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NO. COA10-662

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2010

STATE OF NORTH CAROLINA

v.

Macon County
Nos. 08 CRS 426-428

STEVEN RICHARD MARTIN

Appeal by defendant from judgments entered 8 July 2009 by Judge James L. Baker, Jr. in Macon County Superior Court. Heard in the Court of Appeals 4 November 2010.

Attorney General Roy Cooper, by Assistant Attorney General Angenette R. Stephenson, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for defendant-appellant.

CALABRIA, Judge.

Steven Richard Martin ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of three counts of first-degree sex offense. We find no error.

I. Background

"Melissa"¹ is the victim in this case. Defendant is Melissa's biological father. Prior to Melissa's third birthday, the court adjudicated Melissa as a neglected juvenile. Melissa was removed from defendant and her mother's custody and placed with her

¹ Melissa is a pseudonym used to protect the identity of the minor child victim.

paternal grandparents. During this time, defendant was permitted to have regular supervised visitation with Melissa.²

When Melissa was five years old, she began living with her father and his new girlfriend, Freda Black ("Ms. Black"). During this time, defendant sexually abused Melissa when the two of them were alone together. Abuse would occur in three separate areas of defendant's home. First, defendant would get into the bathtub with Melissa and make Melissa touch him, and he would put his fingers inside Melissa's vagina. Additionally, defendant would watch pornographic videos with Melissa in his bedroom. While the videos were playing, defendant would again have Melissa touch him and he would put his fingers inside of her vagina. Finally, defendant would engage in similar conduct while in Melissa's bedroom. These acts occurred on multiple occasions and continued over a series of months.

Melissa subsequently ceased living with defendant and Ms. Black and returned to living with her grandparents. During this time, defendant visited her infrequently. There was no further sexual contact between defendant and Melissa after she moved.

In December 2007, Melissa disclosed to her cousin that she had been sexually abused. Melissa's cousin then conveyed this information to Melissa's aunt, who contacted Sara Baxter ("Ms. Baxter"), a child and family counselor at Mountain Youth Resources. Melissa was familiar with Ms. Baxter because of previous counseling

² Melissa's mother ceased having contact with her after Melissa was removed from her custody.

sessions that were intended to correct Melissa's behavioral issues during the fourth and fifth grades. When Melissa met with Ms. Baxter on 3 December 2007, Melissa described defendant's sexual abuse. Ms. Baxter immediately contacted the Macon County Department of Social Services to report the abuse.

On 7 December 2007, Melissa was brought to Kid's Place Child Advocacy Center ("Kid's Place") in Franklin, North Carolina. At Kid's Place, Melissa was interviewed by Sergeant Amy Stewart ("Sgt. Stewart") of the Macon County Sheriff's Department. Melissa told Sgt. Stewart that defendant had previously put his fingers inside her vagina on numerous occasions. Specifically, Melissa mentioned sexual encounters with defendant in the bathtub and additional encounters while defendant watched pornographic videos. Melissa stated that this abuse occurred throughout the time she lived with defendant and Ms. Black.

After the interview with Sgt. Stewart, Melissa received a physical examination by Dr. Sondra Wolf ("Dr. Wolf"). Melissa described to Dr. Wolf a previous incident where defendant had touched her vaginal area when she was five or six years old. Dr. Wolf then examined Melissa's vaginal area and found no signs of infection, scars, or other injuries. However, based upon Melissa's history, Dr. Wolf did not expect any physical findings during the examination.

On 19 February 2008, defendant voluntarily met with Sgt. Stewart. Defendant provided Sgt. Stewart with a written statement, in which defendant asserted that on two or three occasions, his

finger had "slipped inside" Melissa's vagina while he was washing her in the bathtub. In addition, defendant wrote Melissa a note apologizing for what he had done and stating that he neither expected nor asked Melissa for her forgiveness. Defendant asked Sgt. Stewart to deliver the note to Melissa.

Defendant was subsequently arrested and indicted for three counts of first-degree sex offense with a child. Beginning 7 July 2009, defendant was tried by a jury in Macon County Superior Court. At the conclusion of the State's evidence, defendant made a motion to dismiss all charges. Defendant argued that it would be impossible for the jury to distinguish three separate incidents of first-degree sex offense based upon the evidence presented by the State. The trial court denied defendant's motion, but agreed to amend the jury verdict sheets to indicate that each offense occurred in a different room of defendant's home. At the close of all the evidence, defendant renewed his motion to dismiss, which was again denied by the trial court.

On 8 July 2009, the jury returned guilty verdicts to all charges. In addition, for each guilty verdict, the jury found beyond a reasonable doubt the aggravating factor that defendant took advantage of a position of trust or confidence to commit the offense. For each conviction, the trial court sentenced defendant to an active sentence of a minimum of 300 months to a maximum of 369 months. The sentences, which were all in the aggravated range, were to run consecutively and be served in the North Carolina Department of Correction. Defendant appeals.

