NO. COA09-106

NORTH CAROLINA COURT OF APPEALS

Filed: 20 October 2009

STATE OF NORTH CAROLINA

v. Buncombe County
No. 07 CRS 60388

JAMES CURTIS OLIVER,
Defendant.

Appeal by defendant from judgment entered 12 June 2008 by Judge James L. Baker Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 31 August 2009.

Attorney General Roy Cooper, by Assistant Attorney General Anita LeVeaux, for the State.

Duncan B. McCormick for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant James Curtis Oliver appeals his conviction of taking indecent liberties with a minor. Defendant primarily contends that the trial court erred in allowing the State, at the close of its evidence, to amend the date of the alleged offense in the indictment, thus frustrating his ability to put on a defense. The evidence indicates, however, that defendant did not attempt to rely on an alibi defense or any other defense in which the precise date of the offense would have been material. As we also find defendant's other arguments unpersuasive, we find no error.

Facts

The State presented evidence at trial tending to establish the following facts: Defendant is the father of J.C. ("John"), who was born on 14 February 1994.[1] John lived with his mother, but would usually stay at defendant's house every other weekend. Sometime in the late summer or fall of 2004, while over at defendant's house, John was taking a shower. Defendant came into the bathroom and told John that he was not washing himself correctly. Defendant then began washing John and "[w]hen he got to [his] private area, he started washing very hard," making John feel "uncomfortable" and "awkward."

Around that same time, defendant came into John's bedroom one night after his wife had gone to bed. Defendant got on John's bed and began rubbing John's leg. Defendant told John, "Don't tell anybody," and put his hand down John's underwear and rubbed John's penis for five to 10 minutes.

Although John initially did not tell anyone what happened because he was scared, he eventually told his mother and grandmother. John's mother then called the Buncombe County Sheriff's Department and a DSS worker came out to John's home. John told the DSS worker "everything" about "the room and the shower . . . ." John later told the DSS worker that "nothing happened" because he was nervous and scared and did not want anything to happen to his father.

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[1]The pseudonym "John" is used throughout this opinion to protect the privacy of the minor and for ease of reading.

John had a child medical evaluation ("CME") performed in July 2005 in order to play football that fall. During the CME, he told the nurse "about what happened with [his] dad[.]" After John again told his grandmother what had happened, John was interviewed by Detective Kevin L. Briggs with the Buncombe County Sheriff's Department. John told Detective Briggs about defendant's "touch[ing] [him] in the shower and then touching [his] penis in the bed[.]"

After John's mother contacted Detective Briggs and he conducted his interview with John, Detective Briggs called defendant, stating that he wanted to talk to defendant about allegations made by his son. Defendant came to the sheriff's office around 10:00 a.m. on 7 August 2007. Detective Briggs told defendant that he was not under arrest and that he was free to leave at any time. When Detective Briggs told defendant about the allegations that he had inappropriately touched John, defendant became upset and walked out of the interview. As defendant was leaving, Detective Briggs offered to arrange for defendant to voluntarily submit to a polygraph test. Later that day, around noon, defendant called Detective Briggs and told him that he wanted to take the polygraph test. Detective Briggs scheduled the polygraph test for later that afternoon at a nearby SBI office.

Before the lie-detector test was ever administered, defendant told the SBI agent and Detective Briggs that "he had made a mistake and that he had indeed touched his son's penis in the shower and done it three or four times . . . ." Defendant told Detective

Briggs that he did it out of "curiosity," because he "wanted to see what it felt like." Defendant also told Detective Briggs that he had been molested as a child. Defendant wrote out and signed a statement that he was "washing [his] son J.C. in the shower . . . and fondled his penis three times in the shower just to see how it felt."

