NO. COA08-428

NORTH CAROLINA COURT OF APPEALS

Filed: 17 February 2009

STATE OF NORTH CAROLINA

v.

Forsyth County
Nos. 06CRS059304-06
07CRS003061-63

GREGORY MICHAEL BUTLER, SR.

Appeal by defendant from judgments entered 8 June 2007 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 19 November 2008.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Elizabeth C. Weese, for the State.

Parish, Cooke & Condlin, by James R. Parish, for defendant-appellant.

HUNTER, Robert C., Judge.

Gregory Michael Butler, Sr. ("defendant") was indicted on 5 February 2007 on eighteen counts of sex offenses against a minor in six separate indictments as follows: (1) 06CRS059304 – two counts of statutory sex offense of a person between the ages of thirteen and fifteen and one count of indecent liberties, allegedly occurring between 1 June 2004 through 8 September 2004; (2) 06CRS059305 – three counts of statutory sex offense of a person between the ages of thirteen and fifteen, allegedly occurring between 28 May 2005 and 12 June 2005; (3) 06CRS059306 – one count

of statutory rape of a person between the ages of thirteen and fifteen and two counts of statutory sex offense of a person between the ages of thirteen and fifteen, allegedly occurring between 1 June 2005 and 8 September 2005; (4) 07CRS003061 – one count of statutory rape of a person between the ages of thirteen and fifteen and two counts of statutory sex offense of a person between the ages of thirteen and fifteen, allegedly occurring between 1 June 2005 and 8 September 2005; (5) 07CRS003062 – one count of indecent liberties and two counts of statutory sex offense of a person between the ages of thirteen and fifteen, allegedly occurring between 1 June 2005 and 8 September 2005; and (6) 07CRS003063 – one count of indecent liberties and two counts of statutory sex offense of a person between the ages of thirteen and fifteen, allegedly occurring between 1 June 2005 and 8 September 2005. In sum, all the offenses allegedly took place between 1 June 2004 and 8 September 2005, while the minor victim ("I.J.") was fourteen or fifteen years old.

The case proceeded to trial on these indictments. At the close of all the evidence, defendant made a motion to dismiss the charges based on insufficiency of the evidence, which was denied. Defendant was convicted by a jury of all counts on 8 June 2007 in the Superior Court of Forsyth County. The court determined that defendant had no prior criminal history and was thus a Record Level I for purposes of sentencing. The court consolidated the convictions into three judgments of class B1 felonies and sentenced defendant to prison for three consecutive sentences of 240 to 297

months. Defendant now appeals. After careful review, we find no error.

Background

The evidence presented at trial tended to show that defendant was the pastor of the church I.J. and her mother attended. In July 2004, when I.J. was fourteen, defendant began counseling I.J. because she was having trouble dealing with her parents' divorce. The counseling took place each Tuesday. I.J. testified that during the fifth counseling session, she and defendant left a restaurant in his car and he asked her to lift up her shirt, which she did. He then put her head in his lap, fondled her breasts, and kissed her. I.J. stated that defendant unbuttoned her pants and digitally penetrated her.

Defendant and I.J. continued to have sexual contact, during which he would digitally penetrate her. I.J. estimated that over the course of their relationship, defendant digitally penetrated her approximately fifty to seventy times. Four or five of those occurrences took place when she was fourteen. I.J. claimed that she and defendant had oral sex multiple times during their relationship. I.J. testified that she and defendant first had vaginal intercourse when she was fifteen years old in a local park, and that they had vaginal intercourse approximately three times in Forsyth County while she was fifteen.[1] During her testimony, I.J.

[1] I.J. testified that she and defendant had sexual intercourse three times in Hickory, North Carolina, but defendant was not charged in connection with those instances in this case.

went into detail regarding the sexual nature of her and defendant's relationship and of the many instances of sexual contact.

I.J. testified that defendant ended the relationship on or about 19 May 2006. She believed he did so because he was interested in a woman who attended the church. I.J. was very depressed and attempted suicide by slitting her wrists. On 25 May 2006, I.J. told a counselor at school about her relationship with defendant. The counselor informed I.J.'s mother who admitted her to the hospital due to fear that I.J. would commit suicide. I.J. was interviewed soon thereafter by law enforcement from Burke County and Forsyth County.