II. Unanimity

Defendant argues that the trial court erred by denying his motion to dismiss. Specifically, defendant contends that "there was no evidence which would permit the jury to unanimously conclude that each guilty verdict related to a separate incident." As a result, defendant argues that this Court should dismiss two of the three charges against defendant.³ We disagree.

"No person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const. art. I, § 24. "To convict a defendant, the jurors must unanimously agree that the State has proven beyond a reasonable doubt each and every essential element of the crime charged." *State v. Jordan*, 305 N.C. 274, 279, 287 S.E.2d 827, 831 (1982).

"The elements of first degree sex offense are (1) engaging in a sexual act (2) with a child under the age of thirteen (3) when the defendant is at least twelve years old and at least four years older than the victim." *State v. Reber*, 182 N.C. App. 250, 254 n.2, 641 S.E.2d 742, 745 n.2 (2007) (citing N.C. Gen. Stat. § 14-27.4(a) (2005)). "The term 'sexual act' as used in this statute means cunnilingus, fellatio, analingus, or anal intercourse. It also means the penetration, however slight, by any object into the genital or anal opening of another person's body." *State v. DeLeonardo*, 315 N.C. 762, 764, 340 S.E.2d 350, 353 (1986) (citation omitted). "'Any object' in this context includes any part of the

³ Since defendant, in his brief, challenges only two of his convictions, the third conviction remains undisturbed.

human body, including a finger." *State v. Smith*, 180 N.C. App. 86, 95, 636 S.E.2d 267, 273 (2006) (citing *State v. Lucas*, 302 N.C. 342, 345-46, 275 S.E.2d 433, 435-36 (1981)).

In the instant case, Melissa testified that defendant put his fingers inside her vagina on numerous occasions while she was living with him. Melissa specifically testified about the frequency and locations of the sexual encounters. Defendant would put his fingers in her vagina "maybe seven or eight times" per month while Melissa was in the bathtub, "like twice a week" while in defendant's bedroom, and in Melissa's bedroom. Additionally, the State presented evidence that Melissa was between the ages of five and six years old and that defendant was more than four years older than Melissa when these acts occurred,

Defendant contends that Melissa's testimony was "generic evidence [which did] not present the jury with a specific act of sexual offense on which they [could] unanimously agree," and that, as a result, defendant could only constitutionally be convicted of one count of first-degree sex offense. Defendant cites this Court's decisions in *State v. Gary Lawrence*, 165 N.C. App. 548, 599 S.E.2d 87 (2004), *State v. Markeith Lawrence*, 170 N.C. App. 200, 612 S.E.2d 678 (2005), and *State v. Bates*, 172 N.C. App. 27, 616 S.E.2d 280 (2005).⁴ However, as previously explained by this

⁴ The transcript indicates that the trial court was also concerned that, pursuant to *Bates*, defendant could not be convicted of three separate offenses. Accordingly, the trial court amended the jury verdicts to indicate that the three alleged offenses occurred in different locations in an attempt to follow the overruled holding in *Bates*.

Court, all of these cases have been overruled by our Supreme Court on the issue of jury unanimity in the context of generic testimony. See *State v. Bullock*, 178 N.C. App. 460, 472, 631 S.E.2d 868, 877 (2006) ("These decisions are no longer binding precedent on the question of 'generic testimony.'").

As a result, this Court has held that "generic testimony [of sexual abuse] can support more than one conviction. . . ." *Id.* at 473, 631 S.E.2d at 877. This is because

[w]hile the first instance of abuse may stand out starkly in the mind of the victim, each succeeding act, no matter how vile and perverted, becomes more routine, with the latter acts blurring together and eventually becoming indistinguishable. It thus becomes difficult if not impossible to present specific evidence of each event.

Id. In the instant case, the State presented testimony of substantially more than three acts which would constitute a first-degree sexual offense. Melissa testified that defendant placed his fingers in her vagina multiple times over a series of months while in the bathroom and defendant's bedroom, and she acknowledged that the same offenses also occurred in her bedroom. While Melissa never testified to any specific incident, this could not create a constitutional unanimity violation because "[e]ither the jury believed the testimony of the victim that these [sex offenses] occurred, or they did not. There was no possibility that some of the jurors believed that some of the [sex offenses] took place, and some believed that they did not." *Id.* Thus, we conclude that defendant's right to a unanimous verdict was not violated by

Melissa's "generic testimony." This assignment of error is overruled.

III. Conclusion

The record on appeal includes additional assignments of error not addressed by defendant in his brief to this Court. Pursuant to N.C.R. App. P. 28(b)(6) (2008), we deem these assignments of error abandoned and need not address them. Defendant received a fair trial, free from error.

No error.

Judges GEER and THIGPEN concur.

Report per Rule 30(e).