NO. COA01-262

NORTH CAROLINA COURT OF APPEALS

Filed: 7 May 2002

STATE OF NORTH CAROLINA

v. Halifax County
Nos. 98 CRS 11261, 11262, 11263

ROGER LEE MALONE,
Defendant.

Appeal by defendant from judgment entered 2 October 2000 by Judge Henry V. Barnette, Jr. in Halifax County Superior Court. Heard in the Court of Appeals 11 February 2002.

Attorney General Roy Cooper, by Assistant Attorney General Anne M. Middleton, for the State.

Glover & Petersen, P.A., by James R. Glover, for defendant-appellant.

EAGLES, Chief Judge.

Roger Lee Malone ("defendant") appeals from judgment entered on jury verdicts finding him guilty of two counts of first degree sexual offense and one count of first degree statutory rape. After careful consideration of the briefs and record, we find no prejudicial error.

At trial, the evidence tended to show that D ("victim"), was born on 19 December 1985 and is the daughter of Marjorie Weaver ("Weaver") and William Phillips ("Phillips"). Weaver and defendant began a dating relationship in 1993. Defendant moved to North

Carolina in 1996. In September 1996, defendant, Weaver, the victim, and the victim's younger siblings lived with Weaver's sister at a house on Vance Street in Roanoke Rapids. There, defendant allegedly had vaginal intercourse with the victim who was ten years old at the time. The victim told a school guidance counselor and the matter was investigated. The victim moved in with her maternal grandmother but no criminal charges were brought at that time against defendant.

After defendant, Weaver, and the victim's siblings moved to a house on Hamilton Street in Roanoke Rapids, the victim returned to live with them. In May 1997 at the house on Hamilton Street, defendant touched the victim with his private parts and committed two separate acts of anal intercourse with the victim. One incident occurred in the victim's bedroom upstairs while the other incident took place in Weaver's bedroom downstairs.

On 21 May 1997, the Department of Social Services ("DSS") were investigating alleged sexual abuse of the victim's brother, T, after he was found infected with gonorrhea. The victim and her siblings were subsequently tested for gonorrhea. The victim's siblings tested negative while the victim tested positive for oral, anal, and vaginal gonorrhea. After this report, the victim and her siblings were removed from the home on Hamilton Street and placed in foster care. The victim and one of her siblings were then placed in the home of their biological father, Phillips, and their stepmother.

Defendant was indicted for two counts of first degree statutory sexual offense and one count of first degree statutory rape. The matter came to trial at the 25 September 2000 Criminal Session of Halifax County Superior Court. The jury returned verdicts of guilty for all three charges. For each charge, defendant was sentenced to a minimum term of imprisonment of 240 months and a maximum of 297 months. Each sentence is to be served consecutively. Defendant appeals.

Defendant contends that the trial court erred in: (1) denying defendant's motion to dismiss the charge in 98 CRS 11261 due to insufficient evidence; (2) failing to disclose the contents of juror notes and the trial court's responses to the notes; (3) instructing the jury that certain drawings and photographs could be considered as substantive evidence; and (4) refusing to conduct an *in camera* inspection of the State and DSS files for evidence favorable to the defendant and material to his guilt or punishment. After careful review, we find no prejudicial error.

Defendant first contends that the trial court erred in denying defendant's motion to dismiss 98 CRS 11261, the alleged first degree sexual offense upstairs at Hamilton Street, based on the insufficiency of the evidence. We do not agree.

Defendant moved to dismiss 98 CRS 11261 at the close of the State's evidence and again at the close of all the evidence. The trial court denied defendant's motions. Defendant argues that there was insufficient evidence for a reasonable juror to find beyond a reasonable doubt that defendant committed anal intercourse

as alleged in 98 CRS 11261. Defendant contends that the State's evidence was sufficient to prove only a touching of the victim's rectum by defendant's penis. Defendant argues that the State's evidence is insufficient to prove the act of anal intercourse and support the verdict of guilty of first degree sexual offense. We do not agree.

> In reviewing the denial of a motion to dismiss for insufficient evidence, the trial court must ". . . 'consider the evidence in the light most favorable to the State and give the State every reasonable inference to be drawn therefrom.'" A trial court must deny a motion to dismiss where there exists "substantial evidence - whether direct, circumstantial, or both - to support a finding that the offense charged has been committed and that the defendant committed it."

