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NO. COA08-183

NORTH CAROLINA COURT OF APPEALS

Filed: 17 February 2009

STATE OF NORTH CAROLINA

v.

TIMOTHY RAY CASEY,  
Defendant.

Randolph County  
Nos. 06 CRS 50128  
06 CRS 50667  
06 CRS 50668

Appeal by defendant from judgments entered 10 August 2007 by Judge V. Bradford Long in Randolph County Superior Court. Heard in the Court of Appeals 21 August 2008.

*Attorney General Roy Cooper, by Assistant Attorney General David Gordon, for the State.*  
*Crumpler Freedman Parker & Witt, by Vincent F. Rabil, for defendant-appellant.*

GEER, Judge.

Defendant Timothy Ray Casey appeals his convictions of one count of statutory sexual offense with a 14-year-old and three counts of taking indecent liberties with a minor. Defendant primarily argues that the trial court erred in allowing two of the State's expert witnesses to vouch for the credibility of the complainant in this case. As the experts' testimony was limited to stating that the complainant displayed characteristics consistent with those of a sexually-abused child, and they did not offer an opinion as to whether sexual abuse had actually occurred, we

conclude that the testimony was properly admitted under *State v. Stancil*, 355 N.C. 266, 559 S.E.2d 788 (2002) (per curiam), and *State v. Grover*, 142 N.C. App. 411, 543 S.E.2d 179, *aff'd per curiam*, 354 N.C. 354, 553 S.E.2d 679 (2001).

#### Facts

On 7 August 2006, four indictments were issued charging defendant with various sexual offenses. In the first indictment (06 CRS 50128), defendant was charged with taking indecent liberties with a minor and statutory sexual offense with a 14 year old, with the offenses allegedly occurring on 29 December 2005. The second indictment (06 CRS 50667) charged defendant with indecent liberties, with the offense allegedly taking place between 25 and 27 December 2005. In the third indictment (06 CRS 50668), defendant was charged with statutory sexual offense of a 13 year old, indecent liberties, and sexual activity by a substitute parent, with the offenses allegedly occurring between 1 and 30 June 2005. The fourth indictment (06 CRS 50669) charged defendant with sexual activity by a substitute parent, indecent liberties, and first degree statutory sexual offense with a child under the age of 13; the offenses were alleged to have occurred between 15 January 2003 and 15 February 2003. Subsequently, in a final indictment (06 CRS 55182), defendant was charged with intimidating a witness on 30 April 2006. Defendant pled not guilty, and the case proceeded to trial.

The State's evidence tended to show the following facts. "Kim," the alleged victim in this case, was born on 12 October

1992, and was 15 years old at the time of trial.<sup>1</sup> Kim's mother was defendant's girlfriend, and they all lived together in Kim's mother's house. Kim testified that beginning when she was five years old, defendant would ask her once or twice a month to suck on his penis, and he would touch her vagina with his tongue. Almost every night after she was five, defendant would tuck her into bed and rub her vagina, breasts, or bottom with his hands.

In October 1998, defendant, Kim, and her mother went on a beach trip. While Kim's mother was out at a yard sale, defendant had Kim perform oral sex on him in the motel room. Kim testified that she did not tell her mother about what defendant had done because she was worried her mother would not believe her.

When Kim was about 10 years old, defendant began digitally penetrating her vagina and rubbing his penis against her vagina. Defendant would ejaculate on his stomach. These acts mostly occurred while Kim's mother was out at meetings or running errands. On several occasions, defendant had Kim perform oral sex on him in his truck when he picked her up from cheerleading practice. On three to five occasions, Kim performed oral sex on defendant at home after school while he watched pornographic movies.

Kim testified that on several nights during June 2005, defendant told Kim's mother he would tuck Kim into bed. Defendant went into Kim's room and rubbed her vagina, breasts, and bottom. When Kim tried to roll away, defendant would touch her somewhere

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<sup>1</sup>The pseudonym "Kim" is used throughout the opinion to protect the minor's privacy and for ease of reading.

else. Defendant also grabbed Kim's hand and had her rub his penis. Kim did not ask defendant to stop because she was afraid he would get her in trouble with her mother.

