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NO. COA05-1096

NORTH CAROLINA COURT OF APPEALS

Filed: 16 May 2006

STATE OF NORTH CAROLINA

v.

Forsyth County
No. 04CRS050501

DORINDO ESTUA ESQUIVEL-LOPEZ

Appeal by defendant from judgments entered 13 May 2005 by Judge Lindsay R. Davis, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 8 May 2006.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Celia Grasty Lata, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Charlesena Elliott Walker, for defendant-appellant.

HUNTER, Judge.

Dorindo Estua Esquivel-Lopez ("defendant") was found guilty of first degree sexual offense against a child under the age of thirteen and of taking indecent liberties with a child. He was sentenced to consecutive terms of imprisonment. For the reasons stated herein, we find no error.

The victim identified in the indictment, who was age eight at the time of trial, testified that when she was six years old, defendant moved in with her mother. She, defendant, and her mother all slept in the same room. Defendant and her mother slept on one bed and she slept on a separate bed. At times when she was alone

in the bedroom with him, defendant inserted his private part into her private part and her rear. Defendant kissed her private part and tried to insert his finger into her private part and her rear. Defendant touched her private part with his tongue. She also saw "[w]hite stuff" come out of defendant's private part and land on her stomach. She eventually told her mother about the incidents. Her mother took her to the Downtown Health Plaza, where she was examined by two female physicians.

The victim's mother testified that the victim was born in July 1996. She separated from the victim's father and he moved back to Mexico in 1999. Defendant, who was born on 27 October 1975, moved in with her and the victim in 2001. One evening when she was four months pregnant with her second child, who was born 24 December 2003, she observed defendant go into the bedroom, stay about twenty minutes and come out. Suspicious, she went into the bedroom and asked the victim to tell her what defendant "was doing to her." The victim told her that defendant had touched her private part. She subsequently took her daughter to Downtown Health Plaza and to Baptist Hospital for examinations.

Dr. Mary Hadley ("Dr. Hadley"), a pediatric physician employed at the Downtown Health Center, a clinic owned by Baptist Hospital, testified that the victim and her mother came to the center on 2 January 2004. The victim told her that her mother's boyfriend had penetrated her genital and vaginal areas. Assisted by another physician, she examined the victim's genitalia and observed that her hymen was more red and less smooth than normal. She also

tested the victim for sexually transmitted diseases. The results came back negative. Dr. Hadley referred the victim to Dr. Sara Sinal ("Dr. Sinal"), a specialist in the diagnosis of sexual abuse, for further examination.

Dr. Sinal, a professor of pediatrics at the Wake Forest University School of Medicine, testified as an expert in the field of pediatrics. On 22 March 2004, she examined the victim on referral from the Downtown Health Plaza. She observed that the introitus of the child's vagina was very red and irritated. She also noted that the child's hymen had bumps at the four and eight o'clock areas, which she determined were normal. The child also leaked urine and emitted a slight mucoid discharge, which she did not determine to be abnormal. Dr. Sinal also testified that scrapes or bruises to the vagina and anus usually heal on their own within a week or so, and that even "through-and-through" tears of the hymen completely heal within six months such that no abnormalities are seen.

Cynthia Stewart ("Stewart"), a social worker at Baptist Hospital, testified as an expert in social work specializing in family counseling of victims of child sexual abuse. She interviewed the victim and her mother prior to the victim's examination by Dr. Sinal. Using anatomical dolls, the victim told Stewart that defendant put his "body," pointing to the penis of the male doll, into her vagina, pointing to the vagina of the female doll, and into her anus, pointing to the anal area of the female doll. When asked whether defendant made her do anything

with her mouth, she responded, "'[n]o. He just kissed me in the mouth when I was sleeping.'" When asked whether defendant did anything with his mouth, she replied, pointing to the vagina and anus of the female doll, that he put his tongue in her vagina and anus.

Sergeant Natoshia James ("Sgt. James") of the Winston-Salem Police Department testified that she was assigned to investigate the case on 3 December 2003. She interviewed the victim on 31 December 2003. The victim told Sgt. James that "'Dorindo'" put his penis in her vagina, attempted to put his finger in her vagina and butt, kissed her, and kissed her vagina. He would do these things to her when her mother was not in the bedroom. When he did these things to her, "white stuff" would come out of his penis and fall on her body. He would wipe off the white stuff from her body. These incidents stopped after she told her mother, who would not allow her to be alone with defendant.

Defendant testified and denied engaging in any sexual activity with the child.

