NO. COA05-1366

NORTH CAROLINA COURT OF APPEALS

Filed: 1 August 2006

STATE OF NORTH CAROLINA

v. Cumberland County
Nos. 02 CRS 61458, 61506, 61542, 61568

ETHAN ANTHONY HESS,
Defendant.

Appeal by defendant from judgments entered 26 April 2005 by Judge B. Craig Ellis in the Superior Court in Cumberland County. Heard in the Court of Appeals 11 May 2006.

Attorney General Roy Cooper, by Assistant Attorney General Anne M. Middleton, for the State.

M. Alexander Charns, for defendant-appellant.

HUDSON, Judge.

In April 2005, a jury convicted defendant of three counts of taking indecent liberties with a minor, three counts of first-degree sexual offense, and three counts of first-degree statutory rape. The court sentenced defendant to consecutive prison terms for each conviction. Defendant appeals. We conclude that there was no error at trial.

The evidence tends to show that minor girls T.J.F., M.L.F., and M.A.F., were living in Fayetteville in 2000 and had known defendant, a friend of the family, for several years. In 2000, the girls were all under thirteen years of age. Early in 2000, after a modeling representative came to her school, T.J.F. discussed the

possibility of modeling with her mother in defendant's presence. Defendant said that he could get T.J.F. into modeling and that he would take pictures of her. Defendant had T.J.F. look at some papers from his modeling agency, Pegasus Talent, which stated that defendant could take topless, bottomless, swimsuit, lingerie, and naked photos. The forms had boxes and lines to check off, including doing R and X-rated videos. T.J.F's mother checked off all of the boxes.

T.J.F. testified that in January 2000, defendant took five photos of her in lingerie and underwear, topless, and naked. Defendant took the pictures in his bedroom while T.J.F.'s mother waited in defendant's living room. He paid T.J.F. $50, which she gave to her mother. About two weeks later, defendant took more nude photos of T.J.F., again with her mother present. The second or third time defendant photographed T.J.F., he showed her naked photos of another girl, also taken in his bedroom. Defendant gave T.J.F. these photos to take home and she kept them under her mattress. Thereafter, defendant came over and picked up T.J.F. and her mother every week or two to take nude photos of T.J.F. Defendant paid her different amounts, depending on the number of photos and whether or not she was naked.

The first time defendant photographed T.J.F., he touched her breasts. About two months later, he started touching her vaginal area, including penetrating her vagina with his fingers. These activities continued for about two years, with defendant touching her breasts with his hand or mouth, touching her vagina with his

hands, mouth or penis, penetrating her vagina with his fingers or penis, and having her touch his penis with her hands or mouth. The first time defendant ever penetrated T.J.F.'s vagina with his penis was on her thirteenth birthday, 21 January 2001.

Several months after defendant first started taking the photographs and touching T.J.F., her younger sisters M.A.F. and M.L.F began to come with her to defendant's house. M.A.F. was about eleven at the time and M.L.F. was about eight. On one occasion, defendant asked M.A.F. if she wanted to go to the store to get candy, and when she agreed, he took her to a building where he penetrated her vagina with his penis. He told her that if she told anybody, he would kill her and he showed her a gun. M.A.F. did not go back to defendant's house for two months because she was scared. When she started going again, she went every other weekend with T.J.F. and M.L.F. Defendant resumed touching M.A.F. He would touch her breasts and inside her vagina with his hands, he would put his mouth on her vagina, and he would have her touch his penis with her hands and mouth. About a year after M.A.F. started going back to defendant's house, he had vaginal intercourse with her again.

In August 2000, when M.L.F. spent the night at defendant's house for the first time, he touched her breast and penetrated her vagina with his finger. Her sisters, T.A.F. and M.A.F. were there as well, and he also penetrated their vaginas with his fingers. About two weeks later, defendant had M.L.F. put her mouth on his penis, and he put his mouth on her vagina and then put his penis in

her vagina. In mid-2001, defendant began performing sexual acts on all three girls together. He had intercourse with them one at a time and also had them take nude pictures of one another.

