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NO. COA03-462

NORTH CAROLINA COURT OF APPEALS

Filed: 17 August 2004

STATE OF NORTH CAROLINA

v.

Macon County
Nos. 01 CRS 50675
01 CRS 50677
02 CRS 83-88

MICHAEL WILLIAM DELCONTE

Appeal by defendant from judgments entered 10 October 2002 by Judge James U. Downs in Superior Court, Macon County. Heard in the Court of Appeals 18 March 2004.

Attorney General Roy Cooper, by Assistant Attorney General E. Clementine Peterson, for the State.

Reita P. Pendry for defendant-appellant.

McGEE, Judge.

Michael William Delconte (defendant) appeals from judgment of the trial court entered upon jury verdicts finding him guilty of statutory rape, indecent liberties with a child, four counts of engaging in first degree sexual offense, and two counts of first degree statutory rape. The trial court sentenced defendant to a term of 288 to 355 months in prison for the statutory rape conviction, with a sentence of nineteen to twenty-three months in prison for the indecent liberties with a child conviction. The trial court consolidated the four counts of first degree sexual offense with a child and sentenced defendant to a term of 288

months to 355 months in prison. The trial court sentenced defendant to 288 months to 355 months in prison for each of the two counts of first degree rape of a child. All sentences were to be served consecutively. Defendant appeals.

The State presented evidence at trial tending to show that defendant's fourteen-year-old stepdaughter (the juvenile) resided with her mother and defendant for approximately nine years. The juvenile testified that during the summer of 2000, defendant touched her breasts and vagina and put his penis inside her. She testified defendant inserted his penis into her approximately twice per week and that the frequency increased to four times a week after the fall school term began. In addition, the juvenile stated defendant touched her on the breast and vagina in the fall of 2001, "right after school started." The juvenile reported defendant's actions to her mother, her oldest sister, two teachers and the assistant principal of her school, following which the Department of Social Services (DSS) initiated an investigation.

Defendant was arrested based upon the juvenile's accusations. While incarcerated, defendant initiated contact with Robert Holland (Detective Holland), a detective with the Macon County Sheriff's Office, and requested an interview. After being advised of his rights, defendant admitted he had inappropriate contact with the juvenile, including insertion of his finger into her vagina, as well as oral sex with the juvenile. Defendant also admitted he attempted to insert his penis into the juvenile's vagina on numerous occasions, although he stated he was unable to maintain an

erection. Defendant repeatedly stated he had inserted his penis into the juvenile, albeit only slightly. Detective Holland recorded his interview with defendant by means of a concealed camera.

Defendant's eleven-year-old biological son testified he never observed defendant and the juvenile behind the building where some of the sexual acts were reported to have occurred and that he was never told to leave the house when defendant and the juvenile were present.

Defendant testified on his own behalf and denied the juvenile's allegations of inappropriate sexual behavior. Defendant testified he was unaware he was being videotaped during his interview with Detective Holland. He stated he lied to Detective Holland because he was "looking for a way out" and believed it would help his family to cooperate with law enforcement. Defendant further testified he was intimidated and under duress when he made the videotaped statement.

Defendant asserts four assignments of error on appeal, arguing the trial court erred by (1) joining for trial the indictments against him; (2) admitting a videotaped statement by defendant containing references to uncharged acts of misconduct; (3) admitting prior statements of the juvenile; and (4) denying his motions to dismiss. For the reasons stated herein, we find no error by the trial court.

By his first assignment of error, defendant argues the trial court erred in joining for trial the two indictments for statutory

rape and indecent liberties occurring on 3 August 2001 with the six indictments for sex offenses and statutory rape occurring in July of 2000.

N.C. Gen. Stat. § 15A-926 provides that joinder is appropriate where "the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." N.C. Gen. Stat. § 15A-926 (2003). A two-step analysis is necessary for all joinder inquiries. *State v. Montford*, 137 N.C. App. 495, 498, 529 S.E.2d 247, 250, cert. denied, 353 N.C. 275, 546 S.E.2d 386 (2000). First, the trial court must determine whether a sufficient transactional connection exists between the criminal offenses. *Id.* Second, where an adequate transactional connection exists, the trial court must consider whether joinder undermines the defendant's right to a fair hearing on each charge and the defendant's ability to present a defense. *Id.* While the first question of whether an adequate connection exists is fully reviewable on appeal, the latter question is within the sound discretion of the trial court and will not be disturbed absent a manifest abuse of discretion. *Id.* Reversible error occurs only where "the charges are 'so separate in time and place and so distinct in circumstances as to render the consolidation unjust and prejudicial to defendant.'" *State v. Beckham*, 145 N.C. App. 119, 126, 550 S.E.2d 231, 237 (2001) (citation omitted). "Our courts have previously held in various circumstances that it was not error for the trial court to

consolidate multiple sexual offense charges against a defendant where such offenses were transactionally connected." *Id.* at 126, 550 S.E.2d at 236-37.

