NO. COA01-900

NORTH CAROLINA COURT OF APPEALS

Filed: 2 April 2002

STATE OF NORTH CAROLINA

v.

Pasquotank County
No. 99 CRS 1424

PEARLOUS LEON BRYANT

Dare County
No. 99 CRS 1569

Appeal by defendant from judgments dated 14 October 1999 by Judge Jerry R. Tillett in Dare County Superior Court. Heard in the Court of Appeals 26 March 2002.

No brief for the State.

Pearlous Leon Bryant pro se defendant-appellant.

GREENE, Judge.

Pearlous Leon Bryant (Defendant) appeals judgments dated 14 October 1999 entered pursuant to jury verdicts finding Defendant guilty of two counts of indecent liberties.

The Dare County Grand Jury and the Pasquotank County Grand Jury indicted Defendant on charges of one count of statutory rape, one count of statutory sexual offense, and three counts of indecent liberties. After the trial court allowed the State's motion to join the offenses for trial, the offenses were tried in Dare County Superior Court.

The trial testimony of T.S., Defendant's fourteen-year-old niece, revealed that Defendant, who was in his forties, had touched T.S.'s breasts and buttocks on several occasions. On one occasion, T.S. spent the night at Defendant's house. As she lay on the sofa, Defendant covered her with a blanket. While placing the blanket on her, Defendant "reached under the blanket, removed [T.S.'s] shorts, and inserted [his] finger down below." In August 1998, Defendant again touched T.S., this time on her chest. T.S. asked to speak to Defendant about this in her room. In her bedroom, Defendant told T.S. to take off her shorts. T.S. initially resisted Defendant's requests but complied as Defendant insisted she should take off her shorts. T.S., who was not wearing any underwear, sat down on the bed. Defendant opened the zipper of his pants and then lay on top of T.S. T.S. told him to get off, but Defendant refused. T.S. later told the police she was not sure whether Defendant had sex with her that day.

Both T.S. and the investigating officer, Leary Sink (Sink), testified to having recorded a telephone conversation between T.S. and Defendant. During the conversation, T.S. told Defendant she was "getting ready to tell something about this" and would be going see a counselor the next day. T.S. asked Defendant: "So you want me to say that you never touched me?" Defendant replied "Yes."

During the direct examination of Defendant, his counsel questioned Defendant regarding his prior criminal record. At the end of the State's evidence and again at the close of all the evidence, Defendant moved for a dismissal of the charges. The

trial court denied Defendant's motions. The State split up its closing arguments by first opening, then allowing Defendant to present his closing argument, and subsequently concluding its argument.

A jury found Defendant guilty of two counts of indecent liberties and not guilty of the three remaining charges. After finding that the aggravating factors, one being that "[D]efendant took advantage of a position of trust or confidence to commit the offense," outweighed the mitigating factors, the trial court sentenced Defendant to two consecutive terms of forty-two to fifty-one months imprisonment. The judgments cite the statute for the crime of indecent liberties as N.C. Gen. Stat. § 14-202.A.

Following his review of the trial transcript and court files, Defendant's appointed appellate counsel, John S. O'Connor (O'Connor), was "of the opinion that no non-frivolous grounds for appeal existed and related this to . . . [D]efendant." After supplying Defendant with a copy of the trial transcript and inviting Defendant to bring any potential issues to his attention, Defendant only questioned the prior record points assigned to him during sentencing. Although O'Connor confirmed that the points were correct, Defendant subsequently raised the issue twice in *pro se* motions which the trial court denied. While Defendant indicated to O'Connor that he understood there was no legal basis for an appeal, O'Connor failed to obtain Defendant's written acknowledgment that filing an appeal would be without merit.

On 13 July 2001, Defendant filed a "record on appeal" with

this Court which contained court documents, assignments of error, and *pro se* arguments. Defendant filed additional documents on 20 August 2001 with the trial court. The State filed a motion on 28 November 2001 seeking to have Defendant's appeal dismissed for various violations of the North Carolina Rules of Appellate Procedure. Both Defendant and O'Connor filed responses to the motion. This Court denied the State's motion to dismiss on 16 January 2002 and also permitted O'Connor to withdraw as counsel of record.

