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NO. COA 09-1262

NORTH CAROLINA COURT OF APPEALS

Filed: 6 July 2010

STATE OF NORTH CAROLINA

v.

Graham County  
No. 08 CRS 322

WILLIAM CARL CRISP

Appeal by defendant from judgment entered 23 January 2009 by Judge James U. Downs in Graham County Superior Court. Heard in the Court of Appeals 21 June 2010.

*Attorney General Roy Cooper, by Assistant Attorney General Jill A. Bryan, for the State.*

*Robert W. Ewing for defendant.*

ERVIN, Judge.

Defendant William Carl Crisp was convicted of one count of statutory rape of a victim aged 13, 14, or 15 in violation of N.C. Gen. Stat. § 14-27.7A(a). Based upon the jury's verdict, the trial court sentenced defendant to a term of 202 to 252 months imprisonment in custody of the North Carolina Department of Correction. Defendant noted an appeal to this Court from the trial court's judgment.

"Sandy"<sup>1</sup>, a minor child, testified that defendant engaged in sexual relations with her on a number of occasions when she was fourteen and fifteen years old. According to Sandy, she lived with both her mother and father at different times following her parents' separation, which occurred when she was about twelve. Sandy first met defendant at her mother's house when she was thirteen years old. Sandy stated that defendant was about forty years old.

Sandy testified that she used drugs with defendant on her fourteenth birthday at her mother's house. The first occasion when defendant and Sandy had sex occurred in defendant's truck, and the second time occurred at a fishing hole. When Sandy moved into her father's house in the spring of 2007, defendant moved in with Sandy and slept with her in her bedroom. According to Sandy, she had sex with defendant anywhere from ten to fifteen times after he moved into her father's house. Sandy had sexual relations with defendant for the last time at approximately 4:00 p.m. on 4 July 2007.

Sandy was interviewed by Investigator Joseph Jones of the Graham County Sheriff's Department on 28 June 2007. Investigator Jones interviewed Sandy at the request of Sandy's mother, who had learned of Sandy's "relationship" with defendant and brought this situation to the attention of law enforcement. Sandy stated that she was sleeping with defendant and using drugs with him. After his interview with Sandy, Investigator Jones notified the Graham

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<sup>1</sup> We use the pseudonym "Sandy" throughout to protect the identity of the juvenile and for ease of reading.

County Department of Social Services about defendant's involvement with Sandy. Sandy's mother was told that she could not allow Sandy to live with her father. Even so, Sandy returned to her father's residence and stayed there until she was removed from the house by law enforcement officers on 5 July 2007 following an incident where Sandy's mother shot out a back window in Sandy's father's house.

After Sandy's removal from her father's residence, she was taken to Murphy Medical Center, where she was seen by Courtney Maney, a Sexual Assault Nurse Examiner, who examined Sandy and collected the evidence normally included in a rape kit from her. Zachary Kallenbach, an expert in DNA analysis, analyzed DNA samples developed from various items of evidence contained in Sandy's rape kit and compared those samples to DNA taken from defendant. According to Mr. Kallenbach, DNA that was consistent with or matched defendant's was present in sperm found on various items of evidence developed at the time that Ms. Maney collected evidence from Sandy.

On appeal, defendant initially argues that the trial court erred by denying his motion to dismiss the charge of statutory rape. We disagree.

In determining whether to grant or deny a motion to dismiss predicated on evidentiary insufficiency, the trial court must decide "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. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996). "Substantial evidence is such relevant

evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Holden*, 321 N.C. 125, 147, 362 S.E.2d 513, 528 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). The trial court has the responsibility to "examine the evidence in the light most advantageous to the State, drawing all reasonable inferences from the evidence in favor of the State's case." *State v. Hyatt*, 355 N.C. 642, 665, 566 S.E.2d 61, 76 (2002), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823 (2003). In so doing, the trial court's only concern is the sufficiency of the evidence to get the case to the jury, and not the weight of the evidence. *State v. McNeil*, 280 N.C. 159, 162, 185 S.E.2d 156, 157 (1971).