Kim also testified regarding a specific incident that occurred on 29 December 2005, when she was 14. Kim had asked her mother if Kim's boyfriend could come to the family's New Year's Eve party, but her mother had said "no." Defendant told Kim that he would talk to her mother about letting Kim's boyfriend come over if she would give him a "blow job." The next morning defendant asked Kim's mother to run an errand for him, and while she was gone, defendant had Kim come upstairs to his bedroom. Defendant, already undressed, ordered Kim to take off her clothes and "give him a blow job." Although Kim was wearing a bra, her breasts were out, and defendant rubbed them with his hands.

On 3 January 2006, Kim told her mother that defendant had been "messing" with her, and, on 30 January 2006, Kim was examined by Dr. Kim Brooks, an obstetrician-gynecologist. Dr. Brooks testified that during the examination, Kim told her that defendant had inserted his fingers into her vagina and had rubbed his penis against her vagina, but he had not penetrated her vagina with his penis. Dr. Brooks testified that Kim's physical examination was "normal" and that she could not determine whether Kim had been sexually abused based on her physical examination.

Dr. Chris Sheaffer, a clinical psychologist, testified that he evaluated Kim, interviewed her father and mother, and obtained reports of Kim's prior interviews. He conducted a Rorschach test,

a Clinical Assessment of Behavior with Kim's father, and a Thematic Apperception Test. Dr. Sheaffer testified that his evaluation of Kim indicated that she had had a "fairly intense emotional experience," but that "there was no indication of any acute psychiatric disturbance." Over defendant's objection, Dr. Sheaffer testified that, in his expert opinion, "[Kim] does display characteristics consistent with a child, young adult, adolescent adult who has been sexually abused." Michelle Noble, a licensed counselor who also evaluated Kim, similarly testified - over defendant's objection - that in her opinion, "[Kim] exhibited characteristics of a child of sexual abuse, based on the characteristics that I've been trained to look for and what she exhibited during the [counseling] sessions."

At the close of the State's evidence, defendant moved to dismiss all charges against him. The trial court denied the motion, and defendant presented evidence in his defense. Defendant testified on his own behalf, denying any sexually inappropriate activity with Kim. Defendant asserted that because Kim's mother embarrassed him at their New Year's Eve party, he left the house and did not return. According to defendant, Kim's mother threatened him that she would accuse him of having molested Kim if he did not come back to her, and Kim did as her mother wanted because "she's scared to death of her mother." Defendant also called four witnesses to testify about statements they heard Kim's mother say that supported defendant's contention that the

allegations were baseless and were in retaliation for defendant's leaving.

After presenting his evidence, defendant again moved to dismiss all the charges. At that point, the State voluntarily dismissed the three counts in 06 CRS 500669: sexual activity by a substitute parent, taking indecent liberties with a minor, and first degree statutory sexual offense with a child under the age of 13. The trial court granted the motion to dismiss the charges of statutory sexual offense and sexual activity by a substitute parent in 06 CRS 50668 and the witness intimidation charge. The court denied the motion to dismiss as to the remaining charges, leaving one count of statutory sexual offense and three counts of indecent liberties.

The jury convicted defendant on all four counts. The trial court sentenced defendant to a presumptive-range term of 288 to 355 months imprisonment for the statutory sexual offense conviction. The court then imposed two consecutive, presumptive-range terms of 19 to 23 months each for the two counts of indecent liberties in 06 CRS 50128 and 06 CRS 50668. The court arrested judgment on defendant's third indecent liberties conviction (06 CRS 50667). Defendant timely appealed to this Court.

I

Defendant first argues, with respect to the testimony of Dr. Sheaffer and Ms. Noble, that "[a]lthough neither witness directly opined that [Kim] was 'credible,' their testimony was semantically equivalent to this, and, taken as a whole, was offered for the

purpose of vouching for [Kim]'s credibility." Defendant contends that this testimony violated both *Stancil* and *Grover*.

At trial, Dr. Sheaffer was asked whether Kim exhibited characteristics of a child who had been sexually abused. Dr. Sheaffer replied:

My opinion is that she does display characteristics consistent with a child, young adult, adolescent adult who has been sexually abused. The characteristics that would be germane in this case are first that she describes in a plausible way sexual acts. That she describes those acts in a way that are consistent with other sources of information. That she has a - had an age-inappropriate sexual knowledge. That she did not have what would appear to be obvious alternative reasons for making a disclosure. In other words, disclosing falsely -

Dr. Sheaffer's testimony was cut off at that point by an objection that the trial court sustained. Ms. Noble, after describing characteristics typical of sexually abused children and listing which of those characteristics Kim exhibited, then testified that, in her expert opinion, "[Kim] exhibited characteristics of a child of sexual abuse, based on the characteristics that I've been trained to look for and what she exhibited during the [counseling] sessions."

