NO. COA11-365
NORTH CAROLINA COURT OF APPEALS

Filed: 15 November 2011

STATE OF NORTH CAROLINA

v. Gaston County
Nos. 10 CRS 056755-57

RAY NOLAN PAGE,
Defendant.

Appeal by defendant from judgments entered 3 August 2010 by Judge Timothy L. Patti in Gaston County Superior Court. Heard in the Court of Appeals 10 October 2011.

Roy Cooper, Attorney General, by Tawanda Foster-Williams, Assistant Attorney General, for the State.

Bryan Gates, for defendant-appellant.

MARTIN, Chief Judge.

On 3 August 2010, defendant Ray Nolan Page pled guilty to three counts of taking indecent liberties with his stepdaughter in 1980, 1981, and 1982. The court found one factor in aggravation of sentence as to each count, i.e., that defendant had taken advantage of a position of trust or confidence to commit the offenses. Defendant was sentenced to three

consecutive sentences of ten years imprisonment. Defendant appeals, contending the trial court erred in finding the factor in aggravation of sentence rather than submitting the existence of the factor to a jury, and, in addition, that the evidence did not support a finding of the aggravating factor. We find no prejudicial error.

While defendant does not bring forward any argument challenging the sentence for his conviction on the 1980 offense, defendant contends the court erred by sentencing him in the aggravated range for his convictions on the 1981 and 1982 offenses, for which he was sentenced under the now-repealed Fair Sentencing Act. *See State v. Ruff*, 349 N.C. 213, 216, 505 S.E.2d 579, 580 (1998) (recognizing repeal of Fair Sentencing Act). Defendant relies on *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, *reh'g denied*, 542 U.S. 961, 159 L. Ed. 2d 851 (2004), to support his contention that the existence of an aggravating factor should have been submitted to a jury and proved beyond a reasonable doubt in order to increase his sentences for the 1981 and 1982 offenses from the presumptive range, which was three years for a Class H felony under the Fair Sentencing Act, *see State v. Lawrence*, 193 N.C. App. 220, 223, 667 S.E.2d 262, 264 (2008) (identifying

presumptive and aggravated sentence terms for a Class H felony under Fair Sentencing Act), to the aggravated range, which was ten years for a Class H felony under the Act. *See id.*; *see also Blakely*, 542 U.S. at 303, 305, 159 L. Ed. 2d at 413, 415 (determining that sentencing a defendant beyond the statutory maximum based on facts found by the court that "were neither admitted by petitioner nor found by a jury" violates a defendant's right to trial by jury under the Sixth Amendment). Defendant argues, based on *Blakely*, that the trial court violated his right to have a jury consider whether defendant had committed the offenses in aggravation by taking advantage of a position of trust or confidence because the trial court considered only arguments from counsel before finding the aggravating factor.

This Court has recognized that, "when defense counsel admits the facts necessary for an aggravating factor, such a finding by a trial court does not constitute *Blakely* error." *State v. Wissink*, 187 N.C. App. 185, 188, 652 S.E.2d 17, 19 (2007) (stating that the holding that "a judge may not find an aggravating factor on the basis of a defendant's admission unless that defendant personally or through counsel admits the necessary facts or admits that the aggravating factor is applicable" suggests that such an admission does not constitute

Blakely error). Here, during the sentencing hearing, the court asked defense counsel, "[W]ill you stipulate to a factual basis and allow [the prosecutor] to summarize the evidence?" Defense counsel responded in the affirmative and stipulated to the State's factual basis. The prosecutor then stated that "abuse occurred between this [d]efendant and his step-daughter" and that "[d]efendant had been married to her mother." Defense counsel's statements that "[defendant] was married to [the victim's] mother for I guess some forty years until she died here a couple of years ago with cancer" were consistent with the statement of the prosecutor. Defendant offered no evidence to contradict the fact that he was the victim's stepfather at the time the offenses were committed.

Our Supreme Court has held that "a parental role is sufficient to support the aggravating factor of abusing a position of trust." *State v. Massey*, 361 N.C. 406, 409, 646 S.E.2d 362, 365 (2007) (citing *State v. Tucker*, 357 N.C. 633, 634, 639–40, 588 S.E.2d 853, 854, 857 (2003) (holding that the aggravating factor of abusing a position of trust was properly applied when the only evidence to support the aggravator was the stepfather–stepdaughter relationship between the defendant and the victim)). In the present case, the victim lived with defendant and was between the ages of five and twelve

years old when the offenses were committed, and defendant stipulated through counsel to the factual basis establishing the close familial relationship between defendant and the victim as stepfather and stepdaughter. Accordingly, due to defendant's stipulation as described above, the trial court's failure to submit to a jury the question of whether defendant committed the 1981 and 1982 offenses in aggravation by taking advantage of a position of trust or confidence was not in error.

Even if the trial court did err under *Blakely* by not submitting to a jury the existence of the factors in aggravation of defendant's sentence for the 1981 and 1982 offenses, such error is reviewed for harmlessness. *See State v. Blackwell*, 361 N.C. 41, 42, 638 S.E.2d 452, 453 (2006), *cert. denied*, 550 U.S. 948, 167 L. Ed. 2d 1114 (2007). "In conducting harmless error review, we must determine from the record whether the evidence against the defendant was so overwhelming and uncontroverted that any rational fact-finder would have found the disputed aggravating factor beyond a reasonable doubt." *Id.* at 49, 638 S.E.2d at 458 (internal quotation marks omitted). "[T]he defendant must bring forth facts contesting the omitted element, and must have raised evidence sufficient to support a contrary finding." *Id.* at 50, 638 S.E.2d at 458 (internal quotation marks omitted). After reviewing the record and

considering defendant's stipulation and his failure to present any evidence to contradict the fact that he was the victim's stepfather at the time the offenses were committed, any error in failing to submit to a jury the question of whether defendant committed the 1981 and 1982 offenses in aggravation was harmless beyond a reasonable doubt.

No error.

Judges GEER and STROUD concur.

Report per Rule 30(e).