NO. COA05-824

NORTH CAROLINA COURT OF APPEALS

Filed: 15 August 2006

STATE OF NORTH CAROLINA

v. Mecklenburg County
Nos. 02 CRS 231911
02 CRS 231913

MOUA VANG,
Defendant.

Appeal by defendant from judgments entered 19 August 2004 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 February 2006.

Attorney General Roy Cooper, by Assistant Attorney General Sonya M. Allen, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Matthew D. Wunsche, for defendant-appellant.

GEER, Judge.

Defendant Moua Vang appeals from two convictions for taking indecent liberties with a child. On appeal, defendant primarily argues that he was erroneously denied his constitutional right to a unanimous jury because the State offered evidence of a greater number of incidents of misconduct than charges submitted to the jury, and the trial court did not distinguish among those incidents in its jury instructions or verdict sheets. Defendant's arguments were, however, rejected in *State v. Lawrence*, 360 N.C. 368, 627

S.E.2d 609 (2006), which compels us to hold that no unanimity problem occurred in this case.

Facts

The State's evidence at trial tended to show the following facts. Prior to January 2002, defendant and his wife lived in a four bedroom house in Charlotte, North Carolina with their seven children, including "Kathy," "Sarah," and "Melissa."[1] Sarah and Melissa shared a room, initially sleeping together in a king size bed, but eventually sleeping separately in bunk beds.

Sarah, who at the time of trial in 2004 was 16 and in the 11th grade, testified that defendant, her father, did "inappropriate things to [her]" from the time she was in the third grade until some point during the sixth or seventh grade. She estimated the overall number of inappropriate events to be "below 15."

Sarah testified that when she was in "[p]robably fourth grade," defendant came into her room, pulled down the covers, removed her underwear, caressed her "private area," and inserted his fingers inside her vagina. Prior to this incident, defendant "would just feel around" her vagina and chest and kiss her. According to Sarah, subsequent to this incident, incidents similar to the one when she was in fourth grade continued to occur until she reached sixth grade.

[1]Pseudonyms will be used throughout this opinion in an effort to guard the privacy of the parties.

To defend against defendant, Sarah wore more clothing to bed, such as a bathing suit covered by a long-sleeve shirt, long pants, and a belt. She recalled one night when defendant came into her bedroom, picked up her covers, and, after seeing her multi-layered clothing, left without touching her or saying anything. Sarah could not recall what grade she was in when this occurred.

While in the fourth grade, Sarah spoke with her younger sister Melissa and learned that defendant had been doing similar things to Melissa as well. Sarah did not, however, tell anyone else until middle school when she told several of her friends. In January 2002, while Sarah was in eighth grade, she told a friend's mother, Mrs. Eubanks, and the police were contacted.

Sarah and Melissa stayed with the Eubanks for several days, and each gave statements reporting that defendant had molested them. While Sarah and Melissa were with the Eubanks, they received a phone call from their sister Kathy that was recorded by Mrs. Eubanks. In that call, Kathy implored them to change their stories because, otherwise, they would not "have a daddy any more [sic]" since he would "be locked up for 30 years." Kathy also told them that "[m]ommy is going to kill herself; and then, we're all going to be out by ourselves, living on the street."

On 4 November 2004, defendant was indicted with two counts of taking indecent liberties with Sarah, the first during the time frame of 1 January and 31 December 2000 and a second during the time frame of 1 January and 31 December 2001. Defendant was also indicted with two counts of taking indecent liberties with Melissa.

At trial, however, Melissa recanted and testified that she had lied when she told police that inappropriate conduct had occurred between her and defendant. Following this testimony, the trial court instructed Melissa on the consequences of perjury. The following exchange occurred:

> THE COURT: . . . . All right. Young lady, I want to tell you something. It is a very serious crime for a witness to lie, under oath. I want you to understand that. You swear to tell the truth, your obligation is to tell the truth, whatever it may be.
>
> And so, before we go any further, I want you to understand that it is a crime; its [sic] perjury; and, a very serious crime when a witness lies, under oath. And, it's punishable by a fine and or imprisonment.
>
> Do you understand that?
>
> [Melissa]: Yes. Can I ask you something?
>
> THE COURT: . . . [Y]es, ma'am.
>
> [Melissa]: How long would the imprisonment be?

The jury found defendant guilty of both indecent liberties counts regarding Sarah, but not guilty as to either count regarding Melissa.

The trial court sentenced defendant to a mitigated range sentence of 10 to 12 months on one count of indecent liberties. With respect to the second count of indecent liberties, the court imposed a concurrent presumptive range sentence of 16 to 20 months imprisonment, which was suspended and defendant was placed on 36 months supervised probation. Defendant timely appealed to this Court.