State v. Santiago, __ N.C. App. __, __, 557 S.E.2d 601, 606 (2001), *disc. review denied*, 355 N.C. 291, __ S.E.2d __ (2002) (citations omitted). "'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' When reviewing the evidence, the trial court must consider even incompetent evidence in the light most favorable to the prosecution, granting the State the benefit of every reasonable inference." *State v. Kraus*, __ N.C. App. __, __, 557 S.E.2d 144, 147 (2001) (citations omitted). "[I]f the trial court determines that a reasonable inference of the defendant's guilt may be drawn from the evidence, it must deny the defendant's motion [to dismiss] even though the evidence may also support reasonable inferences of the defendant's innocence." *State v. Clark*, 138 N.C. App. 392, 402-03, 531 S.E.2d 482, 489 (2000), *cert. denied*, 353 N.C. 730, 551

S.E.2d 108 (2001). "Any contradictions or discrepancies in the evidence should be resolved by the jury." *Kraus*, __ N.C. App. at __, 557 S.E.2d at 147.

Specifically, "[f]or a charge of sexual offense to withstand a motion to dismiss for insufficient evidence, there must be evidence of anal or genital penetration by any object." *State v. Dick*, 126 N.C. App. 312, 317, 485 S.E.2d 88, 91, *disc. review denied*, 346 N.C. 551, 488 S.E.2d 813 (1997). Here, the alleged offense was anal intercourse. This act "requires penetration of the anal opening of the victim by the penis of the male." *State v. DeLeonardo*, 315 N.C. 762, 764, 340 S.E.2d 350, 353 (1986).

Here, defendant was charged with two sexual offenses in May 1997. The first is 98 CRS 11261 which occurred upstairs at the house on Hamilton Street and the second is 98 CRS 11263 which occurred downstairs at the house on Hamilton Street. Regarding the incident that was alleged in 98 CRS 11261, the sexual offense committed upstairs, the victim testified that:

> Q. Did [defendant] touch your private parts in the back?
>
> A. Yes.
>
> . . . .
>
> Q. What, if anything, did [defendant] touch your private parts in the back with?
>
> A. With his private parts.
>
> . . . .
>
> Q. Did that happen again in May of 1997?
>
> A. Yes.

Then, regarding the sexual offense that occurred downstairs at Hamilton Street which is the basis for 98 CRS 11263, the victim testified that:

> Q. What happened next?
>
> A. And then [defendant] got on top of me.
>
> Q. Did [defendant] put his private parts in your private parts?
>
> MR. LIVERMON: Object.
>
> A. Yes.
>
> THE COURT: Overruled.
>
> Q. In the front or the back?
>
> A. Both.

During re-direct examination, the victim testified further:

> Q. When you say touching, does it mean going inside or staying outside?
>
> MR. LIVERMON: Object.
>
> THE COURT: Overruled.
>
> A. Inside.
>
> . . . .
>
> Q. Did the defendant's private parts go inside your private parts or stay outside your private parts?
>
> MR. LIVERMON: Object.
>
> THE COURT: Overruled.
>
> A. Went inside.

Examining the entire testimony of the victim, the State presented sufficient evidence of penetration to deny defendant's motion to dismiss. Defendant cites *State v. Hicks*, 319 N.C. 84,

352 S.E.2d 424 (1987) for support that the victim's testimony is insufficient to support the verdict of guilty. *Hicks* reversed the defendant's conviction on the charge of first degree sexual offense because the only evidence offered to show anal intercourse was the victim's statement that "defendant 'put his penis in the back of me.'" *Id.* at 90, 352 S.E.2d at 427. Here, the victim testified that "touching" meant going "inside" and that defendant's private parts "went inside" her private parts. Also, Dr. Pamela Larsen ("Dr. Larsen"), a nurse practitioner, performed a medical examination of the victim in June 1997. Dr. Larsen testified that the fact that the victim's rectum was torn was a factor in her opinion that the victim was sexually abused. We discern no error in the trial court's denial of defendant's motion to dismiss.

Defendant next contends that the trial court erred by failing to disclose to defendant the contents of two notes the jury submitted to the trial court during deliberations and that the trial court's responses to those two questions were coercive. We are not persuaded.

During deliberations, the jury sent two notes to the trial court. The jury sent the first note after deliberating for approximately one hour and ten minutes. The note stated: "What do we do when we have all 12 votes for guilty of having anal intercourse upstairs, and 11 votes guilty for anal intercourse downstairs and 1 not guilty. We also have 11 guilty for statutory rape and 1 not guilty." The trial court responded to the jury as follows:

> THE COURT: You've indicated that you have reached -- well, you think you can reach a verdict as to one charge but you're split as to the other two?
>
> [FOREPERSON]: We did.
>
> THE COURT: Well, do you feel like as to the two that you're split on that if you deliberate further that you can break the deadlock and come to a unanimous verdict as to those?
>
> [FOREPERSON]: It would be hard but . . . .
>
> THE COURT: Well, I would like for you to try to do that, okay? Okay.

