NO. COA07-458

NORTH CAROLINA COURT OF APPEALS

Filed: 18 December 2007

STATE OF NORTH CAROLINA

v. Vance County
Nos. 05 CRS 051483,
05 CRS 051486-88

SIDNEY E. SMITH

Appeal by defendant from judgments entered 8 November 2006 by Judge Henry W. Hight, Jr. in Vance County Superior Court. Heard in the Court of Appeals 15 October 2007.

Roy Cooper, Attorney General, by Laura E. Crumpler, Assistant Attorney General, for the State.

Glenn Gerding for defendant-appellant.

MARTIN, Chief Judge.

Defendant was charged with one count of first degree rape of a child under thirteen years of age, one count of statutory rape of a thirteen-year-old, two counts of vaginal intercourse with a minor by a person in a parental role, and two counts of indecent liberties with a child. Upon defendant's motion to dismiss, the trial court dismissed the charge of first degree rape and one of the charges of indecent liberties. Defendant was convicted of the remaining charges. Defendant was sentenced to imprisonment for consecutive terms of 288 to 355 months, 29 to 44 months, 29 to 44 months, and 19 to 23 months.

The evidence presented at trial tended to show that T.K., born 5 August 1991, lived with her mother and brothers. Defendant began dating T.K.'s mother in July 2004, shortly after he had been injured in a fight with his brother. On 23 July 2004, T.K.'s mother invited defendant to spend the night at her apartment, and defendant lived in the apartment from then until November 2004. While defendant lived in their residence, he ate dinner with the family, was in charge of the household, would spend time with T.K. every day until her mother left for work, and would walk T.K. to school every day.

During the summer of 2004, there were times when defendant and T.K. were alone in the apartment. One time, T.K. was in her mother's room when defendant entered the room. Defendant told T.K. to take off her clothes, and then he "forced hi[m]self inside of [her]" on her mother's bed. T.K. testified that defendant's "private" went inside her "private parts" and that the incident did not last long because someone started coming up the driveway. T.K. also testified that a couple of weeks later defendant touched her again. She was in her brother's room playing a game and talking on the telephone when defendant came into the room, closed the door, and sat beside her. Defendant took off his shorts, laid on top of her, and pulled her shorts off. T.K. testified that, then, defendant "forced hi[m]self against me a little bit again." T.K. indicated that she was referring to defendant's "private," that it hurt, and that the whole incident lasted about five to ten minutes. When asked if defendant touched T.K. anywhere else on her body

during these incidents, she responded affirmatively and indicated "[h]e would just rub my legs."

The State also introduced evidence through the testimony of expert witness Dr. Karen St. Claire, a board-certified pediatrician who served as Medical Director of the consult team for child abuse at Duke Medical Center and also as Medical Director of the Center for Child and Family Health. Dr. St. Claire examined T.K. in March 2005 after the incidents. Dr. St. Claire testified that, in her opinion, T.K. had been sexually abused based on the history given and the medical findings of a defect in T.K.'s hymen consistent with penetrating trauma.

Defendant first argues that the trial court erred in denying his motion to dismiss the charge of statutory rape of a thirteen-year-old and the charge of vaginal intercourse with a minor by a substitute parent because the State failed to present substantial evidence of the element of vaginal intercourse necessary for the crimes. Our review of a denial of a motion to dismiss is as follows:

> In ruling on a motion to dismiss at the close of evidence made pursuant to G.S. § 15A-1227, a trial court must determine whether there is substantial evidence of each essential element of the offenses charged. If, viewed in the light most favorable to the State, the evidence is such that a jury could reasonably infer that defendant is guilty, the motion must be denied.

State v. Williams, 154 N.C. App. 176, 178, 571 S.E.2d 619, 620-21 (2002) (citation omitted).

The crime of statutory rape of a thirteen-year-old and the crime of vaginal intercourse with a minor by a substitute parent each require, as an element of the crime, vaginal intercourse between defendant and the victim. N.C. Gen. Stat. §§ 14-27.7(a) and 14-27.7A (2005). "'[V]aginal intercourse' in a legal sense means the slightest penetration of the sexual organ of the female by the sexual organ of the male." *State v. Johnson*, 317 N.C. 417, 435, 347 S.E.2d 7, 18 (1986), *superseded by statute on other grounds as stated in State v. Moore*, 335 N.C. 567, 440 S.E.2d 797 (1994).

