What Lessons Can We Learn From State vs. Kelly?

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SOME RECENT AND PENDING CASES INVOLVING CHILD SEXUAL ABUSE

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1. Hearsay

In *State v. Bartlett*, ___N.C. App. __, ___S.E.2d___ (9217SC491, argued 31 March 1993), the child witness testified that she did not remember talking to a doctor about an alleged act of abuse. Moreover, she testified that she did not like doctors. The child was then led to testify that she "might have" talked with a doctor. The doctor was allowed to testify to accusations allegedly made by the child. These statements were admitted as substantive evidence of the defendant's guilt under the "medical treatment" hearsay exception.

In *State v. Holman*, 107 N.C. App. 492, 421 S.E.2d 400 (1992), the trial court considered whether testimony of the child witness to three adults fell within the residual hearsay exception. Unfortunately, the trial court got "declarant" confused with "witness" in its findings of fact and conclusions of law. The state argued on appeal that the evidence was nonetheless admissible under the "medical treatment" exception. The Court of Appeals reversed without reaching the state's contention.

2. Physical or Psychological Examination of the Child Witness.

In *State v. Blake*, 106 N.C. App. 395, 417 S.E.2d 854 (1992), *rev. denied*, 332 N.C. 347 (1992), defendant moved in limine for an order requiring the prosecuting witness to be made available for a medical examination. He cited both the state and federal

constitutions, as well as the discovery statutes. *See* N.C.G.S. §15A-903(e)(1983). This motion was denied. The state introduced its own experts to explain the physical condition of the complainant. The Court of Appeals affirmed the defendant's conviction, relying on *State v. Fletcher*, 322 N.C. 415, 368 S.E.2d 633 (1988). *See also State v. Joyce*, 97 N.C. App. 464, 389 S.E.2d 136 (1990).

3. Pennsylvania v. Ritchie issues.

In *State v. Love*, 100 N.C. App. 226, 395 S.E.2d 429 (1990), *rev. denied* 328 N.C. 95 (1991), the defendant issued subpoenas duces tecum for records compiled on the prosecuting witness, and a recording of an interview conducted by a social worker with the witness. The trial court quashed the subpoenas as being overbroad, and declined to review the materials or seal them for appellate review. The case is currently before the Court of Appeals for the Fourth Circuit after habeas corpus was denied by the District Court for the Eastern District of North Carolina.

4. Psychological Testimony on Abuse after State v. Hall

In *State v. Hall*, 330 N.C. 808, 412 S.E.2d 883 (1992) the Supreme Court held that evidence of "syndromes" associated with sexual abuse are only admissible where the state can show a particularized relevance, and may not be introduced to establish that the complainant has been assaulted.

In *State v. Stallings*, 107 N.C. App. 241, 419 S.E.2d 586 (1992), Dr. Martha Sharpless testified that the complainant was suffering from "sexual abuse accommodation syndrome." The Court of Appeals agreed with the defendant that the testimony was erroneously admitted under *Hall*. *Accord*, *State v. Michaels*, ___N.J. App. ___ (filed 26 March 1993). However, the court concluded that the error was harmless because there was "overwhelming evidence of defendant's guilt."

In *State v. Johnson*, 105 N.C. App. 390, 413 S.E.2d 562 (1992) *rev. denied*, 332 N.C. 347 (1992), Dr. Madelyn Tison testified that the complainant was attractive and cooperative, friendly but somewhat reserved and mildly anxious during her first meeting, had no signs of "fabrication," gave stories with no gross inconsistencies, was articulate, intelligent, secure, and generally a "well put together kid." Dr. Tison testified that she considered the child's "symptoms" to be consistent with "children who are found to be sexually molested."

In *State v. Hutchens*, ___N.C. App. ___, ___S.E.2d___ (9221SC298, argued 1 April 1993), the state presented testimony of two counselors employed by Family Services, Inc. The first, a lay witness, testified that she performed certain psychological "evaluations" of the teenage complainant. The witness was asked to describe the girl's emotional state as she told of the alleged abuse. Rather than doing so, the witness proceeded to testify to her opinions of the teenager's psychological makeup and clinical conditions based on those "evaluations:" problems with self-esteem, difficulty concentrating, feelings of guilt and responsibility, withdrawal, bewilderment, abandonment and isolation, as well as fear and anxiety, distrust, hopelessness, depression and suicidal feelings. The girl was not diagnosed as suffering from any psychological disorder associated with sexual abuse. Nonetheless, the second counselor, who was qualified as an expert in child abuse, testified at great length to her opinions regarding the psychological impact of abuse on child victims. This testimony was received as substantive evidence.

In *State v. Parker*, ___N.C. App. ___, ___S.E.2d___ (9227SC30, argued 11 February 1993), Dr. Carlos Fisher was tendered to the court as an expert in medicine and pediatrics. The trial court granted this tender and then, *ex mero motu*, qualified the witness also as an expert in "the detection of child abuse and trauma." The doctor

testified that he examined and interviewed the complainant. He found that her hymen was missing. The doctor concluded, "It is my opinion that she had been sexually abused over a long period of time based on my exam."