The issues are whether: (I) the trial court, situated in Dare County, lacked jurisdiction to try Defendant for an offense charged in Pasquotank County; (II) the trial court erred in denying Defendant's motion to dismiss the charges; (III) the disclosure to the jury by Defendant's trial counsel of Defendant's criminal record constituted ineffective assistance of counsel; (IV) the trial court erred in failing to give a curative instruction to the jury following an allegedly prejudicial statement by the investigating officer regarding prior criminal encounters with Defendant; (V) the tape recording of a conversation between Defendant and T.S. constituted an illegally obtained involuntary confession under the Fourth Amendment that should have been excluded; (VI) Defendant was improperly denied a closing argument while the State was permitted to make two closing arguments; (VII) the trial court improperly relied on a statutory aggravating factor that was an element of the offense; (VIII) Defendant has been

imprisoned pursuant to an incorrect statute for "secret peeping,"; and (IX) Defendant's convictions should be reversed because he has been "denied direct appeal since October 14th, 1999."[1]

I

Defendant first contends his conviction for the Pasquotank County charge of indecent liberties (99 CRS 1424) tried in Dare County Superior Court should be overturned as the trial court did not have jurisdiction to try this charge. We disagree.

When two or more offenses have been joined for trial pursuant to N.C. Gen. Stat. § 15A-926, each county in which the charged offenses occurred "has concurrent venue as to all charged offenses." N.C.G.S. § 15A-132(b) (1999). In this case, both counts of indecent liberties were joined for trial. Accordingly, the Dare County Superior Court properly tried all of the charged offenses.

II

Defendant next contends the trial court erred in denying his motion to dismiss the charges.

A motion to dismiss is properly denied by the trial court if "'there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense.'" *State v. Harding*, 110 N.C. App. 155, 162, 429 S.E.2d 416, 421 (1993) (citation omitted). "Substantial evidence

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[1]Despite Defendant's numerous violations of the North Carolina Rules of Appellate Procedure, this Court suspends the requirements of those rules to review Defendant's assignments of error. *See* N.C.R. App. P. 2.

is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). All the evidence is to be considered in the light most favorable to the State. *Harding*, 110 N.C. App. at 162, 429 S.E.2d at 421. Under N.C. Gen. Stat. § 14-202.1:

> (a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he . . . :
>
> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire[.] . . .

N.C.G.S. § 14-202.1(a)(1) (1999). The uncorroborated testimony of the victim is sufficient to convict under this section if the testimony establishes all the elements of the offense. *State v. Quarg*, 334 N.C. 92, 100, 431 S.E.2d 1, 5 (1993).

In this case, the evidence established Defendant was over sixteen years of age and more than five years older than T.S. There was also substantial evidence Defendant willfully took indecent liberties with T.S. for the purpose of arousing or gratifying his sexual desire when he inserted his finger in her vagina the night she was sleeping at his house and when he lay on top of T.S. in her bedroom with his pants unzipped. Consequently, the trial court properly denied Defendant's motion to dismiss the charges.

III

Defendant further argues his trial counsel's examination of Defendant regarding Defendant's prior criminal record amounted to ineffective

assistance of counsel. We disagree.

When a criminal defendant testifies, the State may cross-examine him regarding his prior criminal record. N.C.G.S. § 8C-1, Rule 609 (1999) (for purposes of impeachment). Defendant's trial counsel questioned Defendant about his criminal record as a preemptive measure knowing this information was open to the State during cross-examination. As such, it was a question of strategy, and "[d]isagreement[s] over trial tactics . . . generally do not make the assistance of counsel ineffective." *State v. Callahan*, 93 N.C. App. 579, 582, 378 S.E.2d 812, 814, *disc. review denied*, 325 N.C. 274, 384 S.E.2d 521 (1989). Accordingly, we find no error.

IV

Defendant also assigns error to the trial court's failure to give a curative instruction following an allegedly prejudicial statement by the investigating officer, Sink, regarding prior criminal encounters with Defendant. Our review of the record does not reveal any such statement. This assignment of error is therefore overruled.