The girls told their mother what was happening. Defendant gave them money and their mother kept it and told them to tell their father they had cleaned defendant's house or something. In 2000, the girls' older sister, J.F., found some nude pictures of T.J.F. and confronted her mother. Defendant called J.F. and told her she needed to return the photos and she refused. When she woke up after falling asleep that night, the photos were gone from her purse and her mother said she had gotten rid of them. When J.F. asked her sisters, they revealed to her what had been going on.

At trial, I.V.J. testified that she knew defendant through her parents and that in 2000, when she was fourteen, he asked her to model underwear and lingerie. Defendant spoke to her about a contract and her parents signed their consent. One day she went to defendant's house, thinking that the other girls were there, but they were not. Defendant asked her to put on a purple teddy, which she did, and when he asked her to take her bra off underneath, she went to the bathroom, changed back into her clothes, and went home. When she relayed this to her father, he told her she was not allowed to go back to defendant's by herself. She testified that she saw photographs of other girls in defendant's desk drawer and that one of these was a nude girl standing against defendant's wall. She estimated that there were between 50 and 150 photos in the drawer.

Dr. Sharon Cooper testified as an expert in developmental pediatrics and forensic pediatrics. She examined T.J.F., M.A.F, and M.L.F. on 29 April 2002. She found old scar tissue on the posterior fourchette of T.J.F.'s vagina, where the tissue was stretched so far that it started to split. Dr. Cooper testified that based on her examination and the child's history, her opinion was that the physical findings were consistent with penetrating injury and that T.J.F.'s physical and behavioral symptoms were consistent with sexual abuse and exploitation. Dr. Cooper also testified regarding her examination of M.A.F., who had an old tear in the posterior fourchette, as well as a complete tear of the hymenal tissue all the way down to the base of the genitalia. Dr. Cooper testified that these findings were consistent with vaginal penetration. Dr. Cooper also testified that she examined M.L.F. and found nonspecific changes to the posterior fourchette area. These findings, according to Dr. Cooper, were consistent with digital or penile penetrating injury.

At trial, defendant appeared pro se.

Defendant first argues that the trial court committed plain error by allowing irrelevant and prejudicial testimony from the State's expert witness Dr. Cooper. We disagree. At trial, Dr. Cooper testified that she believed T.J.F.'s history, behaviors, and physical findings supported a diagnosis of sexual abuse and sexual exploitation. The evidence defendant complains of came in when the prosecutor then asked Dr. Cooper what she meant by sexual exploitation. In her response, Dr. Cooper explained, generally,

five things that can constitute child exploitation: 1)child pornography or child sexual abuse images; 2)child prostitution; 3) internet crimes against children; 4)child sex tourism; 5)human trafficking of children. Dr. Cooper did not refer to defendant or the victims during this description. The prosecutor then asked Dr. Cooper which of these five forms of child exploitation she had based her diagnosis of T.J.F. on and she replied:

> The first one which is child sexual exploitation through child sexual abuse images and later as I took more history from this child, to come to recognize that the taking of pictures and sexual abuse in this particular case was also associated with the exchange of money. And so that would constitute prostitution and we refer to it as intrafamilial prostitution, meaning that T. was being prostituted within her own family. And that is actually a relatively common type of prostitution. And that - those were the two of the five types of child sexual exploitation that this child's case fit into.

Defendant contends that Dr. Cooper's testimony linked defendant to worldwide exploitation of children and uncharged crimes and was irrelevant and prejudicial. We note that it is well-settled that an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular child has symptoms or characteristics consistent therewith. *State v. Stancil*, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002). Furthermore, to prevail under a plain error analysis, a defendant must show an error "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251

(1987), *cert. denied*, 485 U.S. 1036, 99 L.Ed.2d 912 (1988) (*citing State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983)). Given the other medical evidence, the detailed testimony by the victims, as well as other corroborating testimony and evidence, we conclude that even if the trial court erred in admitting this portion of Dr. Cooper's testimony, that such error would not probably result in the jury reaching a different verdict. We overrule this assignment of error.