Defendant contends that the second sexual assault described by T.K. did not constitute substantial evidence of vaginal intercourse. T.K. testified that during the second encounter with defendant, he "forced hi[m]self *against* me a little bit again." (emphasis added). Defendant distinguishes that T.K. never testified that defendant's privates went "inside" her privates, as she did when describing the first incident. Defendant's argument takes T.K.'s testimony out of context. Although T.K. used the word "against" to describe the second encounter, the other evidence of the encounter constituted substantial evidence of the penetration required for vaginal intercourse. T.K. used the word "forced" to describe the encounter and described that the defendant was laying on top of her, "it hurt," and it "lasted about . . . five or ten minutes." This evidence was sufficient for the jury to reasonably infer that the defendant had engaged in vaginal intercourse and was

guilty of the crimes charged; therefore, defendant's assignment of error is overruled.

Defendant also argues that the trial court erred in denying his motion to dismiss the charge of vaginal intercourse with a minor child by a substitute parent because the State failed to present substantial evidence that defendant acted as a substitute parent. The motion to dismiss, with respect to this argument, is reviewed under the same standard as the previous argument. *See Williams*, 154 N.C. App. at 178, 571 S.E.2d at 620-21.

The crime of vaginal intercourse with a minor child by a substitute parent requires that the defendant "assumed the position of a parent in the home of a minor victim." N.C. Gen. Stat. § 14-27.7(a). This Court has held:

> [T]o convict a defendant of violating G.S. § 14-27.7(a), the evidence of the relationship between the defendant and child-victim must provide support for the conclusion that the defendant functioned in a parental role. *Such a parental role will generally include evidence of emotional trust, disciplinary authority, and supervisory responsibility*.

State v. Bailey, 163 N.C. App. 84, 93, 592 S.E.2d 738, 744 (2004) (emphasis added). This Court has also looked for "quasi-parental qualit[ies]," such as "whether defendant was authorized to make disciplinary decisions, assist with homework, treat minor injuries, decide whether the children could leave the apartment, or take them out of the apartment himself," and considered whether defendant functioned as a "*de facto* stepfather," and whether defendant and the victim "had a relationship based on trust that was analogous to that of a parent and child." *Id.* at 94, 592 S.E.2d at 745.

In the present case, T.K. testified that she called defendant her father, her relationship with him was "as my father," and when she went out with her mother and defendant, it was "a family thing." This testimony evidences the type of emotional trust found in a parent-child relationship. T.K. also indicated that, when her mother was not home, defendant was in charge of the household, which tends to support a conclusion that defendant had disciplinary authority and supervisory responsibility. Defendant testified that he took T.K. to school every morning, and T.K. testified that defendant spent time with her every day until her mother went to work. This evidence further suggests defendant's supervisory responsibility in the household. Based on this evidence, the jury could reasonably conclude that defendant functioned in a parental role, and the court did not err in denying defendant's motion to dismiss the charge.

Defendant next argues that the trial court erred in denying his motion to dismiss the charge of indecent liberties with a child for failure to present substantial evidence to show that defendant committed the crime. The trial court submitted the charge of indecent liberties to the jury with respect to defendant's conduct on 1 September 2004. Defendant contends that the evidence presented did not support the charge of indecent liberties on that date. Defendant claims that the only evidence supporting the charge was T.K.'s response when asked whether defendant touched her anywhere else on her body during the time when the other encounters occurred, and T.K. responded: "He would just rub my legs."

Although T.K. did not specify on which date defendant rubbed her legs, T.K.'s testimony was sufficient to meet the burden of substantial evidence, when viewed in the light most favorable to the State, that the jury could reasonably infer that defendant had committed indecent liberties on that date. Therefore, the trial court did not err in denying the motion to dismiss.

