NO. COA05-950

NORTH CAROLINA COURT OF APPEALS

Filed: 16 May 2006

STATE OF NORTH CAROLINA

v. Robeson County
Nos. 03 CRS 52537, 52538

LEROY SMITH

Appeal by defendant from judgments entered 25 January 2005 by Judge Robert F. Floyd, Jr. in Robeson County Superior Court. Heard in the Court of Appeals 22 February 2006.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Sonya M. Calloway, for the State.

Brian Michael Aus, for defendant-appellant.

JACKSON, Judge.

On 11 August 2003, Leroy Smith ("defendant") was indicted on one count of taking indecent liberties with a child, specifically H.J., and one count of first-degree sexual offense against H.J. Both offenses were alleged to have occurred on 1 December 2002. On the same day, and in a separate indictment, defendant was indicted on one count of taking indecent liberties with a child, specifically E.J., and one count of first-degree sexual offense against E.J. Again, both offenses were alleged to have occurred on 1 December 2002.

H.J. and E.J., children of defendant, lived with their maternal grandmother and occasionally stayed with defendant at his house on the weekends. One Sunday in late November 2002, following a church service, H.J. told his preacher Jerry Strong ("Strong"), that his father had been touching him. Strong responded to H.J. that he should talk to his grandmother when they got home. At defendant's trial in January 2005, both of the alleged victims testified, along with a social worker, doctor, detective, and the children's grandmother and preacher. H.J., who was nine years old at the time of the trial, following a voir dire, testified that defendant "touched [him] on [his] peter-bug and [his] butt." H.J. testified that his "peter-bug" was used to go to the bathroom with, and that this was the term defendant used when referring to H.J.'s penis. He stated that while staying at defendant's house for a weekend, defendant touched his butt with his hand, and that defendant stuck his finger inside H.J.'s butt. H.J. did not remember exactly when it happened to him, but stated that it happened the weekend that he spent with defendant prior to the Sunday he told his preacher about the incident, and that the touching had occurred "more than ten" times. H.J. stated that he had seen defendant also touch E.J. "in her butt" while they were at defendant's home. Both H.J. and E.J. testified that defendant watched "nasty movies" with naked people while the children were staying with him for the weekend.

E.J., who was ten years old at the time of defendant's trial, testified that defendant "tried to make [her] have sex with him and

he would touch [her] kitty-cat and [her] butt." E.J. stated that the incidents occurred at defendant's house, and that he would stick his finger in her butt. E.J. testified that the purpose of her "kitty-cat" was for going to the bathroom, "and that's all." She stated that defendant touched her "kitty-cat" with his finger, and that he also penetrated her with his finger. E.J. testified that the first time defendant touched her she was six or seven years old, and the last time it occurred was when she was eight or nine years old. She stated that she first told her grandmother that defendant "was touching [her] in the wrong place" when she was seven years old. Similar to H.J.'s testimony, E.J. testified that the last time defendant touched her was when she saw defendant prior to the children telling the preacher about the abuse. E.J. stated that defendant would occasionally joke around with her and say that he was going to "feel of [her] noosy." He also would joke with H.J. by saying that he was going to "feel of [H.J.'s] pee-bug." E.J. testified that defendant touched her every time that she visited him.

H.J. and E.J.'s grandmother, Annie Laura Jones ("Jones"), testified that in late November 2002, the children told their preacher that defendant had been touching them, and then on 15 December 2002, the children told her that defendant had been touching them, and that it had occurred on more than one occasion. Jones stated that she contacted social services on 17 December 2002 and told them what the children had said. She testified that the first time the children told her that defendant was touching them

was in the latter part of November 2002, and that they again told her he had touched them around the first or second week of December. Jones also testified that she heard defendant pick on E.J. by saying that he was "going to feel of [her] nussy."