The police spoke with defendant, who denied all allegations. He claimed that I.J. had a crush on him, had attempted to inappropriately touch him at times, and wrote him letters. Defendant provided the letters to the police. Defendant consented to a search of his home, office, and car. Several pairs of underwear and fans were found in defendant's car. A forensic serologist with the State Bureau of Investigation examined the items and found blood on the underwear and on one of the fans. The DNA found on the underwear and the fan matched that of I.J. A warrant for defendant's arrest was issued on 8 August 2006. On 5 February 2007 defendant was indicted on eighteen counts of sexual offenses against a minor. At trial, defendant denied that he had any inappropriate contact with I.J.

Argument

I.

Defendant first argues that the trial court erred by instructing the jury that they could find from the evidence that defendant admitted facts relating to the crimes charged. Defendant did not object to this instruction at trial, therefore he relies on the standard of plain error on appeal. "'[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done . . . ."'" *State v. Cummings*, 352 N.C. 600, 616, 536 S.E.2d 36, 49 (2000) (alterations in original; citations omitted).

In his charge to the jury, the trial judge instructed the members as follows: "If you find from the evidence that the Defendant has admitted a fact relating to the crimes charged in this case, then you should consider all the circumstances under which it was made in determining whether it was a truthful admission and the weight you will give to it."

Defendant contends that this instruction was erroneous because defendant did not make any admissions of guilt at trial, and the instruction could have been taken by the jury as an expression of the judge's opinion that defendant had in fact made an admission of guilt. As support for his argument, defendant cites the case of *State v. Bray*, 37 N.C. App. 43, 245 S.E.2d 190 (1978), where this Court found error in the trial court's instruction: "'There is evidence which tends to show that the defendant confessed that he

committed the crime charged in this case.'" *Id.* at 45, 245 S.E.2d at 191. In *Bray*, defendant testified that he shot the victim in self defense, but the trial court's instruction indicated that defendant had confessed to murder. *Id.* That is not the case here. The instruction in this case essentially says that *if* the jury finds defendant made incriminating admissions, the jury must decide the context and weight of those admissions. The trial judge was not expressing his opinion that defendant made incriminating admissions of fact concerning the crimes charged; rather, he charged the jury with evaluating and weighing the evidence presented.

Furthermore, defendant made statements that the jury could reasonably find incriminating under the circumstances. At trial, defendant denied the allegations, but admitted to spending significant amounts of time with I.J. outside of their counseling sessions. Defendant testified that he sometimes picked I.J. up from school, took her to get her nails done, took her to a park and photographed her, and purchased a phone card for her. He also admitted that on two occasions he and I.J. went to the Icard Inn in Hickory, North Carolina, where I.J. testified they had sexual intercourse. Defendant claimed that these activities were permitted by I.J.'s mother; yet, taken together with I.J.'s testimony, the jury could find his admissions incriminating in that the significant amount of time he spent with I.J. and the nature of the activities, corroborated her classification of their relationship as sexual.

Because the instruction pertained to how the jury was to interpret evidence the members deemed inculpatory, not the opinion of the judge that the evidence was in fact inculpatory, we do not find error, much less plain error, in the instruction.

II.

Next, defendant argues that the trial court erred in failing to dismiss, due to insufficiency of the evidence, one of the two counts of statutory first degree sex offense found in indictment 06CRS059304.

A statutory sex offense of a minor between the ages of thirteen and fifteen is defined in pertinent part as follows:

> A defendant is guilty of a Class B1 felony if the defendant engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is at least six years older than the person, except when the defendant is lawfully married to the person.

N.C. Gen. Stat. § 14-27.7A(a) (2007). Indictment 06CRS059304 alleged that I.J. was fourteen at the time of the two statutory sex offenses, which occurred between 1 June 2004 and 8 September 2004.[2] Defendant claims that I.J. only testified to the occurrence of one statutory sex offense while she was fourteen, the first instance of digital penetration in defendant's car, and therefore his motion to dismiss should have been granted as to one of these charges.

"Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense

[2] I.J.'s birthday is 9 September 1989.

included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "The evidence is to be considered in the light most favorable to the State[.]" *Id.* at 99, 261 S.E.2d at 117.