Defendant next contends that the trial court committed plain error in submitting the nine charges against him to the jury without "any limiting instruction or guideline on how to make a unanimous, unambiguous decision." Defendant asserts that he has been denied his right to a unanimous jury verdict because the indictment, the jury instructions, and the verdict sheet fail to differentiate between the instances of sexual misconduct which the State's evidence tended to show, and thus it "was impossible for the jury to be unanimous about the nine charges." Defendant was originally charged with 245 felony offenses, but after 233 were dismissed, the trial proceeded on 12 of the charges. After the State's case, only nine charges remained, and defendant was convicted of all of these. At trial, the three girls testified regarding many more instances of sexual contact than defendant was charged with, often without exact dates. However, in *State v. Lawrence,* our Supreme Court recently held that a defendant can be unanimously convicted of multiple counts of different sexual offenses when the indictments are identically worded and "lack

specific details distinguishing one particular incident of a crime from another." 360 N.C. 368, ___, 627 S.E.2d 609, 611 (2006). In *Lawrence*, the Supreme Court overruled this Court's determination that the possibility that the jury may have considered a greater number of incidents than the number charged created a risk that the jury was not unanimous. 360 N.C. at ___, 627 S.E.2d at 612. In holding that there was no such risk, the Court reasoned that the additional "incident[s] had no effect on jury unanimity because . . . while one juror might have found some incidents of misconduct and another juror might have found different incidents of misconduct, the jury as a whole found that improper sexual conduct occurred." 360 N.C. at ___, 627 S.E.2d at 612-13. The Court held that this was true regarding charges of indecent liberties and first-degree statutory rape. 360 N.C. at ___, 627 S.E.2d at 611-13.

Here, the State submitted one count of statutory rape, one count of statutory sexual offense, and one count of indecent liberties as to M.A.F., and one count of each of the same as to M.L.F. As to T.J.F., the State submitted one count of indecent liberties occurring on or about and between 16 July and 15 August 2001, one count of statutory sexual offense occuring on or about and between 16 January and 20 January 2001, and one count of indecent liberties occurring on or about and between 16 January and 15 February 2001. The trial court instructed the jury that "a verdict is not a verdict until all 12 jurors agree unanimously as to what your decision shall be. You may not render a verdict by

majority vote." The trial court separated the verdict sheets by victim and, as to T.J.F., by dates of offense. In accordance with *Lawrence,* we overrule this assignment of error.

Defendant next argues that the trial court erred in admitting evidence that had been suppressed pretrial. Prior to trial, upon defendant's motion, the court suppressed evidence seized from defendant's computer, including the modeling contracts. However, during trial, defendant called Detective Bloomfield of the Cumberland County Sheriff's Department and asked the following questions:

> Q. Has anyone - to your personal knowledge again, has anyone come forward with any kind of modeling contract from Pegasus Modeling or something - has anyone brought one of those to you?
>
> A. Yes, they have.
>
> Q. Who?
>
> A. The Fayetteville Police Department provided me that information.
>
> Q. The Fayetteville Police Department?
>
> A. The Fayetteville Police Department provided me the contracts that they received from your residence.

In a hearing outside the presence of the jury, the court ruled that defendant had opened the door and allowed the State to question Detective Bloomfield about the document, although the State did not introduce the document into evidence.

> [T]he law wisely permits evidence not otherwise admissible to be offered to explain or rebut evidence elicited by the defendant himself. Where one party introduces evidence

> as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially.

State v. Albert, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981). *See also,* N.C. Gen. Stat. § 15A-1443(c) (2003). We overrule this assignment of error.

Defendant also contends that the trial court erred by not grating his motion for mistrial. After the State questioned Detective Broomfield about the contract found on defendant's computer, defendant moved for a mistrial, which motion the court denied. "The decision to order a mistrial lies within the discretion of the trial judge." *Odom*, 316 N.C. at 309, 341 S.E. at 334. As discussed above, defendant opened the door to this testimony, and thus we conclude that the trial court did not abuse its discretion in refusing to order a mistrial.