The detective investigating the alleged abuse testified that defendant admitted to telling the children that he wanted to feel their "nussy" and "peter-bug" but that he was kidding when he made those statements. Dr. Laura Gutman ("Gutman") conducted medical examinations of both children, and testified that E.J. told her that defendant had touched her in her vagina or "cat" with his finger and that it had happened multiple times. E.J. told Gutman that defendant regularly watched movies with naked people having sex while the children visited him. Gutman's examination of E.J. revealed that E.J.'s hymen was consistent with her having had a penetrating injury, and that something had been inserted into her vaginal area, breaking her hymen. She stated that E.J.'s injuries could not have been self-induced, and that E.J. could not have broken her own hymen. Gutman's physical examination of H.J. showed signs consistent with a child who had suffered a penetrative anal trauma. She stated the physical findings from her examination of H.J. were consistent with his verbal description of defendant's actions.

On 25 January 2005, following four days of trial, the jury returned guilty verdicts against defendant on all four counts. Defendant's convictions for one count of first-degree sexual offense against H.J. and one count of taking indecent liberties

with a child, with H.J. being the child, were consolidated for sentencing, and defendant was sentenced to a prison term of 220 to 273 months. Defendant's convictions for one count of first-degree sexual offense against E.J. and one count of taking indecent liberties with a child, with E.J. being the child, were also consolidated for sentencing, and defendant was sentenced to a prison term of 220 to 273 months, to run consecutively with his sentence for crimes against H.J. Defendant now appeals from his convictions.

We begin our analysis by noting that defendant only presents argument for his assignments of error numbered seven through ten. As defendant has failed to present any argument for assignments of error numbered one through six, those assignments of error are deemed abandoned. N.C. R. App. P. 28(b)(6) (2005).

On appeal, defendant's sole argument is that the trial court denied defendant his right to a unanimous jury verdict by failing to instruct the jury that it must unanimously find defendant guilty of a specific criminal transaction before finding him guilty of first-degree sexual offense and taking indecent liberties with a child.

At defendant's trial, the trial court instructed the jury on single charges of first-degree sexual offense and taking indecent liberties with a child for both H.J. and E.J. The trial court did not instruct the jury that it must unanimously find that defendant committed the complained-of acts on or about a specific date. Defendant did not object to the trial court's jury instructions or

verdict sheets, nor did he request an instruction regarding a specific date on which the alleged incidents were to have occurred. In addition, defendant did not argue the issue of lack of unanimity to the trial court. However, we have held that a defendant's right to a unanimous verdict is not waived by a failure to object at trial, thus we may address defendant's argument. *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 that evidence presented at trial tended to show more incidents of offenses than the number with which defendant was charged. Defendant argues that the trial court failed to provide the jury with any guidance that they all had to agree upon the same date the alleged offense took place in order to find defendant guilty, thereby creating a risk of a non-unanimous verdict. Defendant argues that by failing to provide the jury with a specific date for the alleged offenses, some of the jurors may have convicted defendant of crimes other than those alleged in the indictments.

Criminal defendants are entitled to the right to be convicted only by a unanimous jury verdict. N.C. Const. art. I, § 24 ("No person shall be convicted of any crime but by the unanimous verdict of a jury in open court."); N.C. Gen. Stat. § 15A-1237(b) (2005) ("The verdict must be unanimous, and must be returned by the jury in open court."). When a question of jury unanimity is raised, our duty is to "'examine the verdict, the charge, the jury instructions, and the evidence to determine whether any ambiguity

as to unanimity has been removed.'" *State v. Bates*, __ N.C. App. __, __, 616 S.E.2d 280, 287 (2005) (quoting *State v. Petty*, 132 N.C. App. 453, 461-62, 512 S.E.2d 428, 434 (1999)).

At defendant's trial, both H.J. and E.J. testified that defendant had touched them and abused them on multiple occasions. E.J. testified regarding multiple instances of abuse occurring over multiple years, and stated that defendant did these things to her every time that she visited him at his house. She stated that the abuse happened a lot, and that he always did the same things to her. H.J. also testified that the touching and abuse occurred during his weekend visitations with defendant. Both children testified that the abuse occurred the last weekend they stayed with defendant, which was in the early part of December 2002. Both children were able to testify and answer questions about the specific acts that defendant did to them, however neither child provided specific dates on which the abuse took place.

