NO. COA10-1

NORTH CAROLINA COURT OF APPEALS

Filed: 6 July 2010

STATE OF NORTH CAROLINA

v. Guilford County
No. 07 CRS 104653

ROGER LEN PIERCE,
Defendant.

Appeal by defendant from judgment entered 12 June 2009 by Judge Richard W. Stone in Guilford County Superior Court. Heard in the Court of Appeals 25 May 2010.

Attorney General Roy Cooper, by Assistant Attorney General Brenda Menard, for the State.

Carol Ann Bauer for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant Roger Len Pierce appeals from his conviction for taking indecent liberties with a minor, arguing that the trial court erred in denying his motion to dismiss the charge for insufficient evidence that the alleged incident occurred during the period specified in the indictment. We conclude, however, that the State presented sufficient evidence that the incident took place during the alleged time frame. Consequently, the trial court did not err in submitting the charge to the jury.

Facts

The State's evidence tended to establish the following facts at trial: Brandi Spencer (now Alvarez) was 14 years old and living with her adoptive parents when her sister Sheila Spencer married defendant on 15 March 1995. After school ended for the summer, Brandi visited her sister and defendant for three or four days. During her visit, Brandi slept in the same bed as her sister and defendant, with her sister sleeping in between defendant and Brandi. During the last night of the visit, Brandi woke up to a "sharp pain" in her vagina and saw that defendant had inserted his fingers into her vagina. Pretending to still be asleep, Brandi turned over and defendant took his hand away. Brandi got up and went to the bathroom, where she noticed that she was bleeding. She took a shower and, after getting dressed, Brandi's sister and defendant drove her back to her parents' house.

Within a week of the incident, Brandi told her older sister Ravon Spencer that defendant "molested" her, making her bleed. They decided to tell their pastor, Reverend Jerry W. Walker, about the incident after the next Wednesday evening service. After the church service, Brandi and Ravon talked with Rev. Walker and his wife and told them what had happened. Rev. Walker and his wife talked with Brandi and her parents about the incident and they decided not to report the incident to the police or tell Sheila about it.

Brandi's sister Stephanie Spencer (now Quick) was married in December 1995. In the late spring of 1996, Stephanie, who lived at the beach, picked up Brandi and Ravon from their parents' house to

stay with her and her husband for the weekend. While driving to the beach, Brandi told Stephanie that defendant had "stuck his fingers in her." A couple of months later, Stephanie told Sheila, who was six months pregnant at the time, that defendant had molested Brandi. When Sheila asked defendant about the incident, he was evasive and refused to give her a "straight answer." Roughly a year and half later, however, Brandi confronted defendant and defendant told Sheila that he had molested Brandi.

Sometime in 2007, defendant called Brandi and said: "'I just want to make sure you don't hate me.'" He also "aplogize[d] for anything [he] ever put [her] through or caused to happen to [her]." Brandi told defendant that she was busy and asked if she could call him back. She then went out and purchased a recording device, called defendant back, and recorded their conversation. During the conversation defendant said that he had asked himself "how it could [have] happen[ed]" and that he had "tried to block it out." Brandi took the recording to the Greensboro Police Department in June 2007.

On 7 January 2008, defendant was charged with taking indecent liberties with a minor, with the alleged offense occurring "[b]etween 6/1/95 and 8/1/95." At the close of the State's evidence, defendant moved to dismiss the charge for insufficient evidence. That motion was denied. Defendant, his mother, and his aunt then testified that defendant was not in the State of North Carolina between 19 May 1995 and 26 August 1995. They testified that defendant left on 19 May 1995 to attend training in

Chattanooga, Tennessee to become a long-haul trucker and that after his training ended he drove around the West until he returned for a family birthday party on 26 August 1995. Defendant also called several witnesses who testified to defendant's good character. At the close of all the evidence, defendant renewed his motion to dismiss the charge and, again, the motion was denied. The jury convicted defendant of taking indecent liberties with a minor between 1 June 1995 and 1 August 1995, and the trial court sentenced defendant to a presumptive-range term of 16 to 20 months imprisonment. Defendant gave notice of appeal in open court.

