NO. COA11-545
NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2011

STATE OF NORTH CAROLINA

v. Craven County
No. 07 CRS 56160
WILFREDO LUIS PEREZ-ROMAN 08 CRS 5220

Appeal by Defendant from judgment entered 13 October 2010 by Judge Paul L. Jones in Craven County Superior Court. Heard in the Court of Appeals 26 October 2011.

Attorney General Roy Cooper, by Assistant Attorney General Brenda Menard, for the State.

Kimberly P. Hoppin, for Defendant.

BEASLEY, Judge.

Defendant appeals from judgment entered on his convictions for first degree rape and indecent liberties with a child. For the following reasons, we find no error in part and remand in part.

On 11 February 2008, Wilfredo Luis Perez-Roman (Defendant) was indicted on the charge of indecent liberties with a child.

On 15 December 2008, Defendant was indicted on the charge of first-degree statutory rape of a female child under age thirteen. Defendant was also indicted on the charge of first-degree sexual offense with a child under age thirteen, and a second count of indecent liberties with a child. Defendant was found guilty of two of these offenses: indecent liberties with a child by vaginal intercourse and first-degree rape of a female child under age thirteen. By judgment dated 13 October 2010, Defendant was sentenced to 240 to 297 months' imprisonment, and was ordered to register as a sex offender and enroll in a satellite-based monitoring program upon his release from prison. Defendant gave notice of appeal in open court.

I.

Defendant first argues that the trial court erred by denying his motion to dismiss the charge of first degree rape because there was a fatal variance between the indictment and the evidence introduced at trial. Defendant's indictment for first-degree rape lists the dates of the offense as 1 June 2006 through 31 August 2006. However, at trial the State amended the indictment, changing the dates of the offense to 1 June through 31 August 2007, to conform to the evidence. Defendant argues that because the dates in the original indictment varied from

the evidence presented, his motion to dismiss for insufficiency of the indictment should have been granted. We disagree.

According to N.C. Gen. Stat. § 15A-924(a)(4) (2009), an indictment must contain "[a] statement or cross reference in each count indicating that the offense charged was committed on, or on or about, a designated date, or during a designated period of time." The statute further provides that "[e]rror as to a date . . . is not ground for dismissal of the charges or for reversal of a conviction if time was not of the essence with respect to the charge and the error . . . did not mislead the defendant to his prejudice." *Id.* Appellate courts "review the issue of insufficiency of an indictment under a *de novo* standard of review." *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008).

Defendant does not suggest that time when the alleged acts occurred was a significant factor with respect to the charge of first-degree rape. Defendant does contend that he suffered prejudice as a result of the change regarding the date of the first-degree rape offense. This argument is without merit. Although the indictment for first-degree rape stated the dates of the offense as 1 June 2006 through 31 August 2006, the indictment for indecent liberties with a child listed the date

of the offense as 1 June 2007 through 31 August 2007. Thus, Defendant was on notice that evidence from summer 2007 was important to his defense. In fact, Defendant testified as to the events of summer 2007 at trial. We hold that Defendant did not suffer prejudice though the indictment stated that the dates of the offense were in 2006.

Defendant also contends that the purported insufficiency of the indictment has left him open to be twice tried for the same crime, thereby violating his constitutional right against double jeopardy. However, because the indictment was amended to reflect that the offense occurred between 1 June to 31 August 2007, and the verdict refers to the indictment, Defendant is protected from double jeopardy. Accordingly, this claim is overruled.

Defendant, however, correctly states that the judgment and commitment sheet erroneously list the offense date for the charge of first degree rape as 1 June 2006. "When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth." *State v. Streeter*, 191 N.C. App. 496, 505, 663 S.E.2d 879, 886 (2008) (citation omitted). Thus, we remand for

the limited purpose of correcting the judgment to reflect an offense date of 1 June 2007.

II.

Defendant next argues that the trial court erred by allowing the State to amend the dates of the offense on the indictment for first-degree rape. We disagree.

Pursuant to N.C. Gen. Stat. § 15A-923(e) (2009), "[a] bill of indictment may not be amended." However, this rule has been construed "to mean only that an indictment may not be amended in a way which would substantially alter the charge set forth in the indictment." *State v. Brinson*, 337 N.C. 764, 767, 448 S.E.2d 822, 824 (1994) (internal quotation marks and citations omitted). "[F]or example, where time is not an essential element of the crime, an amendment relating to the date of the offense is permissible since the amendment would not 'substantially alter the *charge* set forth in the indictment.'" *Id.* (quoting *State v. Price*, 310 N.C. 596, 598-99, 313 S.E.2d 556, 559 (1984)). However, "[a] variance as to time . . . becomes material and of the essence when it deprives a defendant of an opportunity to adequately present his defense." *Price*, 310 N.C. at 599, 313 S.E.2d at 559.