In order to sustain a conviction for first degree sexual offense, the State must prove that defendant engaged in a sexual act "[w]ith a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim." N.C. Gen. Stat. § 14-27.4(a)(1) (2005). A defendant may be found guilty of taking indecent liberties with a child, when the State has proven that a defendant,

> being 16 years of age or more and at least five years older than the child in question, he either:

> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or
>
> (2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

N.C. Gen. Stat. § 14-202.1(a) (2005). We hold the testimony provided by both H.J. and E.J., along with that of their grandmother, preacher, doctor, social worker and others, was sufficient to support convictions on each of the charges of first-degree sexual offense and taking indecent liberties.

Defendant was not subjected to multiple counts on each charge as alleged in his brief, and in fact he was indicted and tried on sole charges for each offense as they pertained to each child. The argument put forth by defendant contends that his multiple charges and the evidence presented at trial were sufficient to create a risk of a non-unanimous jury verdict. We disagree. To support his argument, defendant relies on the cases of *State v. Gary Lee Lawrence, Jr.*, 165 N.C. App. 548, 599 S.E.2d 87 (2004) (*G. Lawrence I*), *rev'd in part*, __ N.C. __, 627 S.E.2d 615 (2006), and *State v. Markeith Rodgers Lawrence*, 170 N.C. App. 200, 612 S.E.2d 678 (2005) (*M. Lawrence I*), *rev'd in part*, __ N.C. __, 627 S.E.2d 609 (2006).

In each of the *Lawrence* cases, this Court reversed the convictions when the defendants were charged with multiple counts of taking indecent liberties with a child or multiple counts of first-degree sexual offense, all against a single victim. Both *G.*

Lawrence I and *M. Lawrence I* involved cases in which the defendants were charged with multiple counts of each sexual offense, and the evidence presented at trial suggested there were more incidents of sexual abuse than were actually charged in the indictments. This Court held that the

> risk of a nonunanimous verdict arises in a multiple count offense case where no instruction is given to the jury that they must agree on each incident represented by each verdict sheet *and* the State presents evidence of a greater number of incidents than there are counts.

M. Lawrence I, 170 N.C. App. at 210, 612 S.E.2d at 685 (emphasis in original); *see G. Lawrence I*, 165 N.C. App. at 556, 599 S.E.2d at 94. Not only do we hold defendant's case is distinguishable from these cases, but our Supreme Court recently has reversed our decisions in both of the *Lawrence* cases, and held that the defendants in the *Lawrence* cases were not deprived of their right to a unanimous verdict. *See State v. Markeith Rodgers Lawrence*, __ N.C. __, 627 S.E.2d 609 (2006) (*M. Lawrence II*); *State v. Gary Lee Lawrence, Jr.*, __ N.C. __, 627 S.E.2d 615 (2006) (*G. Lawrence II*). Our Supreme Court held that "'even if some jurors found that the defendant engaged in one kind of sexual misconduct, while others found that he engaged in another, "the jury as a whole would unanimously find that there occurred sexual conduct within the ambit of 'any immoral, improper, or indecent liberties.'"'" *M. Lawrence II*, __ N.C. at __, 627 S.E.2d at __ (quoting *State v. Lyons*, 330 N.C. 298, 305-06, 412 S.E.2d 308, 313 (1991). The Supreme Court went on to hold 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.*

Therefore, we hold the trial court in defendant's case did not err in failing to instruct the jury regarding a specific date on which the alleged offenses were to have occurred. We also hold defendant's case is not one in which the risk of a non-unanimous jury verdict arose, and defendant was not denied his right to a unanimous verdict. Defendant's assignment of error therefore is overruled.

No error.

Judges ELMORE and STEELMAN concur.

Report per Rule 30 (e).