Defendant was later charged with two counts of taking indecent liberties with a child — one for the incident in the shower and one for the incident in the bedroom. Defendant filed several motions prior to trial, including a motion to suppress any statements that were obtained by law enforcement officers while at the SBI office, arguing that they were elicited in violation of his Fifth Amendment rights. After conducting a *voir dire*, the trial court denied the motion. Defendant also filed a motion *in limine* to exclude evidence of defendant's being sexually abused as a child, which was denied. Defendant additionally moved to introduce evidence of John's sexual behavior, asserting that it was admissible under Rule 412 of the Rules of Evidence. At the Rule 412 *in camera* hearing, John testified that he had pulled down his sister's underwear at home, but that he did not touch her. John also stated that he was not charged with any crime and that he went to counseling. At the conclusion of the hearing, the trial court excluded the evidence under Rules 401, 403, and 412.

At the close of the State's evidence, it moved to amend the alleged date of the offense in the indictments, changing it from November 2005 to August 2004 through November 2004. Over

defendant's objection, the trial court granted the motion. The jury acquitted him of the indecent liberties charge relating to the bedroom, but convicted defendant of the charge relating to the shower and found the aggravating factor that defendant had taken advantage of a position of trust or confidence. The trial court sentenced defendant to a presumptive-range term of 14-17 months imprisonment, but suspended the sentence and imposed 60 months of supervised probation, including six months of intensive supervision. Defendant timely appealed to this Court.

I

Defendant first argues that the trial court erred in allowing the State's motion to amend the indecent liberties indictment, changing the date of the offense from November 2005 to August 2004 through November 2004. Defendant contends that the amendment deprived him of a fair opportunity to present a defense.

N.C. Gen. Stat. § 15A-923(e) (2007) prohibits any change in an indictment that would substantially alter the charge set out in the indictment. *State v. Price*, 310 N.C. 596, 598, 313 S.E.2d 556, 558 (1984). "When time is not of the essence of the crime charged, such as first degree rape and taking indecent liberties with children, the State is not required to forecast exact dates and times in its indictments." *State v. Johnson*, 145 N.C. App. 51, 57, 549 S.E.2d 574, 578 (2001). "[I]n child sexual abuse cases our Courts have adopted a policy of leniency with regard to differences in the dates alleged in the indictment and those proven at trial." *State v. Custis*, 162 N.C. App. 715, 717, 591 S.E.2d 895, 897

(2004). The Supreme Court has explained that "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. Wood*, 311 N.C. 739, 742, 319 S.E.2d 247, 249 (1984).

"Even in child sexual abuse cases, however, '[a] variance as to time . . . becomes material and of the essence when it deprives a defendant of an opportunity to adequately present his defense.'" *Custis*, 162 N.C. App. at 717, 591 S.E.2d at 897 (quoting *Price*, 310 N.C. at 599, 313 S.E.2d at 559). When "the defendant relies on the date set forth in the indictment to prepare his defense, and the evidence produced by the State substantially varies to the prejudice of the defendant, defendant's motion to dismiss must be granted." *State v. Stewart*, 353 N.C. 516, 518, 546 S.E.2d 568, 569 (2001). Unless, however, "the defendant demonstrates that he was deprived of his defense because of lack of specificity, th[e] policy of leniency governs." *State v. Everett*, 328 N.C. 72, 75, 399 S.E.2d 305, 306 (1991).

Here, the original indictments alleged that defendant had taken indecent liberties with John "on, about or during November 2005." John testified at trial that on one occasion, defendant came into the bathroom while he was taking a shower, and, telling John that he was not washing himself correctly, began "wash[ing] around [his] private area very much," making John feel "uncomfortable" and "awkward." John also remembered another time

when he was laying in bed and defendant came into his room, put his hand down John's underwear and touched John's penis, telling him: "Don't tell anybody." John stated that he believed the instances occurred when he was "around 11 or 12 years old," when he was "either in fifth or sixth" grade. He thought they occurred while he was "playing football." On re-direct-examination, John ended his testimony by stating that although he could not remember "exactly when it happened, [he] kn[ew] that it did happen . . . ."

