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NO. COA01-976

NORTH CAROLINA COURT OF APPEALS

Filed: 4 June 2002

STATE OF NORTH CAROLINA

v.

Gaston County
No. 00CRS51324, 5842

ROBERT MARTINEZ WATERS

Appeal by defendant from judgment entered 14 March 2001 by Judge James C. Davis in Gaston County Superior Court. Heard in the Court of Appeals 15 May 2002.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Sue Y. Little, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

HUNTER, Judge.

Robert Martinez Waters ("defendant") appeals convictions of statutory rape and taking indecent liberties with a child. The evidence presented at trial tended to show that when defendant was twenty-eight years old, he developed a relationship with fifteen-year-old Rekeyta Hinton. Hinton testified that she told defendant she was sixteen years old, and that the two engaged in consensual sexual intercourse in a hotel room in early December 1999. A jury convicted defendant of both offenses on 14 March 2001. The trial court consolidated the offenses for judgment, and sentenced

defendant to 252 to 312 months' imprisonment based on defendant's prior record level.

Defendant brings forth several arguments on appeal; however, we need not address all issues raised, as we agree with defendant that the indictments contained a fatal variance between the offenses alleged and the proof offered at trial. Accordingly, we vacate defendant's convictions and remand for a new trial.

In his second argument, defendant argues that the trial court erred in denying his motion to dismiss the charges as a result of a variance between the date of the offenses alleged in the indictments and the evidence of the date of the offenses offered at trial. The indictments for statutory rape and taking indecent liberties both alleged that defendant committed the acts with Hinton on 7 January 2000. The indictments were issued as a result of Hinton's statement to the police that on 7 January 2000, defendant picked her up from school and drove her to Hawthorne Street so the two could have a conversation. Hinton told police that the two talked in defendant's vehicle and then engaged in sexual intercourse in the vehicle. At trial, Hinton testified that she had lied about the incident on 7 January 2000, and that she and defendant had not engaged in intercourse in his vehicle. Hinton testified that instead, in early December 1999, defendant drove her to a hotel in Gastonia where the two engaged in intercourse.

While we recognize that a variance in dates is not fatal where time is not of the essence, see *State v. Stewart*, 353 N.C. 516, 517, 546 S.E.2d 568, 569 (2001), the variance in this case

encompassed not only the date of the offenses, but the offenses themselves. Hinton admitted that the act which formed the basis of the indictments, that she and defendant engaged in intercourse in his vehicle on 7 January 2000, was fabricated. Thus, defendant's indictments were based on an act which never occurred, and therefore did not conform with the proof offered by the State at trial and upon which defendant was convicted.

We acknowledge our courts' policy of leniency in date variations in the context of sexual abuse cases, given the difficulty young children may have with recalling exact dates and times. See *Stewart*, 353 N.C. at 518, 546 S.E.2d at 569 ("[i]n sexual abuse cases involving young children, some leniency surrounding the child's memory of specific dates is allowed"). However, this case did not involve a young child incapable of recalling dates and measuring time. Rather, the discrepancy in the act forming the basis of the indictments and the proof offered at trial was the result of fifteen-year-old Hinton's failure to be truthful with police about her involvement with defendant.

"The purpose of an indictment is to give defendant sufficient notice of the charge against him, to enable him to prepare his defense, and to raise the bar of double jeopardy in the event he is again brought to trial for the same offenses,' and '[a]n indictment not meeting these standards will not support a conviction.'" *State v. Lorenzo*, __ N.C. App. __, 556 S.E.2d 625, 628 (2001) (citation omitted). We hold that the indictments in this case do not meet

these standards. Accordingly, defendant's convictions in 00CRS51324 and 00CRS5842 are vacated.

Vacated.

Judges WYNN and THOMAS concur.

Report per Rule 30(e).