In the case before us, the criminal charges involved substantially similar actions of sexual abuse by defendant upon the same juvenile such that joinder was proper. The underlying incidents took place over a one-year time period and occurred in the same two locations. Moreover, public policy favors consolidation in order to avoid the necessity of calling the same witness twice, a factor particularly compelling in trials where juveniles testify about sexual abuse. *State v. Bruce*, 90 N.C. App. 547, 552, 369 S.E.2d 95, 99, *disc. review denied*, 323 N.C. 367, 373 S.E.2d 549 (1988). In *State v. Street*, this Court held that

even though the time period between some of the acts was substantial, the acts were nonetheless so similar in circumstance and place as not to render the consolidation of the offenses prejudicial to the defendant. We also note that all of the offenses involved sexual abuses of stepchildren, and although N.C. Gen. Stat. § 15A-926 does not permit joinder of offenses solely on the basis that they are the same class, the nature of the offenses is a factor which may properly be considered in determining whether certain acts constitute parts of a single scheme or plan.

Street, 45 N.C. App. 1, 6, 262 S.E.2d 365, 368, *cert. denied*, 301 N.C. 104, ___ S.E.2d ___ (1980); *see also Beckham*, 145 N.C. App. at 126, 550 S.E.2d at 236; *Bruce*, 90 N.C. App. at 552, 369 S.E.2d at 99. Under the facts of this case, the trial court did not abuse its discretion in joining the offenses for trial. *See State v. Owens*, 135 N.C. App. 456, 459, 520 S.E.2d 590, 592 (1999). We

overrule this assignment of error.

By his second assignment of error, defendant contends the trial court erred in admitting a portion of the videotaped confession by defendant containing references to uncharged acts of sexual misconduct by him against his stepdaughters that allegedly occurred out-of-state. During the videotaped confession, defendant briefly referred to previous allegations of sexual abuse made against him by his stepdaughters while the family resided in South Carolina and Arkansas. In the videotape, defendant stated these allegations were investigated and could not be substantiated. (Videotape; State's Exhibit 4) Defendant contends admission of this information irreparably prejudiced him, requiring a new trial. We do not agree.

Assuming *arguendo* that admission of that portion of the videotape was error, defendant has failed to show prejudice arising therefrom. Under N.C. Gen. Stat. § 15A-1443(a), defendant has the burden of showing that if the error in question had not been committed, a different result would have been reached. N.C. Gen. Stat. § 15A-1443(a) (2003). Before presentation of the videotape, the trial court instructed the jury to only consider any

possible crimes or misdeeds that [defendant] may allude to for the limited purpose as to whether or not he possessed in the charges that appear before you[,], a plan, and/or preparation, and/or motive, and/or intent, and/or a common scheme to commit to one, some or all of the charges that he's facing before, and/or whether or not there was any absence or mistake about his alleged conduct.

The trial court repeated this admonition to the jury several times

during the jury's viewing of the videotape. In light of the strong evidence against defendant, including his own admission of sexual misconduct, we cannot say that the brief references by defendant on the videotape concerning prior unsubstantiated allegations against him, accompanied by a limiting instruction by the trial court, constitutes reversible prejudice. Moreover, although defendant objected to the admission of this portion of the videotape, he later testified about these out-of-state incidents. It is a well settled rule that if a party objects to the admission of certain evidence and the same or similar evidence is later admitted without objection, the party has waived the initial objection. *State v. Wingard*, 317 N.C. 590, 599, 346 S.E.2d 638, 644 (1986). We overrule this assignment of error.

Defendant further argues the trial court erred in admitting prior statements by the juvenile to a social worker and pediatrician. Defendant contends the prior statements were not sufficiently similar to the juvenile's testimony at trial, and could not be properly admitted under the corroboration exception to the rule of evidence barring hearsay. Defendant asserts he is therefore entitled to a new trial. We disagree.

Prior statements are admissible to corroborate a witness' trial testimony, even though it is hearsay. *State v. Gell*, 351 N.C. 192, 204, 524 S.E.2d 332, 340, *cert. denied*, 531 U.S. 867, 148 L. Ed. 2d 110 (2000). Prior corroborative statements must be substantially similar to the witness' testimony in court. *State v. Williamson*, 333 N.C. 128, 136, 423 S.E.2d 766, 770 (1992).

However, corroborative testimony is not rendered incompetent by the fact that there is some variation, "even though [it] contain[s] new or additional information so long as the narration of events is substantially similar to the witness' in-court testimony." *Id*; see also *State v. Rogers*, 299 N.C. 597, 601, 264 S.E.2d 89, 92 (1980). It is within the province of the jury to decide whether the testimony corroborates the testimony of another witness. *Rogers*, 299 N.C. at 601, 264 S.E.2d at 92.

