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NO. COA01-1455

NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2002

STATE OF NORTH CAROLINA

v.

Cumberland County
Nos. 99 CRS 073297 & 073301

PATRICK ANDREW PIERCE

Appeal by defendant from judgments dated 15 June 2001 by Judge Jack A. Thompson in Cumberland County Superior Court. Heard in the Court of Appeals 10 September 2002.

Attorney General Roy Cooper, by Assistant Attorney General Linda Kimbell, for the State.

Parish, Cooke, Boose & Bullard, by James R. Parish, for defendant appellant.

GREENE, Judge.

Patrick Andrew Pierce (Defendant) appeals judgments dated 15 June 2001 entered consistent with a jury verdict finding him guilty of felonious child abuse by a sexual act and taking indecent liberties with a child.

On or about 22 May 2000, Defendant was charged with one count of felonious child abuse, one count of statutory sexual offense, two counts of taking indecent liberties with a child, and one count

of crime against nature.¹ The indictment for felonious child abuse stated "that on or about the 21st day of September, 1999, . . . [D]efendant . . . unlawfully, willfully and feloniously did commit a sexual act, to wit: by forcing [his stepdaughter S.L.] to perform oral sex on him, upon [S.L.], who was fifteen (15) years old." The indictment for one count of indecent liberties included in the record on appeal refers to acts committed on 26 September 1999.

On 25 January 2001, Defendant filed a motion for a bill of particulars requesting information on the specific act(s) the State contended Defendant had committed. During the pretrial motion hearing, the State explained it had provided Defendant with open file discovery. The case file made available to Defendant indicated "that on September 21, 1999, the family of the victim . . . [was] staying at [a] Days Inn" when Defendant "forced [S.L.] to perform oral sex on him." According to the State, this act constituted the basis for the charges of felonious child abuse, statutory sexual offense, crime against nature, and one count of indecent liberties. The case file further showed that on 26 September 1999, Defendant "put his hands up [S.L.'s] blouse and fondled her" while S.L.'s "mother was in the bathroom taking a shower." It was this act that prompted the indictment for the second count of indecent liberties. Concluding the State had previously furnished all the requested information to Defendant,

¹Although not included in the record on appeal, the indictments for statutory sexual offense, crime against nature, and one count of taking indecent liberties with a child are referenced in Defendant's motion for a bill of particulars and refer to acts allegedly committed on 21 September 1999.

the trial court denied Defendant's motion.

Prior to trial, the State advised the trial court and Defendant that the 21 September 1999 date, based on a handwritten statement by S.L. and appearing in four of the five indictments, including the felonious child abuse indictment, was wrong. The State instead contended the offense actually occurred in late August 1999.

The evidence at trial revealed that sometime in August 1999 S.L. and her family stayed at a Days Inn in Fayetteville, North Carolina, where they shared a hotel room. While her mother was in the shower and her two younger sisters were still asleep, S.L. awoke to find Defendant in bed with her. Defendant was rubbing S.L.'s breasts and motioning for her to perform oral sex on him, which she did.

On the evening of 26 September 1999, S.L. was at home with her mother, Defendant, and her sisters. S.L.'s sisters were in their room getting ready for bed and her mother was taking a shower when Defendant asked S.L. to come into the master bedroom he shared with her mother. In the master bedroom, Defendant placed his hands inside S.L.'s shirt and started rubbing her breasts. When S.L.'s mother opened the bedroom door, she saw Defendant's hands coming out of S.L.'s shirt. Defendant left the bedroom without saying anything. Upon confronting S.L., the mother learned Defendant had been molesting S.L. since she was six years old. Shortly thereafter, S.L. reported the incident to the police.

At the close of the State's evidence, Defendant moved to

dismiss all charges for insufficiency of the evidence. After the trial court denied Defendant's motion to dismiss, Defendant attempted to offer the testimony of Michael Martin (Martin) whom he proffered as an expert in the fields of child sexual abuse profiles and the proper protocol for child abuse investigations. Martin testified during *voir dire* that at the time of the trial, he was working with the Department of Social Services (DSS) in the area of child adoptions. Prior to this position, Martin had been the case manager for all of the sexual abuse cases that came through DSS. Martin had held that position for a little under a year. During his role as a case manager, Martin had never been assigned cases, interviewed clients, or testified regarding a child abuse case on which he had worked. Martin had also not done any clinical or other research nor participated in internships related to child sexual abuse.

Martin testified he has run a part-time private practice as a counselor since 1995. During this time, he treated approximately one hundred children using "a Christian modality and perspective" but never developed treatment plans in conjunction with mental health. Martin further indicated there was "a lot of literature" illustrating the benefit of a joint interview between law enforcement and DSS of the victim of child sexual abuse. According to Martin, it is this joint interview process that enables the investigators to determine whether the victim is credible.