In *Stancil*, our Supreme Court held that "[i]n a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility." 355 N.C. at 266-67, 559 S.E.2d at 789.

This Court similarly concluded in *Grover*, 142 N.C. App. at 413, 543 S.E.2d at 181 (quoting *State v. Dick*, 126 N.C. App. 312, 315, 485 S.E.2d 88, 90, *disc. review denied*, 346 N.C. 551, 488 S.E.2d 813 (1997)), that "where 'experts found no clinical evidence that would support a diagnosis of sexual abuse, their opinions that sexual abuse had occurred merely attested to the truthfulness of the child witness,' and were inadmissible." In this case, however, neither Dr. Sheaffer nor Ms. Noble testified that Kim was, in fact, sexually abused.<sup>2</sup>

Our Supreme Court has specifically considered and rejected defendant's contention, as stated in his brief, that the experts' "characteristics" testimony, in the absence of physical evidence, "is the same as giving an opinion that [Kim] was in fact sexually abused and resulted in vouching for her credibility as a witness." The Supreme Court stressed in *Stancil* that "an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith." *Stancil*, 355 N.C. at 267, 559 S.E.2d at 789. See also *Grover*, 142 N.C. App. at 419, 543 S.E.2d at 184 ("[W]hile it is impermissible for an expert, in the absence of physical evidence, to testify that a child has been sexually abused, it is permissible for an expert to testify that a child exhibits 'characteristics [consistent with] abused

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<sup>2</sup>For this reason, defendant's reliance on *State v. Delsanto*, 172 N.C. App. 42, 615 S.E.2d 870 (2005), is misplaced. *Delsanto* involved expert testimony that the child had been sexually abused. *Id.* at 47, 615 S.E.2d at 873-74.



children.'" (quoting *State v. Aguallo*, 322 N.C. 818, 821, 370 S.E.2d 676, 677 (1988))).

Defendant, however, points to the requirement in *Stancil*, 355 N.C. at 267, 559 S.E.2d at 789, that the expert testify "upon a proper foundation" and argues that no "proper foundation" can exist without physical evidence of sexual abuse. *Grover*, on the other hand, makes plain that "characteristics" testimony is permissible even "in the absence of physical evidence." 142 N.C. App. at 419, 543 S.E.2d at 184. Defendant's argument would require us to conclude that the Supreme Court in *Stancil*, only a year after its affirmance in *Grover*, intended to overrule *Grover sub silentio*. We believe it is more reasonable to construe *Stancil*'s "proper foundation" language as requiring an expert witness to be qualified to testify about characteristics of sexually-abused children.

In holding that experts could testify upon a proper foundation as to whether a complainant had characteristics consistent with those of sexually-abused children, the *Stancil* Court cited as authority *State v. Hall*, 330 N.C. 808, 412 S.E.2d 883 (1992), and *State v. Kennedy*, 320 N.C. 20, 357 S.E.2d 359 (1987). Both of those cases discussed the qualifications of the expert to express the proffered opinions. See *Hall*, 330 N.C. at 817, 412 S.E.2d at 888 (holding that witnesses qualified as experts "where 'the nature of their jobs and the experience which they possessed made them better qualified than the jury to form an opinion as to the characteristics of abused children.'" (quoting *Aguallo*, 322 N.C. at 821, 370 S.E.2d at 677)); *Kennedy*, 320 N.C. at 31, 357 S.E.2d at

366 (upholding admission of expert testimony as "[i]t was merely a statement of opinion by a trained professional based upon personal knowledge and professional expertise"). We, therefore, hold that the Supreme Court's requirement of a proper foundation addresses the question whether the expert witness possesses the necessary educational and experience qualifications to testify regarding the characteristics of sexually-abused children and whether the complaining witness possessed those characteristics. See also *State v. Ware*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 656 S.E.2d 662, 667 (holding that expert was qualified to testify regarding sexually-abused children based on witness' education, professional training, and experience), *disc. review denied*, \_\_\_ N.C. \_\_\_, 667 S.E.2d 278 (2008).