Defendant argues that the juvenile's prior statements made to a social worker and pediatrician were not substantially similar to the juvenile's trial testimony and were therefore inadmissible. Regarding such testimony, the trial court gave limiting instructions as follows:

Members of the jury, you cannot consider what any of these witnesses are testifying to you about what the child . . . told them as the truth of anything or in support of any facts that the State must prove beyond a reasonable doubt to satisfy you of the defendant's guilt of any charge or charges. But you can consider them for a limited purpose.

If you find that what th[ese] witness[es]. . . related to you that the child told them, if you find that that was consistent with what you remember [the juvenile's] . . . sworn testimony to have been, you can let that be reflected in what credibility or believability you give [the juvenile's] testimony about those particular points.

On the other hand if you find that it is inconsistent - in other words this witness or any other witness she talked to, you find that what they tell you is inconsistent with what you recall [the juvenile's] testimony to have been, then you can let that be reflected in

what lack of credibility or believability you give [the juvenile's] sworn testimony.

Defendant objects to several statements as inadmissible. For example, the juvenile told her social worker that no incidents of sexual abuse occurred after she moved to a new home. The juvenile testified at trial, however, that inappropriate touching had taken place after that move. This apparent confusion by the juvenile as to the exact date upon which the sexual offense was committed goes to her credibility as a witness, however, and not the admissibility of the evidence. *State v. Wood*, 311 N.C. 739, 742, 319 S.E.2d 247, 249 (1984). Defendant also notes that the pediatrician's testimony included many details of the alleged abuse not testified to by the juvenile. Specifically, the pediatrician testified the juvenile reported defendant had been abusing her since the age of five, that he washed bedclothes to conceal evidence of his conduct from his wife, the juvenile's mother, and that defendant was angered by the juvenile's refusal to touch him. The juvenile did not testify to such events. While we agree that admission of such statements was improper, we are not persuaded that, given the relative minor importance of such statements, the strong evidence against defendant, and the limiting instruction given by the trial court, that the improper admission of such testimony requires a new trial. We therefore find no prejudicial error.

Finally, defendant urges reversal on the ground that the trial court erred by failing to grant defendant's motions to dismiss the charges against him. We find no merit to defendant's argument. In determining whether to grant or deny a defendant's motion to

dismiss, the trial court must decide "whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996). Substantial evidence is such relevant evidence that a "reasonable mind might accept as adequate to support a conclusion." *State v. Barden*, 356 N.C. 316, 351, 572 S.E.2d 108, 131 (2002), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003). As to whether substantial evidence exists, the question for the trial court is not one of weight, but of the sufficiency of the evidence. *State v. Lucas*, 353 N.C. 568, 581, 548 S.E.2d 712, 721 (2001). "'In resolving this question, the trial court must examine the evidence in the light most advantageous to the State, drawing all reasonable inferences from the evidence in favor of the State's case.'" *State v. Hyatt*, 355 N.C. 642, 665, 566 S.E.2d 61, 76 (2002) (citation omitted), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823 (2003).

Defendant first urges reversal on the ground that the State produced insufficient evidence of defendant's age. Defendant was charged with numerous crimes containing as a required element that the perpetrator be older than the victim by a certain number of years, *see, e.g.*, N.C. Gen. Stat. § 14-27.7A(a) (a person must be at least six years older than the victim to be guilty of the crime of statutory rape). Defendant contends the State presented insufficient evidence to show that defendant was older than juvenile by at least six years. We disagree. In *State v. Bynum*, this Court held that a jury may determine the age of the defendant

based on observation of the defendant during trial. *Bynum*, 111 N.C. App. 845, 850, 433 S.E.2d 778, 781, *disc. review denied*, 335 N.C. 239, 439 S.E.2d 153 (1993). Defendant is, in fact, thirty-six years older than the juvenile. Also, defendant testified that he had been married to the juvenile's mother for approximately eleven years. Defendant does not contend he was actually less than six years older than the victim. From the evidence at trial, including defendant's appearance on the witness stand, the jury could conclude that defendant was well over six years older than the juvenile.

Defendant also argues there was insufficient evidence of the dates of the crimes committed since the statement made by the juvenile before trial conflicted with her testimony at trial. For example, the juvenile told her social worker and her school principal that defendant had sexual intercourse with her in August of 2001. The juvenile later testified that no intercourse had occurred in their new house, into which the family moved two months before August of 2001. As we have already stated, however, any discrepancy in the juvenile's statements as to the date of the alleged acts goes to the weight of the evidence. Upon appeal, we must consider the evidence in the light most favorable to the State and any discrepancies must be resolved in the State's favor. Under the facts of the present case, if we remanded for a new trial for lack of evidence we would be usurping the jury's longstanding role of weighing evidence.

In conclusion, we find no prejudicial error by the trial court.

No prejudicial error.

Judges CALABRIA and STEELMAN

Report per Rule 30(e).