To obtain a conviction for statutory rape of a 13, 14, or 15 year old victim, the State must show that: (1) the defendant engaged in vaginal intercourse or a sexual act, (2) the victim was 13, 14 or 15 years old at the time of the sexual act, (3) the defendant was at least six years older than the victim and (4) the defendant was not lawfully married to the victim at the time. N.C. Gen. Stat. § 14-27.7A(a). Here, Sandy testified that she had a sexual relationship with defendant over the course of several months. She stated that she was fourteen years old when she and defendant began having sexual intercourse and that their relationship continued until 4 July 2007, when she was fifteen years old. In addition, the record contains evidence that defendant was approximately forty years of age and was not married to Sandy. Finally, the predominant DNA profile on Sandy's panties matched defendant's DNA profile and defendant could not be excluded

as the source of the DNA evidence found on Sandy's panty liner. According to the testimony of Mr. Kallenbach, it was "scientifically unreasonable to expect that [the DNA] could have come from anyone other than the suspect, William Carl Crisp, unless this individual has an identical sibling."

According to defendant, the trial court erred in failing to dismiss the charge that he committed statutory rape on 5 July 2007 because there was no evidence that defendant had sex with Sandy on that date. As we will discuss in more detail below, "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." *State v. Norris*, 101 N.C. App. 144, 151, 398 S.E.2d 652, 656 (1990) (citing *State v. Whittemore*, 255 N.C. 583, 592, 122 S.E.2d 396, 403 (1961)), *disc. review denied*, 328 N.C. 335, 402 S.E.2d 843 (1991). Since the State presented substantial evidence of each and every essential element of statutory rape and of defendant's identity as the perpetrator and since nothing about any defense offered by defendant served to make time of the essence in this case, *State v. Custis*, 162 N.C. App. 715, 717-18, 591 S.E.2d 895, 897-98 (2004), the trial court properly denied the defendant's motion to dismiss the charge of statutory rape.

Secondly, defendant argues that his statutory rape conviction should be vacated because there was a variance between the offense date alleged in the indictment and the evidence introduced at trial. Once again, we find defendant's argument unpersuasive.

According to N.C. Gen. Stat. § 15A-924(a)(4), an indictment must allege the date or the period of time during which the offense was committed. As a general proposition, "it is well established 'that variance between allegation and proof as to time is not material where no statute of limitations is involved.'" *State v. Burton*, 114 N.C. App. 610, 612, 442 S.E.2d 384, 385 (1994) (quotations and citations omitted). However, this Court has held that:

Even in child sexual abuse cases . . . variance as to time . . . becomes material and of the essence when it deprives a defendant of an opportunity to adequately present his defense . . . . The purpose of the rule as to variance is to avoid surprise, and the discrepancy must not be used to ensnare the defendant or to deprive him of an opportunity to present his defense . . . . Time variances do not always prejudice a defendant so as to require dismissal, even when an alibi is involved. Thus, a defendant suffers no prejudice when the allegations and proof substantially correspond; when [a] defendant presents alibi evidence relating to neither the date charged nor the date shown by the State's evidence; or when a defendant presents an alibi defense for both dates. However, when the defendant relies on the date set forth in the indictment and the evidence set forth by the State substantially varies to the prejudice of [the] defendant, the interests of justice and fair play require that [the] defendant's motion for dismissal be granted.

*State v. Custis*, 162 N.C. App. at 717-18, 591 S.E.2d at 897-98 (internal quotations and citations omitted); see also *State v. Griffin*, 319 N.C. 429, 436, 355 S.E.2d 474, 478-79 (1987) (stating that "[t]his Court has held that the State may prove that the crime charged was in fact committed on some date other than that alleged in the indictment" and that "[w]e have repeatedly recognized this

allowance in cases involving offenses committed against young children" so long as "such license [is] not . . . used to ensnare a defendant and deprive him of the opportunity to adequately defend himself" (citations and quotations omitted)). As a result, in the absence of evidence that defendant relied on the 5 July 2007 date to his detriment in conducting his defense to the statutory rape charge for which he was convicted, any variance between the date alleged in the indictment and the proof presented at trial would not be fatal.

In this case, the jury found defendant guilty of only one of the eleven counts of statutory rape with which he had been charged. The indictment charging defendant with the offense for which he was convicted alleges that:

The jurors for the State upon their oath present that on or about the date of offense shown [5 July 2007] and in the county named above the defendant named above unlawfully, willfully and feloniously did engage in vaginal intercourse with [Sandy], a person of the age of 15 years. At the time of the offense, the defendant was at least six years older than the victim and was not lawfully married to the victim.