At the conclusion of Martin's *voir dire* testimony and over Defendant's objection, the trial court denied Defendant's request

to permit Martin to testify as an expert because it found Martin was not qualified as an expert in the proffered fields. Offering no further witnesses, Defendant rested his case.

In instructing the jury on the crime of felonious child abuse by sexual act, the trial court stated:

For you to find . . . [D]efendant guilty of this offense, the [S]tate must prove three things beyond a reasonable doubt. First, that . . . [D]efendant was the parent of or legal guardian of the child. I instruct you that a stepfather is a parent. Second, that at the time that child had not yet reached her 16th birthday. And third, that . . . [D]efendant committed a sexual act upon that child. A sexual act is an immoral, improper or indecent touching or act by . . . [D]efendant upon the child or an inducement by . . . [D]efendant of an immoral or indecent touching by the child for the purpose of arousing or gratifying sexual desire.

The jury returned a verdict of not guilty as to the charges of statutory sexual offense, crime against nature, and one count of indecent liberties with a child. The jury found Defendant guilty of (1) felonious child abuse by a sexual act based on the acts committed in August 1999 and (2) the count of indecent liberties with a child relating to the events on 26 September 1999.

The issues are whether the trial court: (I) abused its discretion in denying Defendant's motion for a bill of particulars; (II) erred in failing to recognize Martin as an expert in the proffered fields; (III) abused its discretion in denying Defendant's motion to dismiss the charge of felonious child abuse; (IV) committed plain error in instructing the jury on a theory of

felonious child abuse not charged in the indictment; and (V) committed plain error in failing to arrest judgment on the charges of (A) felonious child abuse and (B) indecent liberties because Defendant's double jeopardy rights were violated.

I

Defendant argues the trial court should have granted his motion for a bill of particulars. We disagree.

The grant or denial of a bill of particulars lies within the sound discretion of the trial court and is not subject to review "except for palpable and gross abuse thereof." *State v. Easterling*, 300 N.C. 594, 601, 268 S.E.2d 800, 805 (1980) (citation omitted). "[A] denial of a defendant's motion for a bill of particulars will be held error only when it clearly appears to the appellate court that the lack of timely access to the requested information significantly impaired [the] defendant's preparation and conduct of his case." *Id.*

In this case, prior to Defendant's request for a bill of particulars, the State had already provided Defendant with open file discovery indicating both acts for which Defendant was being charged. Under such circumstances, Defendant cannot argue the denial of his motion for a bill of particulars significantly impaired his preparation and conduct in this case. See *id.*; *State v. Williams*, 355 N.C. 501, 542, 565 S.E.2d 609, 633-34 (2002) (upholding the trial court's denial of the defendant's request for a bill of particulars where the State had provided open file discovery). Thus, the trial court did not abuse its discretion in

denying Defendant's motion.

II

Defendant next contends the trial court abused its discretion in failing to recognize Martin as an expert in the fields of child sexual abuse profiles and the proper protocol for child abuse investigations.

"Under N.C.G.S. § 8C-1, Rule 702 a witness may be qualified as an expert if the trial court finds that through 'knowledge, skill, experience, training, or education' the witness has acquired such skill that he or she is better qualified than the jury to form an opinion on the particular subject." *State v. Goodwin*, 320 N.C. 147, 150-51, 357 S.E.2d 639, 641 (1987). The trial court's decision whether a witness possesses the necessary qualifications to testify as an expert "is within the sound discretion of the trial court and will not be reversed by the appellate court unless there is a complete lack of evidence to support it." *Pelzer v. United Parcel Serv.*, 126 N.C. App. 305, 309, 484 S.E.2d 849, 851-52 (1997).

In this case, Martin's testimony during his *voir dire* examination revealed he had neither the knowledge, the skill, the experience, the training, nor the education to qualify as an expert in the field of child sexual abuse profiles. In addition, the fact that Martin was aware of literature advising on the proper protocol for child sexual abuse investigations, even if such testimony were

admissible,² does not qualify him as an expert on proper procedure. As such, the trial court properly concluded Martin was not qualified to testify as an expert.

III

Defendant further assigns error to the trial court's denial of his motion to dismiss the charge of felonious child abuse. Specifically, Defendant argues the State, which prior to trial acknowledged the act specified in the felonious child abuse indictment actually occurred in late August 1999 and not on 21 September 1999, failed to "present substantial evidence to support the allegation that on or about September 21, 1999 a crime of felony child abuse was committed by . . . [D]efendant . . . as alleged in [the] bill of indictment."