Defendant brings forward two assignments of error.

First, he contends the trial court committed plain error by not striking, *sua sponte*, the testimony of a social worker regarding statements made to her by the victim which were not corroborative of the victim's trial testimony. These statements are: (1) that her mother did not want defendant to know where her mother hid her newborn baby because "maybe he was going to do it to her[,]"; (2) that defendant did not say anything when her mother

asked him whether he did to the victim the things of which he had been accused, and (3) that defendant touched her inappropriately on another occasion while she was watching television, and that she ran to her aunt's house to tell her about it.

Under the plain error standard of review, to award a new trial the appellate court must be convinced that, absent the error, the jury probably would have reached a different verdict. *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986). We do not think that it is probable that had the testimony in the case at bar been excluded, a different outcome would have resulted. The victim consistently related the same story to her mother, two examining physicians on separate occasions, the social worker, the lead investigating officer, and an investigator with the public defender. While the medical examinations could not conclusively establish sexual abuse, they showed that the victim's hymen was more red and less smooth than normal. Moreover, the inconsistencies in the statements are not significantly different from the evidence offered at trial. For example, while the victim may not have actually testified that her mother hid her newborn baby from defendant out of fear he would sexually abuse the younger child, a reasonable inference that she hid the baby for that reason could be drawn from the mother's testimony. The mother testified that after her daughter told her about the sexual abuse, she refused to allow defendant to be alone in the bedroom with her daughter and that she secured the bedroom to prevent his entry.

She hid her newborn baby in the closet because she did not want defendant to touch the baby.

Second, defendant contends the trial court erred by denying his motion to continue so defendant could interview two expert witnesses. Counsel for defendant argued to the trial court that she needed the continuance so she could interview Dr. Sinal, who had prepared a report she had received for the first time the previous day, and to interview Stewart, who, according to the physician's report, had been told by the victim that her "'Dad'" perpetrated the sexual abuse.

A motion for a continuance is ordinarily addressed to the sound discretion of the trial judge, whose ruling is not reversible on appeal absent an abuse of discretion. *State v. Smith*, 310 N.C. 108, 111, 310 S.E.2d 320, 323 (1984). However, if the motion for a continuance is grounded on a constitutional right, then the motion presents a question of law which is fully reviewable on appeal. *Id.* at 112, 310 S.E.2d at 323. The motion to continue should be supported by affidavit or "some form of detailed proof indicating sufficient grounds for further delay." *State v. Searles*, 304 N.C. 149, 155, 282 S.E.2d 430, 434 (1981). When a defendant asserts that the trial court's failure to allow additional time to investigate or prepare a defense constituted a constitutional violation, he must show "how his case would have been better prepared had the continuance been granted or that he was materially prejudiced by the denial of his motion." *State v. Covington*, 317 N.C. 127, 130, 343 S.E.2d 524, 526 (1986).

Some of the factors considered by North Carolina courts in determining whether a trial court erred in denying a motion to continue have included (1) the diligence of the defendant in preparing for trial and requesting the continuance, (2) the detail and effort with which the defendant communicates to the court the expected evidence or testimony, (3) the materiality of the expected evidence to the defendant's case, and (4) the gravity of the harm defendant might suffer as a result of a denial of the continuance.

State v. Barlowe, 157 N.C. App. 249, 254, 578 S.E.2d 660, 663 (2003).

Here, the record shows that defendant made the motion on 5 May 2005, five days before the trial was scheduled to begin on 10 May 2005. Defendant failed to show that he could not interview the witnesses at any time during the two business days before the commencement of trial, or that he had even attempted to contact the witnesses. Defendant also failed to provide sufficient proof that he would obtain material evidence to aid in his defense. Defendant posited to the trial court that the report could lead to a possible defense that the victim's natural father, not defendant, committed the acts upon her, because she used the term "Dad" to the physician in identifying the perpetrator, or that through "transference" the victim attributed acts perpetrated by her natural father to defendant. However, defendant failed to present any tangible evidence to support this theory.

Finally, defendant has failed to show he was prejudiced by the denial of the continuance. Stewart testified that when she asked the victim to identify the person whom she called "Dad," she stated, "Dorindo." The victim also stated to her, "[m]y real dad

didn't do that.'" Dr. Sinal never testified that the victim told her that "Dad" perpetrated any sexual acts.

We conclude the trial court did not err by denying the motion for a continuance.

We hold defendant received a fair trial, free of prejudicial error.

No error.

Judges WYNN and McGEE concur.

Report per Rule 30(e).