> [PROSECUTOR:] No further questions.
>
> THE COURT: Overruled.

Defendant argues on appeal that the trial court abused its discretion by allowing Levins to offer an expert opinion as to the origin of the semen stains on the

green hand towel. Specifically, he argues that (1) "precedent has established that biological fluid stain genesis on a piece of cloth is an area best left to the jury[;]" (2) "Levins was not admitted as an expert in 'semen stain pattern interpretation' " and "failed to establish that she had expertise in the area[;]" and (3) "Levins's methodology for determining the semen stain genesis on the green hand towel was insufficiently reliable as an area for expert testimony." Defendant contends that the testimony was prejudicial because "the green hand towel was the only forensic evidence in a 'she said-he said' case [and] [a]ll other evidence was testimonial."

Even assuming, without deciding, that Levins' testimony was inadmissible under Rule 702, we conclude that Defendant has not demonstrated that any such error was prejudicial. This is so for several reasons.

First, a careful reading of Levins' testimony reveals that the opinion she gave did not clearly differentiate between Susan's version of these events and Defendant's version. Levins essentially drew a distinction between deposit stains and wipe stains. She explained that a direct deposit semen stain could, for example, have occurred had someone ejaculated directly into the hand towel. However, neither Susan nor Defendant claimed that his semen had gotten onto the towel in such a manner. To the contrary, *both* of their accounts were consistent with a wipe stain. Susan claimed Defendant had used the towel to wipe semen off of the sink after he had masturbated into the sink. Defendant, conversely, stated that he used the towel to wipe semen off

of his penis after he had engaged in sexual activity with Wells. Thus, based on Levins' analysis, Defendant's explanation for the presence of the semen on the towel described a wipe stain just as Susan's account did, as evidenced by the following exchange on direct examination between the prosecutor and Levins:

> [PROSECUTOR:] I want to make sure I understand you. So when you're talking about a direct deposit stain, would that be something like ejaculation onto the face cloth itself?
>
> [LEVINS:] Correct.
>
> [PROSECUTOR:] Or someone wiping their penis?
>
> [LEVINS:] That would be considered a wipe stain.

Levins' ultimate opinion before the jury was the following:

> [PROSECUTOR:] In your expert opinion what is the significance of this pattern?
>
> [LEVINS:] It indicates the towel, the face cloth, was used to wipe a surface.

As the above-quoted exchange between Levins and the prosecutor — which occurred immediately before she rendered her opinion that the towel was used to wipe a surface — clearly shows, the jury heard her expressly state that using a towel to wipe one's penis (Defendant's version of the incident) would, in fact, have resulted in a wipe stain. While Levins' earlier testimony contained some distinguishing statements between surfaces and objects, it is axiomatic that objects have surfaces,

and Levins did not expressly inform the jury that she considered the terms "object" and "surface" to be mutually exclusive.

Therefore, Levins' opinion that the towel was used to wipe a surface did not foreclose the jury from accepting Defendant's version of the events of 24 November 2012. Moreover, we note that during cross-examination Levins admitted that she could not be certain that the towel was actually used to wipe a surface or that this was the only way the stain could have occurred.

Furthermore, contrary to Defendant's argument, Levins' testimony was not the only forensic evidence supporting Susan's version of these events. At trial, the State presented the following testimony from Ann Williams, the sexual assault nurse examiner:

> [PROSECUTOR:] Ms. Williams, are those injuries that you noted on [Susan's] vagina consistent with attempted penile penetration?
>
> [WILLIAMS:] Yes, ma'am. . . . Well, blunt force trauma.
>
> [PROSECUTOR:] Blunt force trauma?
>
> [WILLIAMS:] Yes, ma'am.

Other evidence likewise supported Susan's version of the events at issue. Susan told investigators shortly after the incident that the color of the hand towel that Defendant used to wipe the sink was green — a fact she would have had no way of knowing under Defendant's version of this incident. D.C. also testified that when

he woke up in the middle of the night "the light was on for a long time[.]" Additionally, four witnesses — P.C., Susan's mother, Ann Williams, and Kelli Wood — testified at trial and provided testimony showing that Susan's account of the incident had remained consistent.

Accordingly, we are satisfied that the trial court did not commit reversible error in allowing Levins' opinion testimony. *See Williams*, 232 N.C. App. at 169, 754 S.E.2d at 429 ("Accordingly, even assuming, without deciding, that the admission of this testimony was an abuse of discretion, it was not reversible error.").

**Conclusion**

For the reasons stated above, we conclude that Defendant received a fair trial free from prejudicial error.

NO PREJUDICIAL ERROR.

Judges STROUD and HUNTER, JR. concur.

Report per Rule 30(e).