Discussion

Defendant's sole argument on appeal is that the trial court erred in denying his motion to dismiss the indecent liberties charge for insufficient evidence. The trial court properly denies the defendant's motion to dismiss "[i]f there is substantial evidence — whether direct, circumstantial, or both — to support a finding that the offense charged has been committed and that the defendant committed it . . . ." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988). Substantial evidence is that amount of relevant evidence that "a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "In ruling on a motion to dismiss, the trial court is required to view the evidence in the light most favorable to the State, making all reasonable inferences from the evidence in favor of the State." *State v. Kemmerlin*, 356 N.C. 446, 473, 573 S.E.2d 870, 889 (2002). Contradictions and

discrepancies in the evidence are for the jury to resolve and do not warrant dismissal. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

Defendant was indicted for taking indecent liberties with a minor in violation of N.C. Gen. Stat. § 14-202.1 (2009). On appeal, defendant argues that dismissal was warranted due to the lack of evidence that he committed the offense during the period specified in the indictment: between 1 June 1995 and 1 August 1995. Although "an indictment must include a designated date or period within which the offense occurred[,]" *State v. Everett*, 328 N.C. 72, 75, 399 S.E.2d 305, 306 (1991), an "[e]rror as to a date or its omission is not ground for dismissal of the charges or for reversal of a conviction if time was not of the essence with respect to the charge and the error or omission did not mislead the defendant to his prejudice[,]" N.C. Gen. Stat. § 15A-924(a)(4) (2009); N.C. Gen. Stat. § 15-155 (2009).

Our Supreme Court has emphasized, however, that "[t]his general rule, which is intended to prevent 'a defendant who does not rely on time as a defense from using a discrepancy between the time named in the bill and the time shown by the evidence for the State, cannot be used to ensnare a defendant and thereby deprive him of an opportunity to adequately present his defense.'" *State v. Stewart*, 353 N.C. 516, 518, 546 S.E.2d 568, 569 (2001) (quoting *State v. Whittemore*, 255 N.C. 583, 592, 122 S.E.2d 396, 403 (1961)).

Our courts have also adopted a policy of leniency in sexual abuse cases involving children: "[I]n 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). This policy has been applied in cases involving older children as well. *See State v. Hardy*, 104 N.C. App. 226, 234, 409 S.E.2d 96, 100 (1991) (allowing leniency in case where victim was 15 years old). Thus, "[u]nless the defendant demonstrates that he was deprived of his defense because of lack of specificity, this policy of leniency governs[,]" and "'[i]t is sufficient for conviction that the jury is satisfied *upon the whole evidence* that each element of the crime has been proved beyond a reasonable doubt.'" *Everett*, 328 N.C. at 75, 399 S.E.2d at 306 (quoting *State v. May*, 292 N.C. 644, 655, 235 S.E.2d 178, 185, *cert. denied*, 434 U.S. 928, 54 L. Ed. 2d 288 (1977)); *accord Wood*, 311 N.C. at 742, 319 S.E.2d at 249 ("Nonsuit may not be allowed on the ground that the State's evidence fails to fix any definite time for the offense where there is sufficient evidence that defendant committed each essential act of the offense.").

Even in child sex abuse cases, however, where "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, [the] defendant's motion to dismiss must be granted." *Stewart*, 353 N.C. at 518, 546 S.E.2d

at 569. Defendant contends that he relied on the period alleged in the indictment — 1 June 1995 to 1 August 1995 — in preparing his alibi defense, which tended to show that defendant could not have had any contact with Brandi from 19 May to 26 August 1995, and thus the State was required to present substantial evidence that the offense occurred within the time frame alleged in the indictment. Because, defendant argues, the State's evidence expanded the time frame of the alleged offense to sometime during the "summer of 1995," he was prejudiced by the discrepancy in presenting his alibi defense.