V

Defendant next characterizes the tape recording of his conversation with T.S. as an illegally obtained involuntary confession under the Fourth Amendment. We disagree.

Even if T.S. telephoned Defendant and taped the conversation at the request of the police, Defendant's statements would not constitute an illegally obtained confession because Defendant was not in custody at the time of the recording. *See, e.g., State v. Massey*,

316 N.C. 558, 573, 342 S.E.2d 811, 820 (1986) (confession is illegal under Fourth Amendment if obtained during a custodial interrogation and the defendant either did not waive his Miranda rights or his waiver was not a knowing, intelligent, and voluntary decision); *see also State v. Powell*, 340 N.C. 674, 687, 459 S.E.2d 219, 225 (1995) (recordation of statements made while the defendant's cell mate acted as police agent after the defendant invoked his right to counsel would violate the defendant's Fifth Amendment rights), *cert. denied*, 516 U.S. 1060, 133 L. Ed. 2d 688 (1996). Thus, Defendant's argument fails.

VI

In addition, Defendant claims he was denied a closing argument while the State was granted two closing arguments. The record shows the State was permitted to begin and end closing arguments because Defendant introduced evidence following the close of the State's evidence. *See State v. Macon*, 346 N.C. 109, 114, 484 S.E.2d 538, 541 (1997) (discussing Rule 10 of the General Rules of Practice for the superior and district courts that evidence has to be introduced by the defendant in order to deprive him of the right to open and close final arguments to the jury). Hence, there was no error.

VII

Defendant argues the trial court found a statutory aggravating factor that also constituted an element of the offense. The trial court found as a statutory aggravating factor that "[d]efendant took advantage of a position of trust or confidence to commit the offense[s]." This is not an element of the offense of indecent

liberties as found in section 14-202.1(a) and is discussed in issue II of this opinion. *See* N.C.G.S. § 14-202.1(a) (1999). Accordingly, Defendant's contention is without merit.

VIII

Defendant next contends that he has been imprisoned pursuant to an incorrect statute for "secret peeping," an offense that is not supported by the record.

In this case, the judgments list the statute number of Defendant's offenses as "14-202.A." No such statute exists. The statute for secret peeping is N.C. Gen. Stat. § 14-202, whereas the statute for taking indecent liberties with children is section 14-202.1(a). As this constitutes an apparent clerical error, we remand the judgments to the trial court for correction of this error. *See In re D.D.*, 146 N.C. App. 309, ---, 554 S.E.2d 346, 356 (remanding case for the limited purpose of allowing the trial court to make clerical correction in its order to reflect the proper statutory provision), *appeal dismissed and disc. review denied*, 354 N.C. 572, 558 S.E.2d 867 (2001).

IX

Finally, Defendant contends his convictions should be reversed because he has been "denied direct appeal since October 14th, 1999." We disagree.

O'Connor stated that following his review of the trial transcript and court files, he was "of the opinion that no non-frivolous grounds for appeal existed and related this to . . . [D]efendant." After supplying Defendant with a copy of the trial transcript and

inviting Defendant to bring any potential issues to his attention, Defendant only questioned the prior record points assigned to him. Although O'Connor confirmed that the points were correct, Defendant raised the issue twice in *pro se* motions which the trial court denied.

While Defendant indicated to O'Connor that he understood there was no legal basis for an appeal, O'Connor failed to obtain Defendant's written acknowledgment that filing an appeal would be without merit. Our review, however, of Defendant's *pro se* arguments, the transcript, and his filings reveal Defendant received a fair trial free from prejudicial error. *See* N.C.G.S. § 15A-1443 (1999). Accordingly, this assignment of error is overruled.[2]

No error in part; remanded in part.

Judges HUDSON and TYSON concur.

Report per Rule 30(e).

[2]Defendant also assigned error to the jury's failure to date the verdict sheets. This error, however, is harmless and non-prejudicial. *See* N.C.G.S. § 15A-1443 (1999).