According to John's testimony at trial, defendant committed the acts that formed the basis of the two charges in 2005, since John was born on 2 February 1994, and he stated he was 11 or 12 at the time the acts occurred. Later, however, the prosecutor asked John about the CME that occurred in July 2005 prior to that year's football season where John "talked . . . about what happened with [his] dad[.]" When asked, John agreed that since the CME notes show that the evaluation was in July 2005, that date "help[ed] [him] know when this happened with [his] dad[.]" At the close of its evidence, the State moved to "amend the indictment to show the date as being on or about or during August 2004 through November 2004." Although defense counsel objected to the indictment being amended, he noted that "the case law would probably allow it" to be amended. The trial court granted the State's motion to amend.

Significantly, defendant does not argue on appeal that the incidents did not occur — defendant's argument simply "focuse[s] on the inability of the prosecuting witness to come up with any reasonable time frame for a set of events that occurred in a

discreet [sic] period of time." Although defendant asserts in conclusory fashion that "[t]he court's ruling deprived [him] of an opportunity to present the planned defense," the record is devoid of any evidence indicating that defendant attempted to put on an alibi defense or any other defense in which the time of offense would be material. *See State v. Riffe*, 191 N.C. App. 86, 94, 661 S.E.2d 899, 905 (2008) (holding trial court did not error in permitting State to change date of alleged sexual assault of minor in indictment to correspond to evidence presented "[s]ince defendant did not present an alibi defense and time is not an element of the offense"); *State v. McGriff*, 151 N.C. App. 631, 636, 566 S.E.2d 776, 779 (2002) (finding trial court properly allowed amendment of date of statutory rape and indecent liberties offenses where "defendant offered no alibi defense for the dates originally alleged in the indictment, nor for the . . . dates shown by the evidence"); *State v. Campbell*, 133 N.C. App. 531, 536, 515 S.E.2d 732, 736 (concluding amended date of burglary and statutory rape in indictment was not in error as "the record in the present case indicates that there was no evidence of an alibi defense or any other defense wherein time would be material"), *disc. review denied*, 351 N.C. 111, 540 S.E.2d 370 (1999). This argument is, therefore, overruled.

II

Defendant next argues that the trial court erred in admitting evidence that defendant had been molested as a child. Because defendant failed to object to the admission of the evidence at

trial, defendant argues plain error on appeal. Under the plain error standard, the defendant bears the burden of establishing that (1) "a different result probably would have been reached but for the error," or (2) "the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997). "[R]eversal for plain error is only appropriate in the most exceptional cases." *State v. Duke*, 360 N.C. 110, 138, 623 S.E.2d 11, 29 (2005), *cert. denied*, 549 U.S. 855, 166 L. Ed. 2d 96 (2006).

Defendant first argues that the trial court erred in admitting the evidence because it was not relevant to any disputed issue at trial. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.R. Evid. 401. Evidence is "relevant when it reveals a circumstance surrounding one of the parties and is necessary to understand properly their conduct or motives or if it allows the jury to draw a reasonable inference as to a disputed fact." *State v. Gary*, 348 N.C. 510, 520, 501 S.E.2d 57, 64 (1998).

At trial in this case, defendant denied ever inappropriately touching John. In his statement to the police, however, he wrote that he had "fondled [John's] penis three times in the shower *just to see how it felt*." Defendant's statement that he had been molested as a child is relevant to his state of mind or intent to commit the offenses in that it helps explain why defendant wanted

to "see how it felt" to fondle John's penis. As argued by the State at trial, evidence of defendant's past experience provides insight into his curiosity. Thus the evidence of defendant being molested as a child is relevant to the issue of motive and intent to commit the offense — issues put in dispute by defendant's denial.

