NO. COA03-1038-2

NORTH CAROLINA COURT OF APPEALS

Filed: 3 October 2006

STATE OF NORTH CAROLINA

v. Nash County
Nos. 01 CRS 9508-9518
01 CRS 9520
MARKEITH RODGERS LAWRENCE 01 CRS 51630-51631

Appeal by defendant from judgments entered 16 January 2003 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 28 April 2004.

Attorney General Roy Cooper, by Assistant Attorney General Amy C. Kunstling, for the State.

Everett & Hite, L.L.P., by Stephen D. Kiess, for defendant-appellant.

ELMORE, Judge.

On 16 January 2003 defendant was convicted of six counts of first-degree sexual offense, five counts of rape in the first degree, and three counts of indecent liberties with a child. Consistent with the jury verdicts, defendant was sentenced by the court to a minimum of 3360 and a maximum of 4131 months imprisonment. He appealed those convictions and subsequent sentences. By an opinion filed 17 May 2005 this Court vacated defendant's judgments for first-degree sexual offense, holding there was a fatal variance between the jury instructions and

indictments, and reversed his remaining convictions, holding there was a violation of defendant's right to unanimous jury verdict. *State v. Lawrence*, 170 N.C. App. 200, 612 S.E.2d 678 (2005). From our opinion, the State appealed to the North Carolina Supreme Court. By opinion issued 7 April 2006, and certified to this Court on 27 Apri1 2006, the Supreme Court reversed our decision as to defendant's convictions for rape in the first degree and indecent liberties and remanded the matter to us "for consideration of defendant's remaining assignments of error, including those raised in his motion for appropriate relief." *State v. Lawrence*, 360 N.C. 368, 376, 627 S.E.2d 609, 614 (2006). Pursuant to that opinion, we now undertake that task.

Defendant contends the trial court erred by ruling differently than a previous trial court on the State's motion *in limine* to exclude certain aspects of Lucy's Department of Social Services records. In defendant's first trial, which ended in a mistrial due to a juror knowing a key witness for the State, the trial court denied the State's motion to exclude allegedly "exculpatory" evidence contained in records; however, in defendant's second trial, the one from which appeal is taken, the trial court granted the State's motion to exclude this evidence. Defendant argues that the trial court in the instant action was bound by the ruling on the State's motion *in limine* made in the first trial. Defendant cites *State v. Woolridge*, 357 N.C. 544, 549, 592 S.E.2d 191, 194 (2003), for its proposition that, under most circumstances, a superior court judge may not "modify, overrule, or change the

judgment of another Superior Court judge previously made in the same action." *Id.* at 549, 592 S.E.2d at 194. Alternatively, defendant contends the trial court abused its discretion in granting the State's motion to exclude the evidence in his case.

Foremost we would note that defendant's first trial ended in a mistrial. "When a mistrial has been declared properly, 'in legal contemplation there has been no trial.'" *State v. Sanders*, 347 N.C. 587, 599, 496 S.E.2d 568, 576 (1998) (quoting *State v. Tyson*, 138 N.C. 627, 629, 50 S.E. 456, 456 (1905)). Accordingly then, there can be no prior binding evidentiary rulings when defendant is tried again following a mistrial. Second, the ruling in the prior trial was issued on a motion *in limine* (the trial barely having gotten under way before the mistrial occurred), and "[a] ruling on a motion *in limine* is a preliminary or interlocutory decision which the trial court can change if circumstances develop which make it necessary." *State v. McNeill*, 170 N.C. App. 574, 579, 613 S.E.2d 43, 46 (2005) (quoting *State v. Lamb*, 321 N.C. 633, 649, 365 S.E.2d 600, 608 (1988)). "[A] motion *in limine* is not final, and during trial neither party can rest on an earlier ruling in their favor." *McNeill*, 170 N.C. App. at 581, 613 S.E.2d at 47. As such, we see no reason that the trial court in the instant action was bound by evidentiary rulings in defendant's previous trial, which ended in a mistrial.

We further hold that the trial court here did not abuse its discretion in excluding the victim's confidential social services records. Defendant argues that the evidence was relevant under

Rule 412(b)(2) as "evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant[.]" N.C. Gen. Stat. § 8C-1, Rule 412 (b)(2) (2005). However, we see nothing in the excluded evidence tending to show that any of the acts for which defendant was convicted were done by someone else. Thus, the trial court was well within its discretion in ruling that the evidence was not admissible under the Rule.

Defendant next contends that the trial court erred by admitting the testimony of Heather Thompson, Ann Mitchell, and Shirley McMann, insofar as they related to the witness's opinions of the victim's credibility and character for truthfulness. Defendant did not object to the testimony at trial, and argues that the admission of this testimony was plain error. We disagree.

Heather Thompson, Ann Mitchell, and Shirley McMann were lay fact witnesses. They were not presented as expert witnesses, nor were they received as such. They were therefore permitted to offer "opinions or inferences which [were] (a) rationally based on the perception of the witness[es] and (b) helpful to a clear understanding of [their] testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2005). Since defense counsel attempted to impugn the victim's credibility on cross-examination, the victim's credibility and character for truthfulness was at issue, and the State was entitled to rehabilitate its witness with testimony regarding her character for truthfulness. N.C. Gen. Stat. § 8C-1, Rule 608 (2005); *State v.*

Jones, 342 N.C. 457, 465, 466 S.E.2d 696, 699, *cert. denied*, 518 U.S. 1010, 135 L. Ed. 2d 1058 (1996).

Defendant next contends that the trial court erred in sentencing defendant to fourteen aggravated sentences based on its finding of an aggravating factor that was not alleged in the State's short-form indictments. Pursuant to *State v. Speight*, 359 N.C. 602, 614 S.E.2d 262 (2005), we overrule defendant's assignment of error that aggravating factors be alleged in the indictment. However, defendant has raised an issue regarding the actual sentence received that merits further discussion.