Defendant next argues that the trial court erred in submitting verdict sheets to the jury that did not match the indictment and the evidence presented at trial. The indictment charged defendant with crimes of engaging in "vaginal intercourse" with T.K., the evidence presented at trial related to vaginal intercourse with T.K., and the jury was instructed on the charges of "vaginal intercourse," but the verdict sheet submitted to the jury described the crimes as "engaging in a sexual act with a minor." Defendant notes that the term "sexual act" excludes "vaginal intercourse" from its definition. N.C. Gen. Stat. § 14-27.1(4) (2005) ("'Sexual act' . . . does *not* include vaginal intercourse." (emphasis added)). Accordingly, defendant notes that the crimes of which he was convicted were not the crimes for which he was indicted or a lesser included offense thereof. Defendant argues that "an indictment will not support a conviction for a crime all the elements of which crime are not accurately and clearly alleged in the indictment." *State v. Perry*, 291 N.C. 586, 592, 231 S.E.2d 262, 266 (1977). Therefore, defendant argues that the trial court erred in convicting him of crimes involving "engaging in a sexual

act" with a minor where the indictment was for crimes involving "vaginal intercourse" with a minor.

Although it is obvious that the court made a mistake in the language printed on the verdict sheet, such a mistake is not necessarily reversible error. We note that "a verdict is sufficient if it 'can be properly understood by reference to the indictment, evidence and jury instructions.'" *State v. Tucker*, 156 N.C. App. 53, 60, 575 S.E.2d 770, 774 (quoting *State v. Connard*, 81 N.C. App. 327, 336, 344 S.E.2d 568, 574 (1986)), *rev'd on other grounds*, 357 N.C. 633, 588 S.E.2d 853 (2003). Furthermore, this Court has held that unless such an error is fundamental, it will not be considered prejudicial. *State v. Gilbert*, 139 N.C. App. 657, 673-74, 535 S.E.2d 94, 103 (2000).

This Court has decided an issue virtually the same as the one raised by defendant in *Tucker*, 156 N.C. App. at 60-61, 575 S.E.2d at 775, and defendant has not distinguished this case from *Tucker*. The defendant in *Tucker* was indicted for statutory sexual offense of a thirteen-, fourteen-, or fifteen-year-old, and the evidence and jury instructions related to that charge. *Id.* However, the verdict sheet referenced a charge of first degree sexual offense. *Id.* at 60, 575 S.E.2d at 775. This Court held "this was not fundamental error requiring arrest of judgment." *Id.* Likewise, in the present case, the indictment, evidence, and jury instructions contained the proper charge, while the verdict sheet recited a similar but different charge; therefore, we conclude there was no fundamental error requiring arrest of judgment.

Defendant ultimately argues that the trial court erred in admitting, under Rule 702, evidence of Dr. St. Claire's expert opinion that T.K. had been sexually abused. Defendant argues that the State failed to lay a sufficient foundation to admit the testimony and that the testimony improperly constituted an opinion on the truthfulness of T.K.'s testimony rather than an opinion on the significance of the medical evaluation. "[A] trial court's rulings under Rule 702 will not be reversed on appeal absent an abuse of discretion." *State v. Morgan*, 359 N.C. 131, 160, 604 S.E.2d 886, 904 (2004).

Dr. St. Claire testified as follows:

> A. . . . My medical opinion is that she is a victim of sexual abuse.
>
> Q. And what do you base that opinion on?
>
> A. The information that I obtained during the course of her medical evaluation, primarily based on the elements of her evaluation, which were her exam findings with there being a notch – angular notch, or defect in her hymen, and having spoken with the chid and interviewing her.
>
> . . . .
>
> Q. And, in your opinion, was the abuse a penetrating trauma?
>
> A. I believe it was because of the defect that's in the hymen or that little angular notch where the hymen is either stretched beyond its capacity to tolerate the penetration, or was actually a penetrating force to the hymen in that area.
>
> Q. This finding of the notch in the hymen, is that unusual in adolescent or adult women?
>
> A. It's unusual in even sexually active people who are already into puberty, the estrogen

> effect that you have on the hymen makes the hymen thicker, plumper and much more stretchable, so there are certainly a large number of women and adolescents who can be sexually active without tearing or stretching the hymen too much causing the [sic] sort of defects.
>
> In fact, most sexually active teenagers would not even have a tear or defect and when we see that, again, it is a finding that we should not see there and it indicates that there's been trauma to the hymen in that area.
>
> . . . .
>
> Q. And the notch described, or illustrated in State's number 4 is a clear notch. In other words, the hymenal tissue is away, except for at the bottom, is that correct?
>
> A. That's right. And you can actually see the – the edge of the hymen, which is elevated. The hymen is – is several millimeters wide. Then you get to that one area and it just drops off. It's a very clear defect between those two areas.