There is no dispute in this case that both Dr. Sheaffer and Ms. Noble were qualified to testify about the characteristics of sexually-abused children. Both limited their testimony to stating that in their expert opinions, Kim displayed characteristics "consistent" with a child who had been sexually abused, without expressing any opinion as to whether sexual abuse actually had occurred or whether Kim was telling the truth. Accordingly, the trial court did not err in admitting the challenged testimony.

## II

Defendant next argues that the trial court should have granted his motion to dismiss the indecent liberties charges in indictments 06 CRS 50128 and 06 CRS 50667 for insufficient evidence. Defendant also argues as to the indecent liberties charge in 06 CRS 50667

that the indictment fatally varied from the evidence presented at trial and the verdict sheet on that charge.

We first note that the trial court arrested judgment as to the indecent liberties charge in 06 CRS 50667. "[A] motion in arrest of judgment is generally made after verdict to prevent entry of judgment based on a defective indictment or some fatal defect on the face of the record proper." *State v. Pakulski*, 326 N.C. 434, 439, 390 S.E.2d 129, 131 (1990) (quoting *State v. Davis*, 282 N.C. 107, 117, 191 S.E.2d 664, 670 (1972)). As happened here, "[a] court is free to arrest judgment in a proper case on its own motion . . . ." *Id.* The Court held in *Pakulski* that "[w]hen judgment is arrested because of a fatal flaw which appears on the face of the record, such as a substantive error on the indictment, the verdict itself is vacated and the state must seek a new indictment if it elects to proceed again against the defendant." *Id.*, 390 S.E.2d at 132. See also 21 Am. Jur. 2d *Criminal Law* § 735 (2008) ("The granting of a motion in arrest of judgment does not operate as an acquittal, but only places the defendant in the same situation in which he or she was before the prosecution was begun. The defendant has not been in jeopardy, and the state is free to proceed against the defendant, if it so desires, upon a new and sufficient indictment.").

Thus, the effect of the trial court's arresting judgment in this case was *vacatur* of defendant's conviction on that indecent liberties charge. Since there is no final judgment to review on appeal, defendant's assignments of error relating to that charge

are not properly before us. See *State v. Escoto*, 162 N.C. App. 419, 432, 590 S.E.2d 898, 908 ("In this case, no final judgment has been entered as to the convictions for armed robbery; therefore, our Court is unable to address this assignment of error under the circumstances in this case."), *disc. review denied*, 358 N.C. 378, 598 S.E.2d 138 (2004).

As for the indecent liberties charge in 06 CRS 50128, defendant only challenges the sufficiency of the evidence to support that charge. When ruling on a motion to dismiss, "the trial court's inquiry is limited to a determination of 'whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense.'" *State v. Butler*, 356 N.C. 141, 145, 567 S.E.2d 137, 139 (2002) (quoting *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). On review of a denial of a motion to dismiss, this Court must view the evidence in the light most favorable to the State, giving it the benefit of all reasonable inferences. *State v. Scott*, 356 N.C. 591, 596, 573 S.E.2d 866, 869 (2002). Contradictions and discrepancies do not warrant dismissal; they are for the jury to resolve. *Id.*

The elements of taking indecent liberties with a minor are: "(1) the defendant was at least 16 years of age, (2) he was five years older than his victim, (3) he willfully took or attempted to

take an indecent liberty with the victim, (4) the victim was under 16 years of age at the time the alleged act or attempted act occurred, and (5) the action by the defendant was for the purpose of arousing or gratifying sexual desire." *State v. Rhodes*, 321 N.C. 102, 104-05, 361 S.E.2d 578, 580 (1987); N.C. Gen. Stat. § 14-202.1 (2007). Defendant challenges the evidence relating to the third element only.

In the trial court's instructions to the jury, the court stated that the act alleged as the basis for that indecent liberties charge was defendant's "touching [Kim's] breasts" on 29 December 2005. Defendant contends Kim never testified that defendant touched her breasts on that date and, therefore, there was insufficient evidence to support the indecent liberties charge submitted to the jury. Our review of the record indicates, however, that Kim testified with respect to the incident on 29 December 2005 that while Kim was performing oral sex on defendant, defendant rubbed her breasts. As defendant makes no other argument regarding this charge, we hold that the trial court did not err in denying defendant's motion to dismiss this charge.

No error.

Judges STEELMAN and STEPHENS concur.

Report per Rule 30(e).