Defendant's argument is without merit. I.J. testified that during the span of her sexual relationship with defendant, he digitally penetrated her fifty to seventy times. More specifically with regard to this indictment, I.J. testified that defendant digitally penetrated her four or five times while she was fourteen years old. She stated that these offenses took place in a car prior to her turning fifteen, which was when they began having sexual intercourse. I.J. did not give specific dates for these occurrences; however, with regard to prosecution of child sex offenses where the child's testimony is paramount, "'"nonsuit may not be allowed on the ground that the State's evidence fails to fix any definite time when the offense was committed where there is sufficient evidence that the defendant committed each essential act of the offense."'" *State v. Wiggins*, 161 N.C. App. 583, 590, 589 S.E.2d 402, 407-08 (2003) (citations omitted). Though I.J. was seventeen at the time of trial, the incidents occurred while she was fourteen and fifteen years old. She could not be expected to remember the exact dates the sexual offenses occurred.

We find that I.J.'s testimony that defendant committed at least four sexual offenses against her while she was fourteen was sufficient evidence to present both charges of statutory sexual

offense listed in indictment 06CRS059304 to the jury. Moreover, Officer Ron Davis interviewed I.J. in order to narrow down the time frame in which the sexual acts occurred and he testified that I.J. was "fingered and had sexual relations forced upon her by [defendant] four to five times in the church office," before vacation bible school in 2004. I.J. would have been fourteen at that time. The officer's testimony provided additional evidence that the acts alleged in the indictment occurred and it was within the jury's discretion to weigh both the officer's testimony and I.J.'s testimony. Accordingly, we find no error in the denial of the motion to dismiss.

III.

Defendant argues that the trial court also erred in failing to dismiss, due to insufficiency of the evidence, three counts of statutory first degree sex offense found in indictment 06CRS059305. This indictment alleges that I.J. was fifteen at the time of these offenses, which occurred between 28 May 2005 and 12 June 2005.

Pursuant to N.C. Gen. Stat. § 14-27.7A(a), a statutory sex offense is defined as vaginal intercourse *or* a "sexual act." The indictment at issue specifically alleges that defendant engaged in a "sexual act" with I.J., as opposed to vaginal intercourse. Defendant claims that I.J. did not testify regarding any "sexual acts" that fall under N.C. Gen. Stat. § 14-27.1(4) (2007) while she was fifteen. This statute defines a "sexual act" as "cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration,

however slight, by any object into the genital or anal opening of another person's body . . . ." N.C. Gen. Stat. § 14-27.1(4).

In fact, I.J. testified to many acts of digital penetration, fellatio, and cunnilingus that occurred while she was fifteen, which fall under the definition of a "sexual act." I.J. testified that she was digitally penetrated by defendant when she was walking around an outdoor track on "Willard Street," in a church van while parked outside of Wal-Mart, in a carport after church, and once while she was urinating. I.J. did not recall the specific dates of these events, however:

> This Court has previously held that "'the date given in the bill of indictment is not an essential element of the crime charged and the fact that the crime was in fact committed on some other date is not fatal.'" Further, we have recognized a "[j]udicial tolerance of variance between the dates alleged and the dates proved" in cases involving child sexual abuse. "Unless a defendant demonstrates that he was deprived of the opportunity to present an adequate defense due to the temporal variance, the policy of leniency governs."

State v. Brown, 178 N.C. App. 189, 195, 631 S.E.2d 49, 53 (2006) (citations omitted; alteration in original).

At trial, defendant claimed he never had any sexual contact with I.J. whatsoever. Conversely, I.J. detailed many sexual acts that occurred over the span of more than a year. Based on defendant's total denial of the charges, any temporal variance between the indictment and the testimony did not affect his defense. Moreover, I.J.'s testimony regarding the significant number of sexual acts that occurred while she was fifteen was

sufficient evidence such that the motion to dismiss was properly denied.

IV.

Defendant argues that the trial court also erred in failing to dismiss, due to insufficiency of the evidence: (1) one charge of statutory rape and two charges of statutory sexual offense found in indictment 06CRS059306, which occurred between 1 June 2005 and 8 September 2005; (2) three charges of statutory rape found in indictment 07CRS003061, which occurred between 1 June 2005 and 8 September 2005; (3) one charge of indecent liberties with a child and two charges of statutory sexual offense found in indictment 07CRS003062, which occurred between 1 June 2005 and 8 September 2005; and (4) one charge of indecent liberties with a child and two charges of statutory sexual offense found in indictment 07CRS003063, which occurred between 1 June 2005 and 8 September 2005. I.J. was fifteen at the time of these charges.

Statutory rape and statutory sexual offense both fall under N.C. Gen. Stat. § 14-27.7A(a). A defendant has committed a crime under this statute if "the defendant engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is at least six years older than the person, except when the defendant is lawfully married to the person." *Id.*

Pursuant to N.C. Gen. Stat. § 14-202.1(a) (2007):

> (a) A person is guilty of taking indecent liberties with children if, 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.