Dr. St. Claire also testified that she could not tell from her evaluation exactly what, who, or how many contacts caused the trauma.

The trial court admitted this testimony pursuant to Rule 702, which states:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

N.C. Gen. Stat. § 8C-1, Rule 702 (2005). In cases of expert opinion testimony about sexual abuse, our Supreme Court has noted that testimony "based upon the results of the pelvic exam and the history given . . . by the victim" does not meet the requirements

of Rule 702 unless the State lays a foundation sufficient to show that the opinion "was really based upon [the witness's] special expertise, or stated differently, that [the witness] was in a better position than the jury to have an opinion on the subject." *State v. Trent*, 320 N.C. 610, 614, 359 S.E.2d 463, 465-66 (1987). Our Supreme Court has also found expert opinions to be reversible error "when experts have testified that the victim was believable, had no record of lying, and had never been untruthful." *State v. Aguallo*, 322 N.C. 818, 822, 370 S.E.2d 676, 678 (1988). Defendant argues that the State failed to lay a sufficient foundation for Dr. St. Claire's testimony and also that "Dr. St. Claire's opinion was 'in effect' an expression that T.K. was telling the truth."

We note:

> [A]n expert medical witness may render an opinion pursuant to Rule 702 that sexual abuse has in fact occurred if the State establishes a proper foundation, i.e. physical evidence consistent with sexual abuse. However, in the absence of physical evidence to support a diagnosis of sexual abuse, expert testimony that sexual abuse has in fact occurred is not admissible because it is an impermissible opinion regarding the victim's credibility.

State v. Dixon, 150 N.C. App. 46, 52, 563 S.E.2d 594, 598, *aff'd per curiam*, 356 N.C. 428, 571 S.E.2d 584 (2002) (citation omitted). In a case factually similar to the present case, our Supreme Court held that the expert witness's opinion testimony was admissible. *State v. Hammett*, 361 N.C. 92, 96, 637 S.E.2d 518, 521 (2006). In *Hammett*, the expert witness obtained the victim's history and conducted a physical examination which revealed a hymenal notch in a particular location that the expert testified was consistent with

abuse. *Id.* The Court concluded, "[u]nder these facts, . . . the interlocking factors of the victim's history combined with the physical findings constituted a sufficient basis for the expert opinion that sexual abuse had occurred." *Id.* Dr. St. Claire's detailed explanation of her medical findings upon examining T.K. was clearly based on her specialized knowledge and experience and was admitted to assist the jury in understanding the evidence. Therefore, we conclude that the State laid a sufficient foundation for admitting her opinion that T.K. had been sexually abused.

With regard to the argument that Dr. St. Claire's testimony improperly expressed her opinion about the truthfulness of T.K.'s testimony, we are guided by an opinion from our Supreme Court. Where "[t]he statement of the doctor only revealed the consistency of her findings with the presence of vaginal trauma," and "[t]his expert opinion did not comment on the truthfulness of the victim or the guilt or innocence of defendant," the Court held "[t]he questions and answers were properly admitted to assist the jury in understanding the results of the physical examination and their relevancy to the case being tried." *Aguallo*, 322 N.C. at 823, 370 S.E.2d at 678. Similarly, in the present case, Dr. St. Claire did not comment on the truthfulness of T.K.'s testimony and instead revealed the consistency between her medical findings and the history T.K. gave. Accordingly, the trial court did not err in admitting her expert opinion.

No error.

Judges McCULLOUGH and ELMORE concur.

Report per Rule 30(e).