Defendant also contends that even if the evidence of his molestation is relevant, its probative value is substantially outweighed by the danger of unfair prejudice under Rule 403 of the Rules of Evidence. The decision whether to exclude evidence under Rule 403 is "within the discretion of the trial court and will not be overturned absent an abuse of discretion." *State v. Roache*, 358 N.C. 243, 284, 595 S.E.2d 381, 408 (2004). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

With respect to the evidence relating to defendant being sexually abused as a child, defendant contends that "any probative value was substantially outweighed by the danger of unfair prejudice because the evidence unfairly suggested that [defendant] became a[] molester as a result of his experience." Contrary to defendant's contention, the probative value of the evidence of defendant's being sexually abused is substantial. This evidence bears directly on and helps illuminate defendant's statement in his confession that he fondled John's penis in the shower because he

wanted to "see how it felt." The evidence allows the jury to "understand properly [defendant's] conduct or motives" in this case. *Fleming*, 350 N.C. at 130, 512 S.E.2d at 735.

Under Rule 403, evidence is considered "unfairly prejudicial" when it has "an undue tendency to suggest a decision on an improper basis, usually an emotional one." *Hennis*, 323 N.C. at 283, 372 S.E.2d at 526. "Evidence which is otherwise relevant and competent is not objectionable simply because it tends to discredit or prejudice a defendant in the eyes of the jury." *State v. Forehand*, 17 N.C. App. 287, 289, 194 S.E.2d 157, 158, *cert. denied*, 283 N.C. 107, 194 S.E.2d 635 (1973).

Here, the evidence may well be prejudicial for the reason stated by defendant: it suggests that defendant molested John because he was molested as a child. The probative value of the evidence, however, is not "substantially outweighed" by its danger of unfair prejudice, as required by Rule 403. *See State v. Garcell*, 363 N.C. 10, 34-35, 678 S.E.2d 618, 634 (2009) (holding admission of letter in which defendant wrote to his mother potentially suggesting that defendant believed he deserved death penalty was not "unfairly prejudicial" where letter also included relevant evidence regarding factual details about crime scene).

In support of his argument that the evidence was unfairly prejudicial, defendant cites to *Proffit v. State*, 193 P.3d 228, 232-33 (Wyo. 2008), *cert. denied*, __ U.S. __, 173 L. Ed. 2d 476 (2009), where the Wyoming Supreme Court found plain error in part because the prosecutor repeatedly elicited testimony about the

defendant refusing to take a polygraph test because the defendant was concerned that the "polygraph exam may confuse some of his homosexual behavior as he was molested as a child . . . ." In holding that the reference to the defendant's refusal to take the lie-detector test violated the defendant's constitutional right to remain silent, the *Proffit* Court also noted in passing that "evidence that the [defendant] was molested as a child could have suggested to jurors that he, too, became a molester." 193 P.3d at 233. Beyond the fact that the Wyoming Supreme Court's decision in *Proffit* is not binding on North Carolina's courts, *Morton Buildings, Inc. v. Tolson*, 172 N.C. App. 119, 127, 615 S.E.2d 906, 912 (2005) ("[W]hile decisions from other jurisdictions may be instructive, they are not binding on the courts of this State."), it is distinguishable on the ground that the "prejudicial effect" discussed in *Proffit* resulted from the admission of evidence that was held to be incompetent on constitutional grounds, 193 P.3d at 233. Here, in contrast, there is no constitutional violation; the evidence of defendant's being sexually abused is simply competent, relevant evidence.

Even assuming error, defendant has failed to demonstrate plain error. In light of the evidence presented at trial tending to establish defendant's guilt — John's testimony and defendant's confession — we cannot conclude that a different result would have occurred at trial had the trial court excluded the evidence relating to defendant being molested as a child. *See State v. Lee*, 348 N.C. 474, 485, 501 S.E.2d 334, 341 (1998) (holding that

although trial court erred in admitting evidence of "defendant being abused as a child" under hearsay rules, "error clearly did not constitute plain error").

III

In his final argument on appeal, defendant contends that the trial court should have allowed him to cross-examine John about allegations that John had pulled down his sister's underwear at home. Concluding that the evidence was inadmissible under Rules 401, 403, and 412, the trial court refused to allow defense counsel to question John or the detective about the allegations.