Because "the date given in the bill of indictment is not an essential element of the crime charged[,] . . . the fact that the crime was committed on some other date is not fatal.'" *State v. Blackmon*, 130 N.C. App. 692, 696-97, 507 S.E.2d 42, 45 (1998) (citation omitted). Moreover, "[c]ourts are lenient in child sexual abuse cases where there are differences between the dates alleged in the indictment and those proven at trial." *State v. McGriff*, --- N.C. App. ---, ---, 566 S.E.2d 776, 779 (2002). "Unless the defendant demonstrates that he was deprived of his

²Our Supreme Court has previously held that the trial court properly excluded testimony regarding the standards of an undercover operation and proper investigative techniques because such testimony was not only irrelevant to the issues of the case but constituted improper opinion testimony as to the credibility of witnesses. *State v. Mackey*, 352 N.C. 650, 658-59, 535 S.E.2d 555, 559 (2000).

defense because of a lack of specificity, this policy of leniency governs." *State v. Everett*, 328 N.C. 72, 75, 399 S.E.2d 305, 306 (1991).

In this case, the State, prior to trial, notified Defendant of the correct date on which it alleged the felonious child abuse occurred. Moreover, Defendant chose not to offer any defense evidence. As such, Defendant was not deprived of his defense because of a lack of specificity, the trial court properly denied Defendant's motion to dismiss.

IV

Defendant also argues the trial court committed plain error in instructing the jury on a theory of felonious child abuse not charged in the indictment.

Under a plain error analysis, the defendant carries the burden of showing that an error occurred and that it "had a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983). Thus, in order to find plain error, this Court must determine that absent the error the jury probably would have reached a different result. *Id.* at 661, 300 S.E.2d at 378-79.

In this case, the trial court, in instructing the jury on felonious child abuse by sexual act, defined a sexual act as "an immoral, improper or indecent touching or act by . . . [D]efendant upon the child or an inducement by . . . [D]efendant of an immoral or indecent touching by the child for the purpose of arousing or gratifying sexual desire." Defendant claims this instruction is

too broad because it includes touching by Defendant and the act alleged in the indictment as well as the evidence presented at trial referred only to Defendant's inducement of S.L. to perform oral sex on him. Assuming the trial court's instruction was in error, Defendant has presented no argument in his brief to this Court of any prejudicial impact of the trial court's instruction on the jury's verdict. Thus, the trial court did not commit plain error. See *State v. Cummings*, 352 N.C. 600, 637, 536 S.E.2d 36, 61 (2000) (the "[d]efendant's empty assertion of plain error, without supporting argument or analysis of prejudicial impact, does not meet the spirit or intent of the plain error rule").

V

Defendant next contends the trial court committed plain error in failing to arrest judgment on the charges of felonious child abuse and indecent liberties based on a violation of Defendant's double jeopardy rights.

A

Defendant's argument in respect to the charge of felonious child abuse rests on the jury's finding of not guilty as to the charges of statutory sexual offense and crime against nature, both of which related to the acts alleged to have been committed at the Days Inn in August 1999. Because, as Defendant contends, these verdicts indicate oral sex did not occur at that time, the trial court should have arrested the judgment and vacated the sentence for felonious child abuse. We disagree.

This Court has held:

"It is not required that the verdict be consistent; therefore, a verdict of guilty of a lesser degree of the crime when all the evidence points to the graver crime, although illogical and incongruous, or a verdict of guilty on one count and not guilty on the other, when the same act results in both offenses, will not be disturbed."

State v. Black, 14 N.C. App. 373, 378, 188 S.E.2d 634, 637 (1972) (citation omitted). The jury's verdict in this case as to the charges of statutory sexual offense and crime against nature therefore is not determinative on the issue of whether oral sex actually took place. This is especially true as the three offenses charged are not identical in terms of the elements required to be proven. See N.C.G.S. § 14-27.7(a) (2001) (statutory sexual offense); N.C.G.S. §14-177 (2001) (crime against nature); N.C.G.S. §14-318.4(a2) (2001) (felonious child abuse).

B

Finally, Defendant asserts that because the State's actions prior to trial "completely blurred the lines between the two alleged crimes of indecent liberties and made them indistinct and indistinguishable from one another[,] . . . an acquittal by a jury of one count of indecent liberties bars, on these facts, the judgment and conviction on the other count." This argument has no merit. The indictments and the State's case file made available to Defendant clearly indicated one count of indecent liberties related to the acts that allegedly occurred during the stay at the Days Inn in August 1999 and the other count, of which Defendant was found guilty, related to the events that took place at the family's home on 26 September 1999. Accordingly, the trial court did not err in

failing to arrest judgment as to the count of indecent liberties of which Defendant was found guilty.

No error.

Judges WYNN and BIGGS concur.

Report per Rule 30(e).