Approximately forty-five minutes later, the jury submitted another note to the trial court. This note stated: "We have all 12 votes on statutory rape and also 1st degree sexual offense upstairs. We have 11 to 1 on the sexual offense downstairs." In response, the trial court stated to the jury that:

> THE COURT: Okay, [Foreperson], your latest note indicates that you have a unanimous verdict as to two of the counts?
>
> [FOREPERSON]: Yes.
>
> THE COURT: But as to the third count, you are deadlocked. Do you feel like that you are hopelessly deadlocked on that count?
>
> [FOREPERSON]: Pretty much. We went over everything.
>
> THE COURT: Well, pretty much -- well, it's like I said to you before, do you feel like that if you're allowed to deliberate further on that count you can reach a unanimous verdict or do you feel like that you're locked in?
>
> [FOREPERSON]: (No response.)
>
> THE COURT: I see the split is eleven to one.

> [FOREPERSON]: Yes.
>
> THE COURT: Do [you] all want to go back there and talk about that particular matter and then let me know after [you] all have talked about it?
>
> [FOREPERSON]: We'll try.
>
> THE COURT: And then I'll bring you right back out here. You let the bailiff know that you're ready to come back out here but I'll let you go back there and discuss what I just asked you.
>
> [FOREPERSON]: Okay.

Defendant argues that the trial court's responses were coercive under the totality of the circumstances. Defendant contends that it was coercive since the trial court was aware of the majority position and the trial court gave no instruction for the jurors to maintain their convictions. We do not agree.

In *State v. Jones*, 342 N.C. 457, 466 S.E.2d 696, *cert. denied*, 518 U.S. 1010, 135 L. Ed. 2d 1058 (1996), the jury notified the trial court of the numerical split and the majority's position. *Id.* at 467, 466 S.E.2d at 701. The trial court did not inform the parties about the majority's position and instructed the jury to return to deliberate to reach a verdict. *Id.* at 467-68, 466 S.E.2d at 701. The defendant argued that "when the court and the jury know the division is in favor of one result, any instruction on the duty to reach a verdict will be understood by the jury as an endorsement of the majority's position." *Id.* at 468, 466 S.E.2d at 701. Our Supreme Court stated "[w]e do not believe this instruction by the court is any more coercive *because the court*

knew the majority position. It should be equally coercive whether or not the court knows the division of the vote." *Id.* (emphasis added).

"In determining whether the trial court coerced a verdict by the jury, this Court must consider the totality of the circumstances." *State v. Nobles*, 350 N.C. 483, 510, 515 S.E.2d 885, 901 (1999). Some factors that should be considered in determining whether a jury's verdict was coerced include: "whether the court conveyed an impression to the jury that it was irritated with them for not reaching a verdict, whether the court intimated to the jury that it would hold them until they reached a verdict, and whether the court told the jury a retrial would burden the court system if the jury did not reach a verdict." *State v. Beaver*, 322 N.C. 462, 464, 368 S.E.2d 607, 608 (1988). "[T]he Court has upheld decisions by trial courts to continue deliberations despite jury indications that it was 'at a standstill,' or 'hopelessly deadlocked.'" *State v. Baldwin*, 141 N.C. App. 596, 608, 540 S.E.2d 815, 824 (2000) (citations omitted). The better practice would be for the trial court to instruct the jury to include only the vote count and not include which way the majority voted. However, the trial court's responses do not show that the court was irritated with the jury, or that the trial court told the jury that it would require them to deliberate until a verdict was reached or that a retrial would burden the court system. On the facts here, we cannot say that the court's language was coercive.

Also, during the jury charge, the trial court gave instructions in accordance with G.S. § 15A-1235(b). Included in the charge was the following statement: "But none of you should surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict." G.S. § 15A-1235(c) provides: "If it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b). The judge may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals." "However, '[i]t is clearly within the sound discretion of the trial judge as to whether to give an instruction pursuant to N.C.G.S. § 15A-1235(c).'" *State v. Fernandez*, 346 N.C. 1, 22, 484 S.E.2d 350, 363 (1997) (quoting *State v. Williams*, 315 N.C. 310, 326-27, 338 S.E.2d 75, 85 (1986)). Here, the trial court did not give an instruction pursuant to G.S. § 15A-1235(c) when responding to the jury regarding their notes. There is no showing that the trial court abused its discretion in failing to give the G.S. § 15A-1235(c) instruction. This assignment of error is overruled.

Third, defendant contends that the trial court committed error in instructing the jury that certain exhibits, admitted for illustrative purposes, could be considered as substantive evidence. We disagree.

Dr. Larsen took photographs of the victim's vagina and rectum during a physical examination of the victim on 2 June 1997. SBI Agent Cheryl McNeil ("Agent McNeil") interviewed the victim on 21 January 1998. During the interview, Agent McNeil gave the victim anatomical drawings of a female and a male. Agent McNeil instructed the victim to write with colored pens on the drawings of the female indicating the places where defendant touched her and on the drawings of the male the parts of defendant's body that he used to touch her. The photographs and anatomical drawings were admitted into evidence for illustrative purposes only.