Contrary to defendant's argument, he "was not ensnared or deprived of the opportunity to present his alibi defense" in this case. *State v. Sills*, 311 N.C. 370, 376, 317 S.E.2d 379, 383 (1984). Here, the indictment alleged that defendant took indecent liberties with Brandi between 1 June 1995 and 1 August 1995. Brandi testified at trial that the incident occurred "in the summer of 1995[.]" Brandi explained that the incident occurred while she was visiting her sister and defendant after their marriage in March 1995 and that she was "out of school for the summer." Rev. Walker also testified that Brandi spoke to him after a church service and told him that defendant had "do[ne] things to her" during a visit to her sister's and defendant's apartment. Rev. Walker indicated that the discussion with Brandi occurred in June 1995. Brandi's sisters also testified at trial that the incident occurred in the summer of 1995.

This evidence is sufficient to permit the jury to reasonably conclude that defendant committed the offense during the period alleged in the indictment — particularly Brandi's testimony that the incident occurred *after* the end of the school year and Rev. Walker's testimony that he talked with Brandi about the incident sometime in June 1995, *before* the end of the period alleged in the indictment. *See id.* at 373-77, 317 S.E.2d at 381-83 (holding that "[t]he defendant in this case was not ensnared or deprived of the opportunity to present his alibi defense" where the indictment alleged that the rape occurred "on or about March 15, 1983," the State's evidence tended to show that the rape occurred on 14 March 1983, and defendant's alibi evidence tended to show that he "had no access to the victim on that day or for a considerable number of days before and after that day"). Once the trial court determined that the State had presented substantial evidence that defendant committed the offense during the period alleged in the indictment, it was for the jury to decide whether to believe defendant's alibi defense. *See State v. Jeffreys*, 192 N.C. 318, 321, 135 S.E. 32, 34 (1926) ("The alibi of the defendant was strong and supported by witnesses of good character, and, upon the evidence offered in his behalf, if believed, he was not guilty. But the weight of the evidence is for the jury, and not for the court."); *State v. Puckett*, 46 N.C. App. 719, 724, 266 S.E.2d 48, 51 ("Despite the fact that defendant presented unimpeachable alibi witnesses, which if believed, would have precluded a conviction, we must conclude

that the evidence was sufficient to go to the jury."), *appeal dismissed*, 300 N.C. 561, 270 S.E.2d 115 (1980).

The trial court, moreover, properly instructed the jury regarding defendant's alibi and that the State was required to prove beyond a reasonable doubt that defendant committed the offense "between June 1, 1995 and August 1, 1995." *See Wood*, 311 N.C. at 742-43, 319 S.E.2d at 249 (holding that "defendant's alibi defense was [not] affected by the State's inability to prove conclusively that the offense occurred on 18 April" where, "[f]ollowing the presentation of evidence, the trial judge ruled and later instructed the jury that in light of the defendant's evidence of an alibi, the State would be held to prove that the offense occurred on or about 18 April").

As the Supreme Court in *Wood* reasoned:

> Having been given the benefit of this instruction and an opportunity to present alibi evidence for 18 April, which evidence the jury chose to disbelieve, defendant appears to be arguing that these circumstances now require conclusive proof that the offense occurred on 18 April, proof not normally necessary and not normally possible where the victim is a child. We reject this argument. To force the State to admit of a date certain in order to accommodate defendant's alibi evidence, and then by convoluted reasoning to suggest that failure to prove the offense occurred on that specific date is fatal to the State's case, would clearly frustrate the State's efforts to convict on sex related offenses involving young children.

Id. at 743, 319 S.E.2d at 249-50. Defendant's argument is overruled.

No Error.

Judges WYNN and CALABRIA concur.

Report per Rule 30(e).