Again, defendant claims that I.J. described many incidents of sexual activity between her and defendant, but did not list dates or give her age for each account. As stated in the sections above, our courts are lenient with regard to child testimony and do not expect the child to be able to list dates for every sexual encounter. *Wiggins*, 161 N.C. App. at 590, 589 S.E.2d at 407-08; *Brown*, 178 N.C. App. at 195, 631 S.E.2d at 53; *see also State v. Wood*, 311 N.C. 739, 742, 319 S.E.2d 247, 249 (1984) ("in the interests of justice and recognizing that young children cannot be expected to be exact regarding times and dates, a child's uncertainty as to time or date upon which the offense charged was committed goes to the weight rather than the admissibility of the evidence"); *State v. McGriff*, 151 N.C. App. 631, 635, 566 S.E.2d 776, 779 (2002) ("[c]ourts are lenient in child sexual abuse cases where there are differences between the dates alleged in the indictment and those proven at trial").

The majority of the crimes for which defendant was charged occurred when I.J. was fifteen years old. The two began having sexual intercourse and performing acts of fellatio and cunnilingus

when I.J. was fifteen. In fact, I.J. detailed more occurrences of these sexual activities than defendant is actually charged. She claimed that defendant digitally penetrated her fifty to seventy times during their relationship, in addition to sexual intercourse and oral sex. She also claimed that defendant took nude photographs of her, which qualifies as an indecent liberty pursuant to N.C. Gen. Stat. § 14-202.1(a). *See State v. Kistle*, 59 N.C. App. 724, 727, 297 S.E.2d 626, 628 (1982), *disc. review denied*, 307 N.C. 471, 298 S.E.2d 694 (1983) (taking photographs of a nude female child in a sexually suggestive pose was sufficient to constitute the offense of taking indecent liberties with a child, as the applicable statute does not require physical contact with the child).[3]

Given the substance of I.J.'s testimony, despite the lack of dates provided, there was sufficient evidence to present these charges to the jury.

V.

Defendant's final argument is that this Court should arrest judgment on charges two and three in indictment 06CRS059306, because to punish defendant under these charges would violate his constitutional right to be free from double jeopardy under the Fifth Amendment of the United States Constitution and Article I of the Constitution of North Carolina.

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[3] N.C. Gen. Stat. § 14-202.1(a)(1) (1981) was in effect at the time of *Kistle* and mirrors the current statute in pertinent part.

Indictment 06CRS059305 alleges that defendant committed three statutory sex offenses of a person between the ages of thirteen and fifteen occurring between 28 May 2005 to 12 June 2005. Indictment 06CRS059306 alleges that defendant committed two statutory sex offenses of a person between the ages of thirteen and fifteen occurring between 1 June 2005 to 8 September 2005.

Defendant points out that there is an eleven day overlap between the two indictments (from 1 June 2005 to 12 June 2005). Defendant contends that this overlap creates the possibility that he was punished twice for the same offense, if a single offense listed in both indictments occurred during that eleven day overlap. In other words, defendant argues that since the offenses alleged in both indictments are identical, the overlap in dates creates a situation in which the same evidence would support a conviction for both a 06CRS059305 charge and a 06CRS059306 charge. Defendant claims that since there is nothing in the testimony or verdict sheets that specifically ties the particular instances of offensive conduct (statutory sex offense against a person aged thirteen, fourteen, or fifteen) to a count in a particular indictment, there is a substantial likelihood that he was punished twice for the same offense.

However, since defendant did not challenge the indictments at trial, he cannot bring forth this argument on appeal. Our Supreme Court has stated, "a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal." *State v. Hunter*, 305 N.C. 106, 112, 286

S.E.2d 535, 539 (1982); *see also State v. Nobles*, 350 N.C. 483, 495, 515 S.E.2d 885, 893 (1999) (citation omitted; alteration in original) ("'[t]his Court is not required to pass upon a constitutional issue unless it affirmatively appears that the issue was raised and determined in the trial Court'"). Because defendant failed to object to the charges at the trial court level, we need not address defendant's constitutional question on appeal.

For the foregoing reasons, we find no error in the jury instruction, no error in the denial of defendant's motion to dismiss, and we need not address defendant's claim of double jeopardy.

No error.

Judges ELMORE and JACKSON concur.

Report per Rule 30(e).