Upon request by defendant at the charge conference, the trial court agreed to give an instruction that the photographs and anatomical drawings were admitted for illustrative purposes. However, during the jury charge, the trial court instructed the jury that they could consider the photographs and anatomical drawings as substantive evidence. The trial court overruled defendant's objections to these instructions.

After accepting the photographs and drawings into evidence for illustrative purposes and then agreeing to provide a limiting instruction at the charge conference, it was error for the trial court to disregard his own earlier rulings and instruct the jury that these exhibits could be considered as substantive evidence.

"However, not all trial errors require reversal. The error must be material and prejudicial. An error is not prejudicial unless 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been

reached at the trial[.]'" *State v. Mason*, 144 N.C. App. 20, 27-28, 550 S.E.2d 10, 16 (2001) (citations omitted). "An error is harmless 'unless a different result would have been reached at the trial if the error in question had not been committed.'" *State v. Berry*, 143 N.C. App. 187, 206, 546 S.E.2d 145, 158, *disc. review denied*, 353 N.C. 729, 551 S.E.2d 439 (2001) (quoting *State v. Hardy*, 104 N.C. App. 226, 238, 409 S.E.2d 96, 102 (1991) (citation omitted)). The burden is on the defendant to show that he was prejudiced by the error in question. *Mason*, 144 N.C. App. at 28, 550 S.E.2d at 16.

Here, defendant has not shown prejudice. Dr. Larsen examined the victim and found signs of sexual abuse. Dr. Larsen testified about these findings and used the photographs to illustrate her testimony. Agent McNeil testified about her interview with the victim and how she had the victim indicate on the drawings where defendant touched her and with what body part defendant touched the victim with. Agent McNeil testified as to the nature of the abuse and used the drawings to illustrate her testimony. The victim testified about what had been done to her and used the drawings to illustrate her testimony. The consideration of the photographs and drawings as substantive evidence added nothing since the content of the photographs and drawings were already in evidence through the witnesses' testimony. Due to the substantial evidence and the testimony of the victim, Dr. Larsen, and Agent McNeil, the instruction that the drawings and photographs could be considered

as substantive evidence is harmless error. This assignment of error is overruled.

Defendant next contends that it was error for the trial court to refuse to conduct an *in camera* inspection of the State and DSS files in search of evidence favorable to defendant and material to his guilt or punishment. We do not agree.

Defendant filed a motion seeking "the District Attorney to furnish counsel for the defense copies of all 'Brady' material which he now has in his possession or knowledge" on 12 January 2000. The trial court heard this motion on 11 February 2000 and denied it on 15 March 2000 "except as to those matters to which the Defendant is entitled pursuant to the case of Brady v. Maryland . . . ." Also on 11 February 2000, defendant filed further *Brady* motions. These additional *Brady* motions along with defendant's request for an *in camera* review of the State and DSS files were denied by the trial court on the eve of the trial.

Defendant found a statement that he alleges to be exculpatory in the court file of Ricky Staton ("Staton"). Staton was convicted at an earlier trial for sexually abusing the victim. The statement implicates Staton as the abuser of the victim. This alleged exculpatory statement does not appear in the record. "[I]t is the appellant who 'bears the burden of seeing that the record on appeal is properly settled and filed with this Court.'" *Groves v. Community Hous. Corp.*, 144 N.C. App. 79, 82, 548 S.E.2d 535, 537 (2001) (citations omitted). Defendant obtained the alleged exculpatory statement in February 2000, approximately seven months

prior to defendant's trial. Defendant was free to cross examine the victim regarding her statement and had seven months before trial to investigate the matter further.

The prosecutor contended that the statement was not exculpatory in that it provided that Staton was the only person who abused both the victim and her brother. Here, it was alleged that defendant sexually assaulted only the victim. The prosecutor repeatedly stated that she had turned over all *Brady* material and no *Brady* material remained in the State's file.

"[J]ust because defendant asks for an *in camera* inspection does not automatically entitle him to one. Defendant still must demonstrate that the evidence sought to be disclosed might be material and favorable to his defense." *State v. Thompson*, 139 N.C. App. 299, 307, 533 S.E.2d 834, 840 (2000). "'[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.'" *Id.* at 306, 533 S.E.2d at 839, (citing *Brady v. Maryland*, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 218 (1963)).

There is no evidence that the prosecutor suppressed evidence favorable or material to defendant. While the better practice would have been for the trial court to conduct an *in camera* review, we cannot say that the denial of the request for an *in camera* review on the day before the trial was prejudicial.

Accordingly, defendant received a fair trial free from prejudicial error.

No prejudicial error.

Judges McCULLOUGH and BIGGS concur.

Report per Rule 30(e).