Defendant's sentence was enhanced beyond the presumptive range following the trial court's determination that the presence of an aggravating factor outweighed the presence of four mitigating factors. The aggravating factor—that defendant took advantage of a position of trust or confidence in committing the offenses—was found by the trial court, not the jury, and applied to each conviction. Defendant argues, in part in his brief and in part in a motion for appropriate relief, that this is structural error requiring a new sentencing hearing.

In *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005), our Supreme Court applied *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), to the North Carolina Structured Sentencing Act and held that the provisions of N.C. Gen. Stat. § 15A-1340.16 (2003), which require a trial judge to make findings of aggravating factors neither stipulated to by the defendant nor found by a jury violate the defendant's Sixth Amendment right to a jury trial. *See*

Allen, 359 N.C. at 433, 615 S.E.2d at 262. Therefore, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed [presumptive range] must be submitted to a jury and proved beyond a reasonable doubt." *Id.* at 434, 615 S.E.2d at 264-65.

In *Allen*, the Court determined that the error in failing to submit aggravating factors to the jury for its consideration is structural and reversible *per se*. *See id.* at 449, 615 S.E.2d at 272. But, in *Washington v. Recuenco*, ___ U.S. ___, ___ L. Ed. 2d ___ (No. 05-83) (26 June 2006), the United States Supreme Court determined that "*Blakely* error" was *not* structural and instead could be evaluated under a harmless error analysis.

There, relying on *Neder v. United States*, 527 U.S. 1, 144 L. Ed. 2d 35 (1999), the Court determined that since sentencing factors were like elements of a crime, the methodology of resolving the errors would also be similar.

> Our decision in *Apprendi* makes clear that "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." . . . Accordingly, we have treated sentencing factors, like elements, as facts that have to be tried to the jury and proved beyond a reasonable doubt. . . . The only difference between this case and *Neder* is that in *Neder*, the prosecution failed to prove the element of materiality to the jury beyond a reasonable doubt, while here the prosecution failed to prove the sentencing factor of "armed with a firearm" to the jury beyond a reasonable doubt. Assigning this distinction constitutional significance cannot be reconciled with our recognition in *Apprendi*

> that elements and sentencing factors must be treated the same for Sixth Amendment purposes.

Recuenco, ___ U.S. at ___, ___ L. Ed. 2d at ___. Accordingly, the Court held that "[f]ailure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error." *Id.* at ___, L. Ed. 2d at ___. Instead, "harmless-error analysis applied to these errors, because 'an instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.'" *Id.* at ___, L. Ed. 2d at ___ (citations omitted).

After *Recuenco*, our Supreme Court decided *State v. Norris*, ___ N.C. ___, n.2, ___ S.E.2d ___, ___ (No. 486A05) (30 June 2006), in which the Court noted that "contrary to *Allen*, the United States Supreme Court held that *Blakely* errors are not structural errors. *Washington v. Recuenco*, 2006 WL 1725561 (U.S. June 26, 2006). Accordingly, such errors do not require reversal if harmless beyond a reasonable doubt. *Id.*"

The North Carolina Supreme Court in *Norris* has thus held that *Recuenco* abrogates its holding in *Allen*—that *Blakely* error is structural—and instructed North Carolina courts that "such errors do not require reversal if harmless beyond a reasonable doubt." *Norris*, ___ N.C. at ___, n.2, ___ S.E.2d at ___. Based on *Norris*, therefore, we must determine whether the trial court's error in failing to submit the "abuse of trust" aggravating factor to the jury was harmless beyond a reasonable doubt.

"A finding that a defendant took advantage of a position of trust or confidence depends on 'the existence of a relationship between the defendant and victim generally conducive to reliance of one upon the other.'" *State v. Bingham*, 165 N.C. App. 355, 366, 598 S.E.2d 686, 693 (2004) (quoting *State v. Daniel*, 319 N.C. 308, 311, 354 S.E.2d 216, 218 (1987)). Due to the necessary evidentiary burdens existing at the time of trial, the State did not explicitly focus on defendant's relationship to the victim. It was, however, established by several witnesses that defendant at some point during the eighteen months covered in the indictments was the victim's older sister's boyfriend. Later, still within the eighteen months, he became the victim's brother-in-law after marrying the victim's sister. At all times complained of, defendant either resided in the house with the victim or was at times responsible for her care when others were not there. Based on the testimony at trial, we believe that it is inevitable that the jury very likely would have found that defendant occupied a position of trust in the victim's life and abused that position in committing various sexual acts on her. *See Bingham*, 165 N.C. App. at 366-67, 598 S.E.2d at 693 (defendant was dating victim's mother and lived in the same house for a period of time as victim); *State v. McGriff*, 151 N.C. App. 631, 640, 566 S.E.2d 776, 781-82 (2002) (victim knew the defendant because defendant was dating and living with her friend's sister, the victim and her friend visited defendant's house every day after school, and the victim had known defendant for approximately two months). While the sufficiency of

the evidence in previous cases needed only to satisfy a judge by a preponderance of the evidence, we nonetheless can see no logical reason why, given numerous witness's testimony regarding the relationship of defendant to the victim, that a reasonable jury would not have found the evidence sufficient beyond a reasonable doubt.

As such, the Sixth Amendment error in defendant's sentencing was harmless beyond a reasonable doubt. And having found that defendant's trial was free of prejudicial error, we can discern no error in the proceedings below and affirm defendant's convictions.

No error.

Judges BRYANT and GEER concur.

Report per Rule 30(e).