In *State v. Figured* (Chatham County, 92CrS264-266), Dr. Mark Everson was qualified as an expert in child abuse. He testified that the child victim was abused; that he was abused by the defendant; and that the abuse took place while the defendant's girlfriend (and erstwhile co-defendant) was present.

5. Prior Bad Acts of the Defendant

In *State v. Sneeden*, ___ N.C. ___, ___ S.E.2d___ (58A93, Appellant's New Brief filed 11 March 1993), the state introduced evidence that the defendant had committed rape in 1967. Two judges of the Court of Appeals held that the evidence was properly admitted to show defendant's intent and the victim's lack of consent. A dissenter argued that the evidence was too remote in time to show anything other than a propensity to commit rape.

Two other points were raised by the Court of Appeals. First, the majority opined that, even if the evidence were not admissible to show a "plan," it was admissible to show defendant's intent and Ms. Hatfield's lack of consent. Second, the Court held that the time defendant spent in jail for the first rape does not apply toward the remoteness analysis. This case is currently before the Supreme Court of North Carolina.

In *State v. Scott*, 331 N.C. 39, 413 S.E.2d 787 (1992), the Supreme Court held that evidence of a prior crime of which a defendant has been acquitted may not be introduced against him in a subsequent trial. *Cf, Dowling v. United States*, 493 U.S. 342,

107 L.Ed.2d 708 (1990)(no federal constitutional violation for prior acquittal to be used in a subsequent prosecution).

The "unnatural lust" instruction found in some very early cases, *e.g., State v. Edwards*, 224 N.C. 527, 31 S.E.2d 516 (1944), is still being used. *See State v. McCarty*, 326 N.C. 782, 392 S.E.2d 359 (1990).

6. Good Character of the Defendant

In *State v. Ramseur*, ___N.C. App. ___, ___S.E.2d___ (9325SC2, Appellee's Brief filed 30 March 1993), defendant's employer would have testified that, "I did not think [the defendant] could do anything like this." *Cf State v Squire*, 321 N.C. 541, 364 S.E.2d 354 (1988)(a defendant's trait for law-abidingness is always at issue). Similarly, in *State v. Najewicz*, ___N.C. App. ___, ___S.E.2d___ (9214SC5, argued 9 February 1993), defendant's immediate supervisor was asked "In your opinion, with your knowledge of [the defendant], do you believe he's capable of raping anyone?" The state's objection was sustained.

Evidence that the defendant is not a pedophile is relevant. *State v. Helms*, 93 N.C. App. 394, 378 S.E.2d 237 (1989).

7. Rape Shield Act

In *State v. Najewicz*, *supra*, counsel sought to cross-examine the prosecuting witness about whether or not she had made prior claims of rape and sexual harassment. The trial court ruled that counsel could not cross-examine the prosecuting witness on these matters, but would have to present defendant himself to testify to them.

In *State v. Watson*, ___N.C. App. ___, ___S.E.2d___ (922SC490, argued 14 April 1993), the teenage complainant made a prior accusation of abuse against her stepfather.

Defendant would have presented evidence that the other man was sent to prison. Counsel argued that this information would show that the girl knew the effect her accusations against defendant would have; that she knew how to get a person in trouble if she wanted to. The trial court ruled that this would be irrelevant. *Cf, State v. Anthony*, 89 N.C. App. 93, 365 S.E.2d 195 (1988)(prior false accusations are relevant); *State v. Watkins and McCarroll*, ___N.C. App. ___, ___S.E.2d___ (925SC44, filed 6 April 1993)(same).

8. Testimony of a Child Witness

The jury may be instructed that a child's vagueness on the date of the crime goes only to the weight of the evidence. *State v. Woods*, 311 N.C. 739, 319 S.E.2d 247 (1984). In *State v. Bartlett*, *supra*, the jury was instructed that "[t]he law does not require children to give the exact date of sexual offenses as perhaps adults would be able to do, because of the nature of their age."

9. Attempt as a Lesser Included Offense

Defendant is not entitled to an instruction on attempt where he denies any misconduct. *See, e.g., State v. Norfleet*, 105 N.C. App. 172, 404 S.E.2d 512, *rev. denied* 329 N.C. 502 (1992); *State v. Edwards*, ___N.C. App. ___, ___S.E.2d___ (936SC26). The quantum of evidence to trigger an instruction on attempt is also unclear. *See State v. Rhinehart*, 322 N.C. 53, 366 S.E.2d 429 (1988)("[the defendant] started trying to suck my privates" insufficient to warrant attempt instruction where child testified at trial to completed act).

10. Construction of Statutes

In *State v. Edwards*, *supra*, the evidence tended to show that a nine year old girl sat in defendant's lap. Both she and the defendant were apparently fully clothed. The child did not see the defendant's penis, and could not tell whether or not defendant took his penis out of his pants. Nonetheless, she testified that he put his penis in her "behind." In a pre-trial statement, the defendant admitted that he and the child had "anal intercourse" but said that it was "through our clothes." The trial court instructed the jury that it could find an act of anal intercourse even if both parties were fully clothed; that is, the judge defined anal intercourse as penetration of the anus, "whether covered or uncovered." The jury convicted defendant of first degree sexual offense. *See also*, *State v. Johnson*, *supra* (evidence of fellatio sufficient even if mouth of victim does not contact penis of defendant).