In its instructions to the jury, the trial court (after an initial indication to the contrary), informed the jury that it could convict defendant on this charge if it found that he committed the necessary acts "on or about" 5 July 2007. Although we agree with defendant that the State's evidence tended to show that defendant engaged in sexual intercourse with the victim on numerous occasions, that the last act of sexual intercourse between defendant and the victim occurred on 4 July 2007, and that there

was no evidence that defendant engaged in sexual intercourse with the victim on 5 July 2007, the record also indicates that defendant did not mount any defense at trial beyond arguing that the State had failed to meet its burden of proving defendant's guilt beyond a reasonable doubt. Since the State presented evidence that defendant engaged in sexual intercourse with the victim on 4 July 2007 and since defendant did not assert an alibi or any other defense that hinged on the fact that the State had alleged that the crime charged occurred on 5 July 2007, defendant's defense was not adversely affected by the one day difference between the date of offense alleged in the indictment and the date of offense proved in the State's evidence. As a result, we hold that there was no fatal variance between the indictment and the evidence received at trial in this case.

Finally, defendant argues that the trial court abused its discretion by allowing the State's motion to join the eleven counts of statutory rape with which defendant was charged for trial. In essence, defendant contends he could not receive a fair trial as a result of the consolidation of these eleven charges for trial. Once again, we disagree.

"Two or more offenses may be joined in one pleading or for trial when the offenses . . . are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." N.C. Gen. Stat. § 15A-926(a). "Motions to join for trial offenses which have the necessary transactional connection under [N.C. Gen. Stat.



§] 15A-926 are addressed to the discretion of the trial court and, absent a showing of abuse of discretion, its ruling will not be disturbed on appeal." *State v. Avery*, 302 N.C. 517, 524, 276 S.E.2d 699, 704 (1981). "Our courts have previously held in various circumstances that it was not error for the trial court to consolidate multiple sexual offense charges against a defendant where such offenses were transactionally connected." *State v. Beckham*, 145 N.C. App. 119, 126, 550 S.E.2d 231, 236-37 (2001). "Moreover, where trials involve child witnesses testifying about sexual abuse, public policy favors consolidation of cases because it avoids the necessity of having the child testify more than once." *State v. Bruce*, 90 N.C. App. 547, 552, 369 S.E.2d 95, 99, *disc. review denied*, 323 N.C. 367, 373 S.E.2d 549 (1988). Generally speaking, "[a] defendant is not prejudiced by the joinder of two crimes unless the charges are so separate in time and place and so distinct in circumstances as to render the consolidation unjust and prejudicial to defendant." *State v. Howie*, 116 N.C. App. 609, 615, 448 S.E.2d 867, 871 (1994) (citations omitted).

In this case, the charges against defendant all stemmed from a sexual relationship between defendant and a minor child that took place over a period of approximately five months when she was fourteen and fifteen years old. Defendant does not argue that the charges which the trial court allowed to be joined for trial lacked the necessary transactional connection. Instead, defendant argues that the joinder of these eleven charges impaired his ability to present an adequate defense in light of the voluminous number of

charges that were joined for trial and the absence of specific evidence relating to the times and dates on which the alleged acts of sexual intercourse occurred. More specifically, defendant argues that his ability to mount an adequate defense was impaired because "there was no way for him to determine the incident(s) that would possibly lead to a conviction since *the evidence* was not specific to many of the alleged rapes." (emphasis added).

The extent to which the State's evidence was sufficiently specific to support a conviction for the offenses with which defendant had been charged is not relevant to the joinder issue. Instead, the specificity issue relates to the sufficiency of the evidence to support a conviction, which is an entirely different matter. Defendant has not established that the mere fact that all eleven of these charges were joined for trial in any way prejudiced his defense. In fact, the jury's decision to acquit defendant of ten of the eleven charges which had been brought against him strongly suggests that the jury was able to make an independent decision relating to the merits of each charge. Therefore, we hold that the trial court did not abuse its discretion by allowing the State's motion to join all of the charges against defendant for trial.

Thus, for the reasons set forth above, we conclude that none of the arguments that defendant has advanced on appeal have merit. As a result, we conclude that defendant received a fair trial that was free from prejudicial error and that he is not entitled to any relief from his conviction on appeal.

No error.

Judges STEPHENS and BEASLEY concur.

Report per Rule 30(e).