A defendant is entitled to cross-examine adverse witnesses. *State v. Newman*, 308 N.C. 231, 254, 302 S.E.2d 174, 187 (1983). The scope of cross-examination, however, is within the discretion of the trial court, and its rulings will not be disturbed absent a showing of abuse of discretion. *State v. Herring*, 322 N.C. 733, 743, 370 S.E.2d 363, 370 (1988). When cross-examination involves the sexual activity of the complainant, North Carolina's "rape shield law" limits the scope of cross-examination by declaring such examination to be "'irrelevant to any issue in the prosecution' except in four very narrow situations" listed in Rule 412(b) of the Rules of Evidence. *Id.* at 743-44, 370 S.E.2d at 370 (quoting N.C.R. Evid. 412(b)).

In Rule 412(b), relevant evidence is defined as any evidence of sexual behavior that:

> (1) Was between the complainant and the defendant; or

> (2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or
>
> (3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or
>
> (4) Is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

N.C.R. Evid. 412(b)(1)-(4). The rape shield law does not exclude evidence that is otherwise admissible; it is simply a "codification of the 'rule of relevance' as it pertains to issues" relating to the complainant's sexual activity in sex offense cases. *State v. Younger*, 306 N.C. 692, 697, 295 S.E.2d 453, 456 (1982). Although evidence of prior sexual activity may be admissible pursuant to an exception listed in Rule 412(b), "the defendant must show the basis of admissibility, and the trial court must determine the relevance of the proffered evidence." *State v. Jenkins*, 115 N.C. App. 520, 526, 445 S.E.2d 622, 626, *disc. review denied*, 337 N.C. 804, 449 S.E.2d 752 (1994).

Here, defendant neither cites to any specific exception in Rule 412(b) nor argues that the proffered evidence of John pulling down his sister's underwear would fall under any of the exceptions. Defendant instead maintains that "[t]he purpose of offering the evidence was to show that [John] made his allegations when he was

being accused of sexual misconduct." As this Court held in *State v. Dorton*, 172 N.C. App. 759, 766, 617 S.E.2d 97, 102 (first alteration added), *disc. review denied*, 360 N.C. 69, 623 S.E.2d 775 (2005), "'simply want[ing] to attack [the victim's] credibility as a witness'" does not "bring the sought testimony within any of the four exceptions to the Rape Shield Statute . . . ." Similarly, this Court in *State v. Trogden*, 135 N.C. App. 85, 89, 519 S.E.2d 64, 66, *disc. review denied*, 351 N.C. 190, 541 S.E.2d 725 (1999), held that the trial court properly refused under Rule 412 to permit the defendant in that case to introduce evidence that the minor complainant was seen performing sexual acts with a sibling prior to the incident involving the defendant that resulted in the charges. *See also State v. Degree*, 322 N.C. 302, 306, 367 S.E.2d 679, 682 (1988) (upholding trial court's denial of defendant's request to cross-examine victim about her sexual history where trial court "'might allow'" impeachment under Rule 412 through questioning about prior inconsistent statements but did not allow defendant to "embark upon a fishing expedition" for "purpose of casting doubt on [victim's] credibility"). Without any specific argument as to how the proffered evidence is relevant under any exception in Rule 412(b), defendant has failed to establish that the trial court erred in excluding the evidence.

Defendant, moreover, makes absolutely no argument that — assuming error — the exclusion of this evidence was prejudicial. *Trogden*, 135 N.C. App. at 89, 519 S.E.2d at 66 (holding that in context of Rule 412 "[i]t is not sufficient for the defendant to

merely allege error[;] [defendant] must show that absent the trial court's allegedly erroneous exclusion of evidence, a different result would have obtained"). In addition to John's testimony, defendant's confession that he touched John in the shower was admitted at trial and defendant does not challenge its admission on appeal. Thus, "a determination by the trial court to admit evidence of [John]'s past sexual behavior would not have produced a different outcome and there was no reversible error." *Id.* at 89, 519 S.E.2d at 66.

No Error.

Chief Judge MARTIN and Judge BRYANT concur.

Report per Rule 30(e).