I

Defendant first argues that he was deprived of his constitutional right to a unanimous jury. Under the North Carolina Constitution, "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const. art. 1, § 24. Although defendant did not argue unanimity to the trial court or object to the verdict sheets, "[v]iolations of constitutional rights, such as the right to a unanimous verdict, . . . are not waived by the failure to object at trial and may be raised for the first time on appeal." *State v. Wiggins*, 161 N.C. App. 583, 592, 589 S.E.2d 402, 409 (2003), *disc. review denied*, 358 N.C. 241, 594 S.E.2d 34 (2004).

Defendant contends on appeal that "if evidence is presented at trial that a defendant might have engaged in more specific episodes of a particular offense than the defendant is charged with, then there is a risk of a nonunanimous verdict." (Emphasis omitted.) In making this argument, defendant relies upon *State v. Lawrence*, 165 N.C. App. 548, 599 S.E.2d 87 (2004), which, subsequent to the filing of defendant's appellate brief, was reversed by our Supreme Court, *State v. Lawrence*, 360 N.C. 368, 627 S.E.2d 609 (2006).

While the State concedes that it presented evidence of a greater number of separate, criminal acts than charges submitted to the jury, the Supreme Court in *Lawrence* held that "a defendant may be unanimously convicted of indecent liberties even if: (1) the jurors considered a higher number of incidents of immoral or indecent behavior than the number of counts charged, and (2) the

indictments lacked specific details to identify the specific incidents." *Id.* at 375, 627 S.E.2d at 613. The Court reached this conclusion because, in the context of indecent liberties, "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." *Id.* at 374, 627 S.E.2d at 612-13.

Here, defendant was convicted of two counts of indecent liberties based upon indictments using nearly identical language to those in *Lawrence*, the jury was instructed on unanimity generally, and the jury received separate verdict sheets for each count. We can conceive of no basis upon which to distinguish *Lawrence*, and, consequently, this assignment of error is overruled. *See State v. Brigman*, __ N.C. App. __, __, __ S.E.2d __, __, 2006 N.C. App. LEXIS 1298, at *31, 2006 WL 1675363, at *10 (June 20, 2006) ("Here, as in *Markeith Lawrence*, the jury was instructed on all issues, including unanimity; [and] separate verdict sheets were submitted to the jury for each charge. Therefore, defendant's argument regarding jury unanimity is overruled." (internal citation and quotation marks omitted)).

II

Defendant next argues that the State's expert witness improperly "vouched for" Sarah's version of events. It is well-established that "the trial court should not admit expert opinion that sexual abuse has *in fact* occurred . . . absent physical evidence supporting a diagnosis of sexual abuse, [as] such

testimony is an impermissible opinion regarding the victim's credibility." *State v. Stancil*, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002).

Here, the State's expert witness, Dr. Preeti Matkins, was a physician in the pediatrics department at Carolinas Medical Center. Dr. Matkins performed a "full physical exam" on Sarah in March 2002, which was "a normal exam." Dr. Matkins then testified that a normal examination was "consistent with the history that [Sarah] gave." She explained that "several scientific studies [have shown that] where there has been known abuse . . . a young woman [Sarah's] age, with the — with the genital maturity that she has, those kind of penetrations may not show abnormalities, outside of possible abrasions or bruising or things like that, which heal very quickly. So that several years later, the exam would appear normal."

This testimony is unlike the expert testimony in *Stancil* where, despite the absence of any physical abnormalities, the State's expert testified "that the child 'was sexually assaulted and [that there was] maltreatment, emotionally, physically and sexually.'" *State v. Stancil*, 146 N.C. App. 234, 238, 552 S.E.2d 212, 214 (2001) (alteration in original), *modified and aff'd per curiam*, 355 N.C. 266, 559 S.E.2d 788 (2002). Contrary to defendant's position, however, Dr. Matkins neither stated that Sarah was in fact abused nor expressed an opinion on her veracity. Instead, Dr. Matkins merely testified that, in Sarah's case, a physical examination showing no abnormalities does not necessarily

mean the alleged abuse did not occur. In other words, while her testimony was relevant to Sarah's credibility — as is much evidence — it did not amount to the expression of an expert opinion as to Sarah's credibility. *See State v. Aguallo*, 322 N.C. 818, 822, 370 S.E.2d 676, 678 (1988) ("Essentially, the doctor testified that the physical trauma revealed by her examination of the child was consistent with the abuse the child alleged had been inflicted upon her. We find this vastly different from an expert stating on examination that the victim is 'believable' or 'is not lying.' The latter scenario suggests that the complete account which allegedly occurred is true, that is, that this defendant vaginally penetrated this child. The actual statement of the doctor merely suggested that the physical examination was consistent with some type of penetration having occurred."). Accordingly, this assignment of error is overruled.

Defendant's brief brings forth and argues only assignments of error 9, 10, and 12, which we have already addressed. The remaining nine assignments of error are deemed abandoned. N.C.R. App. P. 28(b)(6) ("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.").

No error.

Judges McGEE and CALABRIA concur.

Report per Rule 30(e).