We have already found in Section I, *supra*, that the State's amendment of the indictment for first-degree rape did not prejudice Defendant. Similarly, Defendant was not deprived of an opportunity to adequately present his defense. Defendant was on notice as to the importance of events in summer 2007 from the indictment for indecent liberties with a child, and Defendant put on evidence regarding that time. This argument is overruled.

III.

Defendant also contends that the trial court committed plain error by allowing the State to present testimony regarding the victim's reputation for truthfulness. We disagree.

N.C. Gen. Stat. § 8C-1, Rule 608(a) (2009) provides that "[t]he credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion[,]" but "evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise." Our Supreme Court has held that "whenever a witness has given evidence in a trial and his credibility is impugned . . . by testimony contradicting his [reputation for truthfulness] it is permissible to corroborate and support his credibility by evidence tending to restore

confidence in his veracity and in the truthfulness of his testimony." *State v. Bethea*, 186 N.C. 22, 24, 118 S.E. 800, 800 (1923). Similarly, this Court has previously found a defendant's character for truthfulness sufficiently attacked to activate Rule 608(a) where the defendant did not even testify, but the written statement he gave police was contradicted by the prosecution's evidence. *See State v. Marecek*, 152 N.C. App. 479, 506, 568 S.E.2d 237, 255 (2002).

In the case *sub judice*, the victim's credibility was impugned by Defendant's testimony, where he repeatedly contradicted her account of the events. As such, the prosecution was entitled to put on witnesses as to the victim's character for truthfulness pursuant to Rule 608(a). Defendant relies on this Court's decision in *State v. Hannon*, 118 N.C. App. 448, 455 S.E.2d 494 (1995) in an attempt to refute this argument. *Hannon* is distinguishable from this case, and the other cases cited, because there the contested opinion testimony came from a witness accepted as an expert. *See id.* at 451, 455 S.E.2d at 496. In recognizing the influence that expert testimony has over the jury, this Court awarded the defendant in *Hannon* a new trial. Here, the opinion testimony came from the victim's schoolteachers, rather than an expert. Because the

admission of this evidence was not in error, we need not reach the issue of whether it reached the level of plain error.

IV.

Defendant argues that the trial court committed reversible error by stating that all ages are a matter of record while instructing the jury. We disagree.

Defendant failed to object to this instruction at trial so "our review is limited to review for 'plain error.'" *State v. Black*, 328 N.C. 191, 200, 400 S.E.2d 398, 404 (1991) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). "To show plain error, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result, or we must be convinced that any error was so fundamental that it caused a miscarriage of justice[.]" *State v. Garcell*, 363 N.C. 10, 35-36, 678 S.E.2d 618, 634-35 (2009) (internal quotation marks and citations omitted).

The ages of both the victim and the perpetrator are essential elements of the crime of first-degree rape of a child under age thirteen, and the crime of indecent liberties with a child. *See* N.C. Gen. Stat. § 14-27.2(a)(1) (2009); N.C. Gen. Stat. § 14-202.1 (2009). While instructing the jury as to the

elements of these crimes, the trial court stated that "all the ages are a matter of record." Defendant claims that this instruction was in error, because the State has the burden of proving all essential elements of the crime beyond a reasonable doubt, and it should not be aided in that respect by the presiding judge. However, Defendant cannot show that this statement constituted plain error, such that the outcome of the trial would likely have been different without this purported error. The ages of Defendant and the victim were never in contention, and no evidence was produced to contradict the testimony regarding their respective ages. As such, there is no basis from which to presume that the verdict would have been different had the trial court not made the contested statement.

V.

Finally, Defendant contends that the trial court committed reversible error by allowing Nurse Cindy Morton (Nurse Morton) to testify that her physical findings were consistent with the victim's statements about what happened. We disagree.

Defendant did not object to this testimony at trial, so again we review for plain error. *See* Section IV, *supra*. Our Supreme Court has stated that "[i]n a sexual offense prosecution involving a child victim, the trial court should not admit

expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility." *State v. Stancil*, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002) (citations omitted). However, an expert may testify to "profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith." *Id.* (citations omitted).

We hold that the admission of Nurse Morton's testimony was not in error. She testified only that the findings from her physical examination of the victim were consistent with the victim's account of abuse. At no point in her testimony did she state that the victim had *in fact* been sexually abused. Her testimony did not constitute impermissible opinion testimony used to bolster the victim's credibility. Instead, it was admissible expert testimony. This argument is overruled.

No error in part; Remanded in part.

Judges STEELMAN and GEER concur.

Report per Rule 30(e).