Defendant next argues that the trial court erred in denying his motion to subpoena an out-of-state witness. On appeal, defendant argues that his trial strategy was to attack the competency of the police investigation against him and to use the statements taken by lead detective, Det. McLain, to undercut the credibility of the three victims. During trial, defendant made an oral motion to bring Det. McLain to court, which the court declined to grant. At a pretrial hearing on 4 April 2004, the prosecutor informed the court that Det. McLain had moved to Maryland and provided his new address. Defendant concedes that the trial court's decision is subject to an abuse of discretion standard of

review on appeal. This Court has previously held that the trial court did not abuse its discretion in denying a motion to subpoena witnesses where defendant failed to seek issuance of the subpoena prior to the trial date. *State v. Cyrus*, 60 N.C. App. 774, 300 S.E.2d 58 (1983). We conclude that this assignment of error lacks merit.

In his next argument, defendant asserts that the trial court committed plain error in allowing evidence in violation of the best evidence rule. The best evidence rule provides that "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." N.C. Gen. Stat. § 8C-1, Rule 1002 (2003). Defendant contends that the court improperly allowed testimony describing the contents of the modeling contracts where the actual contracts were available, and testimony by a witness describing photos of nude girls observed in defendant's residence when the actual photos could have been introduced. We need not address whether this violated the best evidence rule, because we conclude that even if the trial court erred, it was not plain error. Given the other evidence at trial and the testimony of the victims, we cannot conclude that the testimony regarding the modeling contracts and the photo caused the jury to convict where they otherwise would not have.

Defendant also contends that the trial court erred in not dismissing the charges against him for insufficiency of the evidence. We disagree. The court should grant a motion to dismiss

if the State fails to present substantial evidence of every element of the crime charged. *State v. McDowell*, 329 N.C. 363, 389, 407 S.E.2d 200 (1991). Substantial evidence constitutes evidence that is "existing and real, not just seeming or imaginary." *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114 (1980). In reviewing the trial court's ruling on a motion to dismiss, we must evaluate the evidence in the light most favorable to the State, resolving all contradictions in the State's favor. *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983). Ultimately, we must determine "whether a reasonable inference of the defendant's guilt may be drawn from the circumstances." *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998). On appeal, defendant does not argue that evidence was lacking as to any essential element of any offense, but rather asserts that given the delay in reporting the offenses and the "relative lack of physical injury findings for . . . repeated acts of rape with very young girls," the trial court should have dismissed all charges. Here, the victims gave graphic testimony, the State presented medical evidence of abnormal physical findings of all three victims, and the State presented other corroborating evidence. After reviewing the record, and taking the evidence in the light most favorable to the State, we conclude that the trial court did not err in declining to dismiss the charges against defendant.

Next, defendant argues that the trial court committed plain error in allowing hearsay testimony about statements allegedly made by a non-testifying co-defendant. One of the victims was allowed

to testify that "My mom told us to say it [charges] wasn't true," and that she threatened the girls. As the victims' mother was a non-testifying co-defendant, defendant asserts that this hearsay statement violated his Sixth and Fourteenth Amendment rights to confront witnesses under *Crawford v. Washington*, 541 U.S. 36, 158 L.Ed.2d 177 (2004). Defendant fails to argue how a mother's statement to her child might be considered testimonial under *Crawford*, and he fails to argue how the admission of this statement prejudiced him. We overrule this assignment of error.

Finally, defendant argues that the trial court erred in allowing hearsay evidence of a thirty-year-old allegation against defendant. The trial court initially granted defendant's motion to suppress allegations of indecent liberties against defendant in Michigan in 1977, in which defendant offered a 12-year-old girl a "modeling contract," and payment of $600. At trial, defendant asked Detective Bloomfield, "To the best of your knowledge, has anyone, other than the [F.] family, made any complaint about me?" The detective replied that "there has been some additional information that has been discovered about an incident in another state. I don't recall the specifics." The trial court ruled that defendant had opened the door to further inquiry by the State regarding this testimony. The State asked only the age of the complainant and no other details. As discussed *supra*, where a defendant opens the door, evidence which is otherwise inadmissible becomes admissible to explain or rebut the evidence introduced by

defendant. *Albert*, 303 N.C. at 177, 277 S.E.2d at 441. We overrule this assignment of error.

No error.

Judges MCCULLOUGH and TYSON concur.

Report per Rule 30(e).